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DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 16

RIN 0503–AA27

Equal Opportunity for Religious Organizations

AGENCY: Office of the Secretary, USDA.

ACTION: Final rule.

SUMMARY: This final rule implements executive branch policy that, within the framework of constitutional church-state guidelines, religiously affiliated (or "faith-based") organizations should be able to compete on an equal footing with other organizations for United States Department of Agriculture (USDA) assistance. The final rule revises USDA regulations to remove barriers to the participation of faith-based organizations in USDA programs and to ensure that these programs are implemented in a manner consistent with the requirements of the Constitution, including the religion clauses of the first amendment.

DATES: Effective date: August 9, 2004.

FOR FURTHER INFORMATION CONTACT: Juliet McCarthy, Director, Faith-Based and Community Initiatives, United States Department of Agriculture, Office of the Secretary, Room 200A, Washington, DC 20250; electronic mail: *Juliet.mccarthy@usda.gov;* telephone: 202–720–3631 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this telephone number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background—The March 5, 2004, Proposed Rule

On March 5, 2004, USDA published a proposed rule (69 FR 10354) to adopt USDA regulations that would eliminate unwarranted barriers to the participation of faith-based organizations in USDA programs. The proposed rule was part of USDA's effort to fulfill its responsibilities under two Executive Orders issued by President Bush. One of these Orders, Executive Order 13280, which was published in the **Federal Register** on December 16, 2002 (67 FR 77145), created a Center for Faith-Based and Community Initiatives in USDA and charged USDA to identify and eliminate regulatory, contracting, and other programmatic barriers to the full participation of faith-based and community organizations in its programs. The second of these Orders, Executive Order 13279, also published in the **Federal Register** on December 16, 2002 (67 FR 77141), charged executive branch agencies to give equal treatment to faith-based and community groups that apply for funds to meet social needs in America's communities. The President called for an end to discrimination against faith-based organizations and, consistent with the first amendment to the Constitution, ordered implementation of these policies throughout the executive branch, including, among other things, allowing organizations to retain their religious autonomy over their internal governance and composition of boards, and over their display of religious art, icons, scriptures, or other religious symbols, when participating in government-funded programs. The Administration believes that there should be an equal opportunity for all organizations—both religious and non-religious—to participate as partners in Federal programs.

The March 5, 2004, rule proposed to add USDA regulations to achieve the following objectives:

1. Equal Opportunity for faith-based organizations in USDA programs. The proposed rule provided that organizations would be eligible to participate in USDA programs without regard to their religious character or affiliation, and that organizations could not be excluded from competition for direct USDA assistance simply because they were religious. Specifically, religious organizations would be eligible to compete for USDA assistance on the same basis, and under the same eligibility requirements, as all other non-profit organizations. Under the proposed rule, USDA, as well as State and local governments administering USDA programs, would be prohibited from discriminating against organizations on the basis of religion, religious belief, or religious character in the administration or distribution of USDA assistance, including grants and commodities.

2. Inherently religious activities. The proposed rule described requirements, which would be applicable to all recipient organizations, restricting the use of direct USDA assistance [1] for inherently religious activities. Specifically, a participating organization could not use direct USDA financial assistance from USDA to support inherently religious activities, such as worship, religious instruction, or proselytization. If the organization engaged in such activities, it would be required to offer them separately, in time or location, from the programs or services supported by direct USDA assistance, and participation would have to be voluntary for the beneficiaries of such programs or services. This requirement would ensure that direct USDA assistance to religious organizations would not be used to support inherently religious activities.

This requirement does not mean that an organization that receives direct USDA assistance cannot engage in inherently religious activities. It means that an organization cannot pay for these activities with direct USDA assistance or require program beneficiaries to participate in such activities as a condition of receiving services. The proposed rule further provided that these restrictions on inherently religious activities would not apply where indirect USDA assistance was provided to religious organizations as a result of a genuine and independent private choice of a beneficiary (e.g., under a program that gave a beneficiary a voucher, coupon, certificate, or

[1] As used in this final rule, the term "direct USDA assistance" refers to direct aid within the meaning of the Establishment Clause of the first amendment. For example, direct USDA assistance may mean that the government or an intermediate organization with similar duties as a governmental entity under a particular USDA program selects an organization and purchases the needed services straight from that organization. In contrast, indirect funding scenarios may place the choice of service provider in the hands of a beneficiary, and then pay for the cost of that service through a voucher, certificate, or other similar means of payment.

another funding mechanism from USDA designed to give that beneficiary a choice among providers) or through other indirect means, provided the religious organizations otherwise satisfied the secular requirements of the program.

3. Independence of faith-based organizations. The proposed rule also clarified that a religious organization that participated in USDA programs would retain its independence and could continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it did not use direct USDA assistance to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, a faith-based organization could use space in its facilities to provide services supported with direct USDA assistance without removing religious art, icons, scriptures, or other religious symbols. In addition, a religious organization could retain religious terms in its organization's name, select its board members and otherwise govern itself on a religious basis, and include religious references in its organization's mission statements and other governing documents.

4. Nondiscrimination in providing assistance. The proposed rule provided that an organization that received direct USDA assistance would not be allowed, in providing program assistance supported by such assistance, to discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief.

5. Use of USDA funds for acquisition, construction, or rehabilitation of structures. The proposed rule clarified that USDA funds may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting eligible activities under the specific USDA program involved. Where a structure is used for both eligible and inherently religious activities, the proposed rule clarified that USDA funds may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities.

II. Discussion of Comments Received

USDA received comments on the proposed rule from 22 different commenters, representing both individuals and organizations. Some of the commenters were generally supportive of the proposed rule without any specific recommendations or comments, while others were generally opposed without specific recommendations or comments.

The following is a summary of specific comments and recommendations and USDA responses. The comments are organized first by general comments, second by comments in the order of the section of the rule that they address, and finally by comments that raise issues not specifically addressed by any section of the rule.

General Comments

Comment: Insufficient justification for the proposed rule. Two commenters disagreed that there are currently barriers that prevent participation of faith-based organizations in USDA Food and Nutrition Service (FNS) programs. the commenters wrote that faith-based organizations have been participating in FNS programs and anti-hunger efforts for many years, and sometimes at a higher rate than secular organizations.

USDA Response: The commenter is correct that many USDA programs have partnered extensively with faith-based organizations for years. The purpose of this rule is to ensure that all USDA programs are open to faith-based organizations to the same extent that they are open to other organizations, in accordance with Executive Order 13279. Some USDA mission areas may already follow a number of these provisions in practice, but this rule sets out a single set of overarching provisions for the entire USDA in regard to equal opportunity for faith-based organizations without singling out or distinguishing among many mission areas within USDA.

Comment: Religious organizations are financially unaccountable. One commenter alleged that religious organizations are unaccountable since they do not have to file an annual report of revenue with the Internal Revenue Service (IRS). However, the commenter would revisit the concern if religious organizations are held to the same level of financial accountability as other non-profit organizations.

USDA Response: USDA disagrees. Regardless of IRS filings, all organizations receiving USDA assistance—both religious and non-religious—must comply with audit and Office of Management and Budget Circular requirements, applicable to assistance recipients. These requirements provide transparency and accountability for faith-based organizations just as they do for other organizations.

Comment: Unclear if non-financial as well as financial assistance is included in the definition of "direct USDA assistance." A number of commenters wondered if non-financial assistance, such as commodities, was included in the definition of direct USDA assistance and referenced when the proposed rule referred to "funding." Several commenters wanted non-financial assistance included in the definition, while another wanted it excluded. The commenter wanting it excluded argued that it should be excluded from the definition and the rule because the restrictions would "go too far" for the mere acceptance of the non-financial assistance. The other commenter interpreted the rule as excluding commodities from the definition of direct assistance and insisted that it was constitutionally required to be a part of the definition.

USDA Response: USDA intended for commodities to be included within the definition of "direct USDA assistance."

Comment: Extend limitation on inherently religious activities to indirect funding. Two commenters observed that in the proposed rule the limitations on inherently religious activities applied only to direct funding, and they argued that the limitation should apply to indirect funding as well in order to protect the rights of beneficiaries.

USDA Response: USDA has not revised the rule in response to these comments because the protections of the rights of beneficiaries in this rule coincide with current Supreme Court precedent. Any USDA-funded programs that involve indirect funding must, of course, comply with Federal law (including current legal precedent), and nothing in the proposed regulation provides otherwise. As explained above and in the preamble of the proposed rule, the term "direct USDA assistance" refers to direct funding within the meaning of the Establishment Clause of the First Amendment. In other words, USDA's use of the phrase "direct assistance" in this rule incorporates current First Amendment jurisprudence into its definition.

The religious freedom of beneficiaries in an indirect funding program is protected by the guarantee of genuine and independent private choice. Officials administering public funding under an indirect funding program would have an obligation to ensure that everyone who is eligible receives services from some provider, and no client maybe required to receive services from a provider to which the client has a religious objection. In other words, vouchers and services indirectly funded by the government must be available to all clients regardless of their religious belief, and those who object to a provider that has integrated inherently

religious activities into the provision of its services have a right to services from some alternative provider. Again, for a program to be considered voucher-like, this choice among providers must be genuine. These requirements protect beneficiaries from having to participate in religious activities to which they object.

Comment: Why is this rule restricted to programs for which non-profit organizations are eligible? One commenter asked why the rule applied only to programs for which non-profit organizations are eligible, saying that such a restriction is unwarranted.

USDA Response: We agree and have revised 16.1(a) and 16.2(a) to provide that a religious organization is eligible to the same extent an organization is otherwise eligible. The intent of this regulation is to ensure that religious organizations are given the same opportunity to participate that similar non-religious organizations are given. For example, if a secular charitable non-profit organization is not eligible for a particular program, then neither would a religious non-profit organization be eligible. In contrast, if a secular for-profit corporation is eligible for a particular program, a religious for-profit corporation would likewise be eligible.

Comment: Title and language of rule is inconsistent. One commenter noted that the title of the rule and its sections refer to religious organizations; however, the language of the rule appears to place restrictions on all organizations, not just religious ones. For example, 16.3(c) states that any organizations that receive direct USDA assistance may not engage in inherently religious activities as part of the services supported with such assistance. It does not restrict this prohibition only to religious organizations. Therefore, the titles and language are inconsistent.

USDA Response: USDA acknowledges this inconsistency in the language of the rule. In this final rule, USDA has changed the title to "Equal Opportunity for Religious Organizations," reflecting the purpose section of the rule. It has also changed the appropriate heading to "Responsibilities of participating organizations" (replacing "Responsibilities of religious organizations").

Purpose and Applicability

Comment: Change equal participation in purpose to equal opportunity or treatment. One commenter mentioned that 16.1(a) states the purpose of the rule is to set policy regarding equal participation of religious organizations and suggested that the language be changed to "equal opportunity for religious organizations" or "promoting equal treatment of religious organizations."

USDA Response: USDA agrees with the commenter's suggestion and amends 16.1(a) to reference the purpose as "equal opportunity for religious organizations to participate." It was not USDA's intent to establish participation rates for religious organizations in USDA programs; instead, as described in the preamble to the proposed rule, the purpose of the rule was to ensure that any organization wanting to participate in USDA programs, whether religious or secular, had an equal opportunity to do so.

Eligibility of Religious Organizations

Comment: Allowing direct funding of pervasively sectarian organizations violates the Constitution. Some commenters disagreed with the proposed rule on the basis that it would allow Federal funds to be given to "pervasively sectarian" organizations. They maintain that the rule places no limitations on the kinds of religious organizations that can receive funds, and they argued that "pervasively sectarian" organizations are barred from receiving direct Federal funding.

USDA Response: USDA does not agree that the Constitution requires USDA to distinguish between different religious organizations in providing direct USDA assistance. Religious organizations that receive direct USDA assistance may not use that assistance for inherently religious activities. These organizations must ensure that such religious activities are separate in time or location from services directly funded by USDA and also must ensure that participation in such religious activities is voluntary. Furthermore, they are prohibited from discriminating against a program beneficiary on the basis of religion or a religious belief, and program participants that violate these requirements will be subject to applicable sanctions and penalties. The regulations thus ensure that there is no direct USDA assistance of inherently religious activities, as required by current precedent.

Retain Independence

Comment: Use of religious art or icons should not be permitted. Some commenters wrote that the use of religious art or icons can constitute a subtle but powerful form of proselytization or may be offensive to some persons. The commenters stated that the rule should require religious art or icons to be removed or covered and cite *Spacco* v. *Bridgewater School USDA*, 722 F. Supp. 834, 843 (D. Mass. 1989).

USDA Response: USDA declines to impose this restriction on USDA program participants that are faith-based organizations. A number of Federal statutes affirm the principle embodied in this rule. *See e.g.*, 42 U.S.C. 290kk–1(d)(2)(B). A prohibition on the use of religious icons would make it more difficult for many faith-based organizations to participate in the program than other organizations, and would thus be an inappropriate and excessive restriction, typical of the types of regulatory barriers that this final rule seeks to eliminate. Consistent with constitutional church-state guidelines, a faith-based organization that participates in USDA programs will retain its independence and may continue to carry out its mission, provided that it does not use direct USDA assistance to support any inherently religious activities. Accordingly, this final rule continues to provide that faith-based organizations may use space in their facilities to provide services supported with direct USDA assistance, without removing religious art, icons, scriptures, or other religious symbols. Finally, the presence of religious symbols in the building of a religious organization that provides social services with USDA assistance is distinct from the situation addressed in Spacco, where a public school (i.e., the government itself) held classes in the facilities of a Catholic church.

Title VII Exemption

Comment: Recognition of religious organizations' Title VII exemption. A number of commenters expressed views on the rule's provision that religious organizations do not forfeit their Title VII exemption by receiving direct USDA assistance, absent statutory authority to the contrary. Some expressed appreciation that a religious organization will retain its independence in this regard, while others disagreed with the provision retaining the Title VII exemption. Some argued that it is unconstitutional for the government to provide direct assistance for provision of social services to an organization that considers religion in its employment decisions. Others argued that Congress must expressly preserve religious organizations' Title VII exemption—as it has done in certain welfare reform and substance abuse programs—for such organizations that receive Federal funds to retain those exemptions, and in any event that it is unwise and unfair to secular organizations to preserve such religious exemptions as a matter of executive

branch policy. These commenters requested that the proposed rule be amended to provide that discrimination on the basis of religion with respect to an employment position is not allowed if an organization is federally funded.

USDA Response: USDA agrees with commenters who supported the preservation of the religious hiring autonomy of faith-based organizations, and it disagrees with the objections to the rule's recognition that a religious organization does not forfeit its Title VII exemption when administering services supported by USDA assistance. As an initial matter, applicable statutory nondiscrimination requirements are not altered by this rule. Congress establishes the conditions under which religious organizations are exempt from Title VII; this rule simply recognizes that these requirements, including their limitations, are fully applicable to organizations supported by USDA assistance unless Congress says otherwise. As to the suggestion that the Constitution restricts the government from providing funding for social services to religious organizations that consider faith in hiring, that view does not accurately represent the law. The employment decisions of organizations that receive extensive public funding are not attributable to the State, *see Rendell-Banker* v. *Kohn*, 457 U.S. 830 (1982), and it has been settled for more than 100 years that the Establishment Clause does not bar the provision of direct Federal grants to organizations that are controlled and operated exclusively by members of a single faith. *See Bradfield* v. *Roberts*, 175 U.S. 291 (1899); *see also Bowen* v. *Kendrick*, 487 U.S. 589, 609 (1988). Accordingly, numerous courts have held that a religious organization does not waive its Title VII exemption when it receives government funds. *See, e.g., Hall* v. *Baptist Memorial Health Care Corp.*, 215 F.3d 618, 625 (6th Cir. 2000); *Little* v. *Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991). Finally, USDA notes that allowing religious groups to consider faith in hiring when they receive government funds is much like allowing a federally funded environmental organization to hire those who share its views on protecting the environment: Both groups are allowed to consider ideology and mission, which improves their effectiveness and preserves their integrity. Thus, USDA declines to amend the final rule to require religious organizations to forfeit their Title VII rights.

Comment: Faith-based organizations and state action. Two commenters claimed that there is a sufficient nexus between the organizations covered by the proposed regulation and the government such that the organizations are State actors subject to constitutional requirements.

USDA Response: USDA disagrees with these comments. The receipt of government assistance does not convert a non-governmental organization into a State actor subject to constitutional norms. *See Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982) (holding that the employment decisions of a private school that receives more than 90 percent of its funding from the State are not State actors).

Comment: Proposed rule raises additional Establishment Clause concerns. The commenter argues that the decision in *Bob Jones University* v. *United States*, 461 U.S. 574(1983), which held that the Federal government could deny a religiously run university tax benefits because the university imposed a racially discriminatory anti-miscegenation policy, is analogous to a prohibition against organizations that receive Federal funding discriminating on the basis of religion when hiring for government-funded positions.

USDA Response: USDA does not agree that the Bob Jones University decision is analogous or requires that the rule be changed in order to comply with the Establishment Clause. In the Bob Jones University decision, the Supreme Court merely said that the Free Exercise Clause permitted the government to deny tax-exempt status to religious educational institutions that prescribed and enforced racially discriminatory admission standards on the basis of religious doctrine. The Court's limited discussion of the Establishment Clause in the case (*see* 461 U.S. at 604 n.30) had nothing to do with whether organizations that consider faith in making employment decisions are ineligible for government funding. In addition, whereas the Court in Bob Jones University concluded that racial discrimination in education was contrary to public policy, permitting religious organizations to consider faith in employment decisions is consistent with the public policy established decades ago, and maintained today, in the civil rights laws enacted by Congress.

Nondiscrimination Toward Beneficiaries

Comment: Neither organizations that receive direct USDA funding nor organizations that receive indirect USDA funding should be able to discriminate against a beneficiary or potential beneficiary on the basis of religion. Generally, commenters believed that non-discrimination toward a beneficiary on the basis of religion or religious belief should apply to both direct and indirect USDA assistance. One commenter also suggested that the regulation state that participating organizations cannot deny beneficiaries for refusal to participate in a religious practice.

USDA Response: As mentioned earlier, any USDA-funded programs that were to involve indirect funding would, of course, have to comply with Federal law (including current legal precedent), and nothing in the regulation provides otherwise. Moreover, the religious freedom of beneficiaries in an indirect funding program is protected by the guarantee of genuine and independent private choice. Officials administering public funding under an indirect funding program would have an obligation to ensure that everyone who is eligible receives services from some provider, and no client could be required to receive services from a provider to which the client had a religious objection. In other words, vouchers and services indirectly funded by the government must be available to all clients regardless of their religious belief, and those clients who object to a provider that has integrated activities into the provision of its services have a right to services from some alternative provider.

USDA believes that the religious freedom of beneficiaries is sufficiently explicit. For example, inherently religious activities, such as worship, religious instruction, and proselytization, must be separate in time or location from programs or services supported with direct USDA assistance, and participation in those inherently religious activities must be voluntary for beneficiaries of programs or services supported with direct assistance. Additionally, organizations that participate in programs and activities supported by direct USDA assistance programs are prohibited from discriminating against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief. These protections require no further elaboration.

Comment: Discrimination on the basis of sexual orientation. One commenter objected to the ability of religious organizations, as well as other organizations, to discriminate on the basis of sexual orientation.

USDA Response: Although Federal law prohibits persons from being excluded from USDA Federally assisted services or subjected to discrimination based on race, color, national origin, sex, age, or disability, it does not prohibit discrimination on the basis of

sexual orientation. We decline to impose such restrictions by regulation.

Inherently Religious Activities

Comment: "Inherently religious" does not capture the full range of prohibited activity. Some commenters asserted that the language describing proscribed religious activities is unclear or incomplete. These commenters suggest the rule be amended to make it clear that any religious activity is prohibited and that the provision of government-funded services must be entirely secular.

USDA Response: Concerning the treatment of "inherently religious" activities, it would be difficult to establish an acceptable list of all inherently religious activities. Inevitably, the regulatory definition would fail to include some inherently religious activities or would include certain activities that are not inherently religious. Rather than attempt to establish an exhaustive regulatory definition, USDA has decided to retain the language of the proposed rule, which provides examples of the general types of activities that are prohibited by the regulations. This approach is consistent with Supreme Court precedent, which has not comprehensively defined inherently religious activities. For example, prayer and worship are inherently religious, but services supported by direct USDA assistance do not become inherently religious merely because they are conducted by individuals who are religiously motivated to undertake them or view the activities as a form of "ministry."

Finally, there is not constitutional support for the view that the government must exclude from its programs those organizations that convey religious messages or advance religion with their own funds. As noted above, the Supreme Court has held that the Constitution forbids the use of direct government funds for inherently religious activities, but the Court has rejected the presumption that religious organizations will inevitably divert such funds and use them for their own religious purposes. In sum, USDA believes that the requirement that when an organization receives direct USDA assistance, any inherently religious activities must be privately funded and separate in time or location from the USDA-assisted activities adequately sets out the parameters of the Supreme Court's jurisprudence.

Comment: The provision on separation of inherently religious activities is inadequate. Some commenters suggested that the requirement is insufficient and that it be strengthened to require separation in time and location. One commenter stated that the rule failed to provide the separation requirement to food aid and commodities. Another commenter stated that the restriction that inherently religious activities need to be separated in time or location gives insufficient flexibility to small faith-based organizations. That commenters recommended adding the following language to 16.3(c): "Responses to genuine and independent voluntary client-initiated requests for prayer or counseling, including the reading of religious texts or materials, do not require a separate time or location."

USDA Response: USDA does not believe that the requirement articulated in the regulation regarding separation necessitates any additional guidance or requirements for proper adherence to the Constitution. USDA believes that existing regulations and this rule are clear that faith-based organizations, or any organizations for that matter, using direct USDA assistance for certain activities must separate their inherently religious activities from the activities supported by such assistance. As to the suggestion that the rule must require separation in both time and location, USDA believes that such a requirement is not legally necessary and that it would impose an unnecessarily harsh burden on small faith-based organizations, which may have access to only one location that is suitable for the provision of USDA-funded services. As commodities are a type of direct USDA assistance, commodities are also subject to the separation requirement. Nothing in this rule is intended to inhibit an organization's ability to respond to voluntary, client-initiated requests of any kind, including religious inquiries, provided that actual inherently religious activities are separated from services supported by direct USDA assistance. Thus, USDA disagrees that additional clarifying language is necessary in the regulatory text.

Comment: Voluntary participation in any inherently religious activities. While some commenters were encouraged by the voluntary language of 16.3(c), others believed there were not enough safeguards for beneficiaries in this area. Some commenters recommended that the proposed rule be modified to require participating organizations to inform program beneficiaries at the outset of their receipt of services that participation in the organization's religious activities is voluntary.

USDA Response: USDA believes that the language in the rule prohibiting faith-based organizations from requiring program beneficiaries to participate in religious activities is sufficiently explicit. USDA also declines to require that religious organizations provide a notice to a beneficiary or potential beneficiary assuring that participation in religious activities would be entirely on a voluntary basis. USDA recommends that both governmental officials administering USDA assistance and participating organizations work to ensure that clients and potential clients have a clear understanding of the services offered by the organization, including any religious activities, as well as the organization's expectations and requirements. The requirement that participation be voluntary, however, is sufficient to address concerns about the religious freedom of program beneficiaries.

Comment: Clarify that students at religious schools that receive school lunch assistance may be required to attend religion classes and assemblies. One commenter noted that they appreciated the provision in 16.3(b) that allowed religious schools receiving assistance under the School Lunch Act or the Child Nutrition Act to consider religion in their admission practices. They argued that a similar allowance needs to be made in 16.3(c) regarding the voluntariness language so that it is clear that students at a religious school can be required to attend the school's religion classes and assemblies.

USDA Response: USDA agrees that 16.3(c) should contain the same allowance as is found in 16.3(b). Subsection (c) of the proposed rule has been renumbered subsection (b), and the language previously found in subsection (b) has been inserted into subsection (c) with a clarification that this rule does not affect either the admission or the attendance policies and curricular requirements of religious schools.

Comment: A voucher program does not have adequate safeguards. Two commenters claimed that the proposed rule authorizes a voucher program for religious organizations without instituting adequate constitutional safeguards and requested that the rule be revised to comply with the framework instituted by *Zelman* v. *Simmons Harris*, 536 U.S. 639 (2002). These commenters stated that secular alternatives are not available in the social service context, eliminating the possibility of real choice by program beneficiaries.

USDA Response: USDA respectfully declines to adopt the recommendations of the commenters. Any USDA-funded programs that were to involve indirect funding would, of course, have to

comply with Federal law—which includes current legal precedent such as Zelman. USDA believes that the above discussion and the rule adequately address these commenters' constitutional concerns.

Construction of Structures

Comment: The provision allowing use of funds for acquisition, construction, or rehabilitation of structures is unconstitutional. Two commenters content that Supreme Court rulings only permit use of Federal funds on structures when those structures are used for solely secular purposes in perpetuity. Another indicated that the guidance was too vague on how to apportion costs for a dual-use structure. Finally, one argued that enforcement of this provision would lead to unseemly negotiations between the organizations and government over what are and are not religious activities.

USDA Response: USDA believes that the prorated funding of improvements to a structure that has a mixed use—both religious and non-religious—it not itself a violation of the Constitution. In a neutral program in which the government directly funds the capital improvements of institutions that administer Federal social welfare programs, the government need only put in place safeguards to ensure that public money is not used to finance inherently religious activities. The proposed rule satisfied this requirement by prohibiting the use of USDA funds for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used for inherently religious activities—a prohibition that is enforced by generally applicable cost-accounting standards carefully designed to ensure that USDA funds are not used to support any ineligible activity.

USDA disagrees with those who commented that preventing the use of direct USDA capital-improvement funds for inherently religious activities would necessarily fail or, in the process, excessively entangle the government in the affairs of recipients or subrecipients that are religious organizations. Because inherently religious activities are non-program activities, USDA need not distinguish between program participants' religious and non-religious non-program activities; the same mechanism by which USDA policies the line between ineligible and eligible activities will serve to exclude inherently religious activities from funding. This system of monitoring is more than sufficient to address the commenters' concerns, and the amount of oversight of religious organizations necessary to accomplish these purposes is not greater than that involved in other publicly funded programs that the Supreme Court has sustained.

Comment: Technical, non-substantive changes. One commenter recommended in section 16.3(d)(1) that "conducting activities" should be replaced with "conducting USDA programs and activities." Another commenter recommended that in the same section the first and second sentences be reversed since the second sentence states the general rule and the first sentence the exception to that rule.

USDA Response: USDA agrees with these recommendations and adopts them in the final rule.

Effect on State and Local Funds and Laws

Comment: Need to clarify if the rule is intended to preempt State and local civil rights and diversity requirements. A number of commenters stated that the language regarding State and local agencies disbursing Federal funds and the addition of State and local funds to Federal funds is unclear as to whether the rules regarding the Federal funds preempt any additional requirements that may be imposed by State and/or local laws or regulations. One commenter suggested that it be made clear that Federal rules govern these funds, while two commenters suggested that various areas of State and local law be retained when using these funds. The first commenter requested an explicit statement that Federal power preempts State/local procurement restrictions on religious staffing with USDA or commingled funds. One of the other commenters requested that the regulation expressly require that any recipients of this funding abide by State and local civil rights laws. The final commenter requested that local/State laws requiring board diversity not be preempted. That commenter also suggested that 16.2(b) not be interpreted to preempt State and local laws in general and employment restrictions specifically.

USDA Response: The requirements that govern funding under the USDA programs at issue in these regulations do not directly address preemption of State or local laws. Federal funds, however, carry Federal requirements. No organization is required to apply for funding under these programs, but organizations that apply and are selected for funding must comply with the requirements applicable to the program funds.

Comment: State and local governments should be required to segregate funds. One commenter requested that USDA require that State and local funds be kept separate from any Federal funds.

USDA Response: USDA disagrees with these comments. As an initial matter, USDA believes it would be inappropriate to require States and local governments to separate their own funds from Federal funds in circumstances in which there is no matching or other required grantee contribution. Where no matching requirement or other required grantee contribution is applicable, whether to commingle State and Federal funds is a decision for the States and local governments to make. In addition, for the same reasons that language concerning voluntarily commingled funds does not require clarification, USDA believes the rule requires no clarification as to whether it applies to State funds. When State and local governments have the option to commingle their funds with Federal funds or to separate State and local funds from Federal funds, Federal rules apply only if they choose to commingle their own funds with Federal funds. Where a USDA program explicitly requires that Federal rules apply to State "matching" funds, "maintenance of effort" funds, or other grantee contributions that are commingled with Federal funds (*i.e.*, are part of the grant budget), Federal rules remain applicable to both the Federal and State or local funds that implement the program.

Compliance

Comment: Lack of an oversight mechanism. Some commenters were concerned that the lack of special oversight/reporting requirements/assurances would make it possible for religious organizations to commingle Federal funds and not account for expenditure of the Federal funds. A couple of commenters requested that religious organizations be required to form separate 501(c)(3) organizations to receive Federal funds. One commenter also noted that there was no notice to beneficiaries of how to secure their rights or address a grievance if they believe a religious organization is not fulfilling the requirements of this regulation.

USDA Response: USDA generally does not impose such requirements. It would be unfair to require religious organizations alone to comply with these additional burdens. Further, USDA finds no basis for requiring greater oversight and monitoring of faith-based organizations than of other program participants simply because they are faith-based organizations. As the Supreme Court stated in Allen,

"Absent evidence, we cannot assume that school authorities * * * are unable to distinguish between secular and religious [materials] or that they will not honestly discharge their duties under the law." *Board of Ed. of Central Sch. Dist. No. 1* v. *Allen,* 392 U.S. 236, 244–245 (1968). All program participants must be monitored for compliance with program requirements, and no program participant may use USDA funds for any ineligible activity, whether that activity is an inherently religious activity or a non-religious activity that is outside the scope of the program at issue. Many secular organizations participating in USDA programs also receive funding from several sources (private, State, or local) to carry out activities that are ineligible for funding under USDA programs. In many cases, the non-eligible activities are secular activities but not activities eligible for funding under USDA programs. All program participants receiving funding from various sources and carrying out a wide range of activities must ensure through proper accounting principles that each set of funds is applied only to the activities for which the funding was provided.

Applicable policies, guidelines, and regulations prescribe the cost accounting procedures that are to be followed in using USDA funds. This system of monitoring is more than sufficient to address the commenters' concerns, and the amount of oversight of religious organizations necessary to accomplish these purposes is no different from that involved in other publicly funded programs that the Supreme Court has upheld.

Additional Comments

Comment: Ensure the availability of secular alternate service providers. Some commenters wrote that USDA should clarify that beneficiaries have a right to receive services from a different, non-religious provider, and that the beneficiaries should be informed of this right by the faith-based provider.

USDA Response: USDA declines to adopt the recommendations of the commenters. Under this final rule, directly assisted religious organizations are prohibited from discriminating against program beneficiaries on the basis of "religions or religious belief."

In addition, the rule provides that religious organizations may not use direct USDA assistance for inherently religious activities, that such activities must be offered separately, in time or location, from services directly assisted by USDA, and that no beneficiary served in a program supported with direct USDA assistance will be required to participate in inherently religious activities as a condition of receiving services. These requirements sufficiently protect the rights of program beneficiaries.

Comments: Inadequate protection in relation to what organizations will receive funding. One commenter expressed concern that the regulation fails to prevent government funds from flowing to "anti-Semitic, racist, or bigoted organizations."

USDA Response: The existing protections of applicable civil rights laws are not altered in any way by these regulations. Faith-based organizations that receive funding must adhere to all of these applicable Federal requirements.

Comment: Religious organizations hold a special place in society and the Constitution. One commenter argued that equating or treating as equal religious and non-religious organizations fails to recognize the unique position religious organizations have in our society and Constitutional scheme because religion should be above the fray of government funding, government regulation, and government auditing, not reduced to it.

USDA Response: USDA agrees with the commenter that religious organizations have a unique position in our society and Constitutional scheme; however, USDA does not agree that the unique nature of religious organizations should prevent them from receiving an equal opportunity to participate in federally funded programs, and this rule does not present any violation of the Establishment Clause or Free Exercise Clause. Rather, this rule governs the conscious decision of a religious organization to administer regulated activities, by accepting public funds to do so. Therefore, we have retained language that enables faith-based organizations to compete on an equal footing for funding within the framework of constitutional parameters. Whether to participate in government funding is a decision of the particular religious organization.

Comment: Barriers to specific USDA programs. Some commenters also included examples of barriers they have encountered in specific USDA programs.

USDA Response: Because these barriers have their roots in statutes or regulations for specific programs and are not specific to faith-based or community organizations it is not within our scope to address them, but we encourage the commenters to direct their concerns to the relevant divisions at USDA.

Comment: Rulemaking is unauthorized and undemocratic. One commenter objected to the rule because the Constitution does not contain rulemaking as a power of the executive branch. The commenter went on to say that there is very weak link between rulemaking and democracy since the rules are published in a obscure venue and are made through strict processes. This makes participation and democratic accountability difficult, if not impossible. Finally, the commenter expressed concern about the sweeping nature of rules as opposed to administrative adjudication, which decides just a specific case.

USDA Response: Rulemaking is a necessary component of the executive branch's responsibly to uphold the Constitution and faithfully execute legislation passed by Congress and programs contained. Moreover, the Secretary is authorized to issue rules pursuant to 5 U.S.C. 301.

III. Findings and Certifications

Executive Order 12866—Regulatory Planning and Review

The final rule is issued in conformance with Executive Order 12866 on Regulatory Planning and Review. The Office of Management and Budget has determined that this is a significant regulatory action as defined by Executive Order 12866. Accordingly, the Office of Management and Budget has reviewed this final rule.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) established 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 governments or the private sector within the meaning of the Unfunded Mandates Reform Act of 1995.

Executive Order 13132, Federalism

Executive Order 13132, Federalism, requires that Federal agencies consult with state and local governments and their officials in the development of regulatory policies with federalism implications. Consultation was accomplished through solicitation of comment on the proposed rule.

Regulatory Flexibility Act

The Secretary, 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. The final rule would not impose any new costs, or modify existing costs, applicable to USDA assistance recipients. Rather, the purpose of the rule is to remove policy prohibitions that currently restrict equal participation of faith-based organizations in USDA assistance programs.

Government Paperwork Elimination Act

USDA is committed to compliance with the Government Paperwork Elimination Act (Pub. L. 105–277), which requires government agencies to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR 1320) requires that the Office of Management and Budget approve all collections of information by a Federal agency from the public before they can be implemented. There is no additional information collection burden imposed by this final rule.

List of Subjects in 7 CFR Part 16

Administrative practice and procedure, Agriculture, Grant programs, Reporting and recordkeeping requirements.

■ For the reasons stated in the preamble, USDA proposes to add part 16 of Title 7 of the Code of Federal Regulations as follows:

PART 16—EQUAL OPPORTUNITY FOR RELIGIOUS ORGANIZATIONS

Sec.

Authority: 5 U.S.C. 301; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; E.O. 13280, 67 FR 77145, 3 CFR, 2002 Comp., p. 262.

§ 16.1 Purpose and applicability.

(a) The purpose of this part is to set forth USDA policy regarding equal opportunity for religious organizations to participate in USDA assistance programs for which other private organizations are eligible.

(b) Except as otherwise specifically provided in this part, the policy outlined in this part applies to all recipients and subrecipients of USDA assistance to which 7 CFR parts 3015, 3016, or 3019 apply, and to recipients and subrecipients of Commodity Credit Corporation assistance that is administered by agencies of USDA.

§ 16.2 Rights of religious organizations.

(a) A religious organization is eligible, on the same basis as any other eligible private organization, to access and participate in USDA assistance programs. Neither the Federal government nor a State or local government receiving USDA assistance shall, in the selection of service providers, discriminate for or against a religious organization on the basis of the organization's religious character or affiliation.

(b) A religious organization that participates in USDA assistance programs will retain its independence and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use USDA direct assistance to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, a religious organization may:

(1) Use space in its facilities to provide services and programs without removing religious art, icons, scriptures, or other religious symbols,

(2) Retain religious terms in its organization's name,

(3) Select its board members and otherwise govern itself on a religious basis, and

(4) Include religious references in its organizations' mission statements and other governing documents.

(c) In addition, a religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, is not forfeited when an organization receives USDA assistance.

§ 16.3 Responsibilities of participating organizations.

(a) An organization that participates in programs and activities supported by direct USDA assistance programs shall not discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief.

(b) Organizations that receive direct USDA assistance under any USDA program may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services supported with direct USDA assistance. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services supported with direct assistance from USDA, and participation must be voluntary for beneficiaries of the programs or services supported with such direct assistance. These restrictions on inherently religious activities do not apply where USDA funds or benefits are provided to religious organizations as a result of a genuine and independent private choice of a beneficiary or through other indirect funding mechanisms, provided the religious organizations otherwise satisfy the requirements of the program.

(c) Nothing in paragraphs (a) or (b) shall be construed to prevent religious organizations that receive USDA assistance under the Richard B. Russell National School Lunch Act, 42 U.S.C. 1751 *et seq.*, the Child Nutrition Act of 1966, 42 U.S.C. 1771 *et seq.*, or USDA international school feeding programs from considering religion in their admissions practices or from imposing religious attendance or curricular requirements at their schools.

(d)(1) Direct USDA assistance may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting USDA programs and activities and only to the extent authorized by the applicable program statutes and regulations. Direct USDA assistance may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used by the USDA funding recipients for inherently religious activities. Where a structure is used for both eligible and inherently religious activities, direct USDA assistance may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities in accordance with the cost accounting requirements applicable to USDA funds. Sanctuaries, chapels, or other rooms that an organization receiving direct assistance from USDA uses as its principal place of worship, however, are ineligible for USDA-funded improvements. Disposition of real property after the term of the grant or any change in use of the property during the term of the grant is subject to government-wide regulations governing real property disposition (see 7 CFR parts 3015, 3016 and 3019).

(2) Any use of direct USDA assistance funds for equipment, supplies, labor, indirect costs and the like shall be prorated between the USDA program or activity and any use for other purposes by the religious organization in accordance with applicable laws, regulations, and guidance.

(3) Nothing in this section shall be construed to prevent the residents of

housing receiving direct USDA assistance funds from engaging in religious exercise within such housing.

§ 16.4 Effect on State and local funds.

If a State or local government voluntarily contributes its own funds to supplement activities carried out under programs governed by this part, the State or local government has the option to separate out the direct USDA assistance funds or commingle them. If the funds are commingled, the provisions of this part shall apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the direct USDA assistance.

§ 16.5 Compliance.

USDA agencies will monitor compliance with this part in the course of regular oversight of USDA programs.

Ann M. Veneman,

Secretary of Agriculture.

[FR Doc. 04–15678 Filed 7–7–04; 11:16 am]

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Docket No. FV03–930–6 IFR]

Tart Cherries Grown in the States of Michigan, et al.; Additional Option for Handler Diversion

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule adds another method of handler diversion to the regulations under the Federal tart cherry marketing order (order). Handlers handling cherries harvested in a regulated district may fulfill any restricted percentage requirement when volume regulation is in effect by diverting cherries or cherry products rather than placing them in an inventory reserve. Under this additional method, handlers will be allowed to obtain diversion credit for diverting tart cherries, after processing, that may not be acceptable for the finished products manufactured by the handler. Currently, such diversion must take place prior to processing. This action was unanimously recommended by the Cherry Industry Administrative Board (Board), the body which locally administers the marketing order. The marketing order regulates the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin.

DATES: Effective July 12, 2004; comments received by September 7, 2004, will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this action. Comments must be sent to the Docket Clerk, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; fax: (202) 720–8938, e-mail: *moabdocket.clerk@usda.gov*, or Internet: *http://www.regulations.gov*. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours or can be viewed at: *http://www.ams/usda.gov/fv/moab/html*.

FOR FURTHER INFORMATION CONTACT: Patricia A. Petrella or Kenneth G. Johnson, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Suite 2A04, Unit 155, 4700 River Road, Riverdale, MD 20737, telephone: (301) 734–5243, or Fax: (301) 734–5275; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, or fax: (202) 720–8938.

Small businesses may request information on complying with this regulation, or obtain a guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, fax: (202) 720–5698, or e-mail: *Jay.Guerber@usda.gov*.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 930 (7 CFR part 930), regulating the handling of tart cherries produced in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempt therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

Handler diversion is authorized under § 930.59 of the order and, when volume regulation is in effect, handlers may fulfill restricted percentage requirements by diverting cherries or cherry products into authorized outlets. Volume regulation is intended to help the tart cherry industry stabilize supplies and prices in years of excess production. The volume regulation provisions of the order provide for a combination of processor owned inventory reserves and grower or handler diversion of excess tart cherries. Reserve cherries may be released for sale into commercial outlets when the free percentage portion of the regulated crop is not expected to fill demand.

Section 930.59(b) of the order provides for the designation of allowable forms of handler diversion. These include: uses exempt under § 930.62; contribution to a Board approved food bank or other approved charitable organization; acquisition of grower diversion certificates that have been issued in accordance with § 930.58; or other uses, including diversion by destruction of the cherries at the handler's facilities as provided for in § 930.59(c).

Section 930.159 of the rules and regulations under the order allows handlers to divert cherries by destruction of the cherries at the handler's facility. Currently, at-plant diversion of cherries takes place at the handler's facility prior to placing

cherries into the processing line. However, experience has shown that this limitation places a burden on handlers regulated under this order.

To remove this burden, the Board unanimously recommended that handlers be allowed to divert and receive diversion credit for tart cherries after processing that may not be acceptable for the finished products they manufacture. With the capability to divert such cherries after processing, but before the finished product is completed, handlers would have an incentive to remove the lower quality processed cherries from the lot, meet their restricted obligation requirements, and improve the quality of their products. Improvement in the quality of tart cherries and tart cherry products would benefit producers, handlers, and consumers.

This action is intended to provide handlers more flexibility in meeting their restricted obligation requirements. The ability to perform at-plant diversion after placing the cherries into the processing line, but before a finished product is completed, will benefit all handlers. This action is expected to especially benefit handlers who only process one product. In many instances, these handlers are small.

This rule would allow a handler who processes only five plus one cherries (25 pounds of tart cherries with 5 pounds of sugar added) to fulfill his/her restricted percentage obligation (in a volume regulated year) by diverting at-plant, lower quality wholesome fruit from his/her five plus one processing line. Currently, the diversion must take place prior to processing and handlers that process one product may be forced to divert their good quality tart cherries with the lower quality wholesome cherries, or divert cherries by some other approved method. Handlers processing more than one product also would be able to take advantage of the additional method of at-plant diversion.

Diversion may also be accomplished by handlers donating cherries to charitable organizations, utilizing cherries in exempt outlets, or redeeming grower diversion certificates obtained from growers who have diverted cherries by non-harvest, and who have been issued diversion certificates by the Board in accordance with rules and regulations governing the issuance of grower diversion certificates (§ 930.158).

The Board reported that during the 2001–2002 crop year that the inventory reserve contained 44.3 percent frozen products, 11.3 percent waterpack, 15.2 percent piefill, 28 percent juice and juice concentrate, and 1.2 percent other products. These percentages show that frozen products, and juice and juice concentrate make up most of the reserve quantities.

Pursuant to § 930.159(b), handlers electing to divert cherries or cherry products must first notify the Board and submit a plan for approval. Such notification and plan must include an agreement that diversion will take place under the supervision of the USDA Processed Products Inspection Service or Board employee inspectors, and that the costs of such supervision are to be paid by the handler. USDA inspectors supervise the diversion of cherries or finished products at the current hourly rate under USDA's inspection fee schedule (7 CFR 54.42). Board employees supervise diversion at the same payment rate.

Once diversion is satisfactorily accomplished, handlers receive diversion certificates stating the weight of cherries diverted. Such diversion certificates can be used to satisfy handlers' restricted percentage obligations. Cherries and finished cherry products which have been diverted are not be subject to assessments.

The Regulatory Flexibility Act and Effects on Small Businesses

The Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities and has prepared this initial regulatory flexibility analysis. The Regulatory Flexibility Act (RFA) would allow AMS to certify that regulations do not have a significant economic impact on a substantial number of small entities.

However, as a matter of general policy, AMS' Fruit and Vegetable Programs (Programs) no longer opt for such certification, but rather perform regulatory flexibility analyses for any rulemaking that would generate the interest of a significant number of small entities. Performing such analyses shifts the Programs' efforts from determining whether regulatory flexibility analyses are required to the consideration of regulatory options and economic or regulatory impacts.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 40 handlers of tart cherries who are subject to regulation under the tart cherry marketing order and approximately 900 producers of tart cherries in the regulated area. Small agricultural service firms, which includes handlers, have been defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than $5,000,000, and small agricultural producers are defined as those having annual receipts of less than $750,000. A majority of the producers and handlers are considered small entities under SBA's standards.

Board and subcommittee meetings are widely publicized in advance and are held in a location central to the production area. The meetings are open to all industry members (including small business entities) and other interested persons who are encouraged to participate in the deliberations and voice their opinions on topics under discussion. Thus, Board recommendations can be considered to represent the interests of small business entities in the industry.

The Board reported that during the 2001–2002 crop year that the inventory reserve contained 44.3 percent frozen products, 11.3 percent waterpack, 15.2 percent piefill, 28 percent juice and juice concentrate, and 1.2 percent other products. These percentages show that frozen products, and juice and juice concentrate make up most of the reserve quantities.

The Board unanimously recommended this additional method for diversion credit to allow handlers to divert product after processing that may not be acceptable for the finished products manufactured by the handler. As discussed earlier, this action provides handlers more flexibility in meeting their restricted obligation requirements and is expected to be particularly helpful to handlers who produce only one product. In many instances, the one product handlers in the tart cherry industry are small.

Handlers that process juice concentrate and other products can more easily meet their restricted obligation requirements by juicing and processing lower quality wholesome product and placing it in the inventory reserve. Handlers that only have the ability to process products requiring higher quality fruit, like five plus one cherries have to put this fruit into the inventory reserves, or take advantage of other diversion options available under the order.

To sell more of their higher quality products, some handlers purchase cherries or diversion credit certificates from other handlers to meet their restricted obligation requirements. The

added flexibility provided by this action will help all handlers, and is expected to especially benefit the one-product handlers who will be able to sell more of their higher quality cherries in finished product form.

Producers also are expected to benefit from the implementation of this action. Currently, producers can use in-orchard tank diversion, in which cherries harvested into tanks are measured, calculated then diverted in the orchard. This method of diversion, however, removes both good and lesser quality fruit. Under the Board's recommendation, producers could deliver all of their fruit to handlers and the good quality fruit would be sorted and the poor quality fruit diverted or dumped. Producers would be paid for the good quality fruit. According to the Board, growers are paid on a quality point basis relative to the quality of the fruit delivered. This action would provide producers with more consistent income proportionate to the quality of the fruit delivered to handlers and with discretion to reduce orchard diversion. As such, producers can be more selective in complying with the grower diversion process.

The principal demand for tart cherries is in the form of processed products. Tart cherries are dried, frozen, canned, juiced, and pureed. Data from the National Agricultural Statistics Service (NASS) states that during the period 1995/96 through 2002/03, approximately 92 percent of the U.S. tart cherry crop, or 285.7 million pounds, was processed annually. Of the 285.7 million pounds of tart cherries processed, 58 percent was frozen, 30 percent was canned, and 12 percent was utilized for juice.

With regard to alternatives, the Board felt that the recommendation was the only solution to providing handlers addtitional flexibility in meeting their restricted obligation requirements.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this regulation.

In compliance with Office of Management and Budget (OMB) regulations (5 CFR part 1320) which implement the Paperwork Reduction Act of 1995 (Pub. L. 104–13), the information collection and recordkeeping requirements have been previously approved by OMB and assigned OMB Number 0581–0177.

There are some reporting, recordkeeping, and other compliance requirements under the marketing order. The reporting and recordkeeping burdens are necessary for compliance purposes and for developing statistical data for maintenance of the program. The forms require information which is readily available from handler records and which can be provided without data processing equipment or trained statistical staff. As with other, similar marketing order programs, reports and forms are periodically studied to reduce or eliminate duplicate information collection burdens by industry and public sector agencies. This rule does not change those requirements.

This rule invites comments on adding another method of handler diversion to the regulations under the Federal tart cherry marketing order. Any comments received will be considered prior to finalization of this rule.

After consideration of all relevant material presented, including the Board's recommendation, and other information, it is found that this interim final rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The tart cherry crop year begins July 1 and this action needs to be implemented so handlers can take advantage of this opportunity for the upcoming season; (2) the Board unanimously recommended this action at a public meeting and interested parties had an opportunity to provide input; and (3) this rule provides a 60-day comment period and any comments received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 930

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

■ For the reasons set forth in the preamble, 7 CFR part 930 is amended to read as follows:

PART 930—TART CHERRIES GROWN IN THE STATES OF MICHIGAN, NEW YORK, PENNSYLVANIA, OREGON, UTAH, WASHINGTON, AND WISCONSIN

■ 1. The authority citation for 7 CFR part 930 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 930.159 is amended by revising paragraph (c) to read as follows:

§ 930.159 Handler diversion.

* * * * *

(c) *At-plant diversion.* Diversion by disposal at-plant may take place prior to placing the cherries into the processing line, or after processing, but before a finished product is manufactured. Such diversion will take place under the supervision of USDA Inspection Service or Board employee inspectors. USDA inspectors or Board employees or Board agents will supervise diversion of cherry products at-plant at the current hourly rate under USDA's inspection fee schedule (7 CFR 52.42).

* * * * *

Dated: July 1, 2004.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 04–15584 Filed 7–8–04; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 989

[Docket No. FV04–989–3 IFR]

Raisins Produced From Grapes Grown in California; Change to Reporting Requirements Regarding Other Seedless Raisins

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule.

SUMMARY: This rule invites comments on changing the reporting requirements regarding Other Seedless (OS) raisins under the Federal marketing order for California raisins (order). The order regulates the handling of raisins produced from grapes grown in California and is administered locally by the Raisin Administrative Committee (RAC). The order provides authority for volume and quality regulations and reporting requirements by varietal type of raisin. The OS varietal type includes raisins produced from Flame Seedless (Flames) and other red grapes. This rule requires handlers to report to the RAC information on acquisitions, shipments, inventories, and inter-handler transfers of the different types of OS raisins, including Flames. The RAC will evaluate this data to determine whether segregating Flames into a separate varital type is warranted.

DATES: Effective July 12, 2004; comments received by September 7, 2004, will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be

sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; fax: (202) 720–8938, e-mail: *moab.docketclerk@usda.gov,* or *http://www.regulations.gov.* All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.ams.usda.gov/fv/moab.html.*

FOR FURTHER INFORMATION CONTACT: Maureen T. Pello, Senior Marketing Specialist, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, suite 102B, Fresno, California 93721; telephone: (559) 487–5901, Fax: (559) 487–5906; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, fax: (202) 720–8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington DC 20250–0237; telephone: (202) 720–2491, fax: (202) 720–8938, or e-mail: *Jay.Guerber@usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 989 (7 CFR part 989), both as amended, regulating the handling of raisins produced from grapes grown in California, hereinafter referred to as the "order." The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15) (A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule invites comments on revising the reporting requirements regarding OS raisins under the order. The order provides authority for volume and quality regulations and reporting requirements by varietal type of raisin. The OS varietal type includes raisins produced from Flames and other red grapes. This rule requires handlers to report to the RAC information on acquisitions, shipments, inventories, and inter-handler transfers of the different types of OS raisins, including Flames. The RAC will evaluate this data to determine whether segregating Flames into a separate varietal type is warranted. This action was unanimously recommended by the RAC at a meeting on April 13, 2004.

Section 989.73 of the order provides authority for the RAC to collect reports from handlers. Paragraph (d) of that section provides that, upon request of the RAC, with approval by the Secretary, handlers shall furnish to the RAC other information as may be necessary to enable it to exercise its powers and perform its duties. The RAC meets routinely to make decisions on various programs authorized under the order such as volume regulation and quality control. The RAC utilizes information collected under the order in its decision-making. Section 989.173 of the order's administrative rules and regulations specifies certain reports that handlers are currently required to submit to the RAC.

Many of the reports submitted by handlers under the order require information to be segregated by varietal type of raisin. Section 989.10 defines varietal type to mean raisins generally recognized as possessing characteristics differing form other raisins in a degree sufficient enough to warrant separate identification and classification. Section 989.110 of the order's administrative rules and regulations contains a list and description of the nine varietal types currently segregated under the order.

One of these varietal types, OS raisins, includes raisins produced from Flames and other similar seedless red grapes. There has been some discussion in recent years regarding whether Flames should be segregated into a separate varietal type. Between the 1995–96 and 2000–01 crop years, volume regulation had not been implemented for OS raisins, and handlers were able to market all of the OS raisins they acquired. During this period, some handlers had expanded their market for Flames. When volume regulation was in effect for OS raisins for the 2001–02 crop year, some Flame handlers had difficulty meeting their market needs.

Thus, the RAC recommended revising the order's regulations to require handlers to report data on acquisitions, shipments (dispositions), inventories, and inter-handler transfers of Flames and other OS raisins to the RAC beginning with the 2004–05 crop year which starts on August 1, 2004. The RAC will review this information and determine whether segregating Flames into a separate varietal type is warranted. A separate varietal type would allow the RAC to consider the application of the order's volume regulation provisions for Flames separate from the other types of OS raisins. Accordingly, paragraphs (a) (inventory), (b) (acquisitions), (c) dispositions, and (d) inter-handler transfers in § 989.173 are revised. Paragraph (g) in § 989.173 regarding similar reports for organic raisins is also revised.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 20 handlers of California raisins who are subject to regulation under the order and approximately 4,500 raisin producers in

the regulated area. Small agricultural firms are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than $5,000,000, and small agricultural producers are defined as those having annual receipts of less than $750,000. Thirteen of the 20 handlers subject to regulation have annual sales estimated to be at least $5,000,000, and the remaining 7 handlers have sales less than $5,000,000. No more than 7 handlers, and a majority of producers, of California raisins may be classified as small entities.

This rule revises § 989.173 to require handlers to report acquisitions, shipments, inventories, and inter-handler transfers of the different types of raisins within the OS varietal type. This action is needed so that the RAC can collect accurate data on Flames, a particular type of OS raisin, and evaluate this information to determine whether Flames should be segregated into a separate varietal type under the order. This would permit the RAC to consider application of the order's volume regulation provisions to Flames separate from the other types of OS raisins. Authority for this action is provided in § 989.73 of the order.

Regarding the impact of this action on affected entities, this action imposes no measurable burden on OS raisin handlers. OS handlers will be required to separate out different types of OS raisins on reports that they are already submitting to the RAC. Most handlers have been doing this voluntarily in recent years. This action has no impact on raisin producers.

The RAC considered alternatives to the recommended action. The RAC formed a work group to review the concerns raised by Flame handlers. One alternative considered was to proceed with informal rulemaking to establish a separate varietal type for Flames. Another alternative considered was to try to have all handlers voluntarily separate Flames from the other OS raisins on certain reports. After much discussion, the work group determined that the best course of action would be to collect data on Flames, evaluate the data, and then determine whether segregating Flames into a separate varietal type was warranted.

This rule slightly modifies the reporting requirements on small and large raisin handlers. All raisin handlers are currently required to submit various reports to the RAC where the data collected is segregated by varietal type of raisin. These reports include:

Form nos.	Form
RAC–1	Weekly Report of Standard Raisin Acquisitions.
RAC–3	Weekly Report of Standard Raisins Received for Memorandum Receipt or Warehousing.
RAC–20	Monthly Report of Free Tonnage Raisin Disposition.
RAC–30	Weekly Off-Grade Summary.
RAC–50	Inventory of Free Tonnage Standard Quality Raisins on Hand.
RAC–51	Inventory of Off-Grade Raisins on Hand.
RAC–1 CO	Weekly Report of Organic Raisin Acquisitions.
RAC–20 CO	Monthly Report of Free Tonnage Organic Raisin Disposition.
RAC–50 CO	Inventory of Free Tonnage Standard Quality Organic Raisins on Hand.
RAC–51 CO	Inventory of Off-Grade Raisins on Hand.

This rule requires that an extra line item be added to these 10 forms so that handlers can separate out Flames from the other types of OS raisins. Handlers will also be required to indicate the type of OS raisin on the Inter-Handler Transfers of Free Tonnage Raisins (RAC–6), the Monthly Free Tonnage Exports by Country of Destination (RAC–21), and the Monthly Free Organic Tonnage Exports by Country of Destination (RAC–21 CO); no change to these forms is needed. The current total annual burden for all 13 of these forms is 873.48 hours. This rule will not add to this burden on handlers.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the information collection requirements referenced above have been approved by the Office of Management and Budget (OMB) under OMB Control No. 0581–0178, Vegetable and Specialty Crops. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. Finally, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

Further, the RAC's work group meetings on February 12 and March 4, 2004, the Administrative Issues Subcommittee and RAC meetings on April 13, 2004, and the RAC's Executive Committee meeting on May 4, 2004, where this action was deliberated were all public meetings widely publicized throughout the raisin industry. All interested persons were invited to attend the meetings and participate in the industry's deliberations. Finally, all interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/fv/moab.html*. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

Comments are invited concerning this rule. A 60-day comment period is provided to allow interested persons to respond. All comments received will be considered prior to finalization of this rule.

After consideration of all relevant material presented, including the information and recommendation submitted by the RAC and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The RAC recommended that this action be in effect beginning with the 2004–05 crop year which begins on August 1, 2004; (2) this action was unanimously recommended by the RAC at a public meeting; (3) this action imposes no additional burden on California raisin handlers; and (4) this interim final rule provides a 60-day period for written comments, and all comments timely received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 989

Grapes, Marketing agreements, Raisins, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 989 is amended as follows:

PART 989—RAISINS PRODUCED FROM GRAPES GROWN IN CALIFORNIA

■ 1. The authority citation for 7 CFR part 989 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 989.173 is amended by:
■ A. Revising paragraph (a) introductory text;
■ B. Revising the first sentence of paragraph (b)(1)(ii);
■ C. Revising paragraph (c)(1) introductory text;
■ D. Revising paragraph (d)(1)(iii); and
■ E. Revising paragraph (g) to read as follows:

§ 989.173 Reports.

(a) *Inventory reports.* Each handler shall submit to the Committee as of the close of business on July 31 of each crop year, and not later than the following August 6, an inventory report which shall show, with respect to each varietal type of raisins held by such handler: *Provided*, That, for the Other Seedless varietal type, handlers shall report the information required in this paragraph separately for the different types of Other Seedless raisins:

* * * * *

(b) * * *

(ii) For each report required to be submitted pursuant to this paragraph, the required information shall be shown separately for each varietal type: *Provided*, That, for the Other Seedless varietal type, the required information shall be shown separately for the different types of Other Seedless raisins.

* * *

* * * * *

(c) *Reports of disposition*—(1) *Free tonnage raisins.*

Each month each handler who is not a processor shall furnish to the Committee, on an appropriate form provided by the Committee and so that it is received by the Committee not later than the seventh day of the month, a report showing the aggregate quantity of each varietal type of free tonnage packed raisins and standard natural condition raisins which were shipped or otherwise disposed of by such handler during the preceding month (exclusive of transfers within the State of California between plants of any such handler and from such handler to other handlers): *Provided*, That, for the Other Seedless varietal type, handlers shall report such information for the different types of Other Seedless raisins. Such required information shall be segregated as to:

* * * * *

(d) * * *

(1) * * *

(iii) The varietal type of raisin, with organically produced raisins as specified in paragraph (g) of this section separated out, net weight, and condition of the raisins transferred: *Provided*, That, for the Other Seedless varietal type, handlers shall report such information for the different types of Other Seedless raisins; and

* * * * *

(g) *Organically produced raisins.* For purposes of this section, organically produced raisins means raisins that have been certified by an organic certification organization currently registered with the California Department of Food and Agriculture or such certifying organization accredited under the National Organic Program. Handlers of such raisins shall submit the following reports to the Committee by varietal type: *Provided:* That, for the Other Seedless varietal type, handlers shall report such information for the different types of Other Seedless raisins.

* * * * *

Dated: July 1, 2004.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 04–15583 Filed 7–8–04; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 214

[ICE No. 2297–03]

RIN 1653–AA23

Authorizing Collection of the Fee Levied on F, J, and M Nonimmigrant Classifications Under Public Law 104–208; SEVIS; Correction

AGENCY: Bureau of Immigration and Customs Enforcement, Department of Homeland Security.

ACTION: Final rule: Correction.

SUMMARY: The Department of Homeland Security (DHS) published in the **Federal Register** of July 1, 2004 (69 FR 39814), a final rule which amended the DHS regulations to provide for the collection of a fee to be paid by certain aliens who are seeking status as F–1, F–3, M–1, or M–3 nonimmigrant students or as J–1 nonimmigrant exchange visitors. The final rule contained an error that is corrected in this document.

DATES: This correction is effective September 1, 2004.

FOR FURTHER INFORMATION CONTACT: Jill Drury, Director Student and Exchange Visitor Program (SEVP), Bureau of Immigration and Customs Enforcement, Department of Homeland Security, 800 K Street, NW., Room 1000, Washington, DC 20536, telephone (202) 305–2346.

SUPPLEMENTARY INFORMATION:

Need for Correction

As published in the **Federal Register** on July 1, 2004 (69 FR 39814), the final rule amending parts 103, 214, and 299 contains an error that is in need of correction.

Correction of Publication

■ Accordingly, the publication on July 1, 2004 (69 FR 39814), of the final rule that was the subject of FR Doc. 04–14961 is corrected as follows:

PART 214—NONIMMIGRANT CLASSES

§ 214.13 [Corrected]

■ 1. On page 39825, in the second column, paragraph (b)(3) beginning on the fourth line, the date "May 31, 2004" should read "August 31, 2004"

Dated: July 6, 2004.

Richard A. Sloan,

Director, Regulations and Forms Services Division.

[FR Doc. 04–15608 Filed 7–8–04; 8:45 am]

BILLING CODE 4410–10–P

FEDERAL RESERVE SYSTEM

12 CFR Part 201

[Regulation A]

Extensions of Credit by Federal Reserve Banks

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) has adopted final amendments to its Regulation A to reflect the Board's approval of an increase in the primary credit rate at each Federal Reserve Bank. The secondary credit rate at each Reserve Bank automatically increased by formula as a result of the Board's primary credit rate action.

DATES: The amendments to part 201 (Regulation A) are effective July 9, 2004. The rate changes for primary and

secondary credit were effective on the dates specified in 12 CFR 201.51, as amended.

FOR FURTHER INFORMATION CONTACT: Jennifer J. Johnson, Secretary of the Board (202) 452–3259; for users of Telecommunication Devices for the Deaf (TDD) only, contact (202) 263–4869.

SUPPLEMENTARY INFORMATION: The Federal Reserve Banks make primary and secondary credit available to depository institutions as a backup source of funding on a short-term basis (usually overnight). The primary and secondary credit rates are the interest rates that the 12 Federal Reserve Banks charge for extensions of credit under these programs. In accordance with the Federal Reserve Act, the primary and secondary credit rates are established by the boards of directors of the Federal Reserve Banks, subject to the review and determination of the Board.

The Board approved requests by the Reserve Banks to increase by 25 basis points the primary credit rate in effect at each of the 12 Federal Reserve Banks, thereby increasing from 2 percent to 2.25 percent the rate that each Reserve Bank charges for extensions of primary credit. As a result of the Board's action on the primary credit rate, the rate that each Reserve Bank charges for extensions of secondary credit automatically increased from 2.50 percent to 2.75 percent under the secondary credit rate formula. The final amendments to Regulation A reflect these rate changes.

The 25-basis-point increase in the primary credit rate was associated with a similar increase in the target for the federal funds rate (from 1 percent to 1.25 percent) approved by the Federal Open Market Committee (Committee) and announced at the same time. A press release announcing these actions indicated that:

The Committee believes that, even after this action, the stance of monetary policy remains accommodative and, coupled with robust underlying growth in productivity, is providing ongoing support to economic activity. The evidence accumulated over the intermeeting period indicates that output is continuing to expand at a solid pace and labor market conditions have improved. Although incoming inflation data are somewhat elevated, a portion of the increase in recent months appears to have been due to transitory factors.

The Committee perceives the upside and downside risks to the attainment of both sustainable growth and price stability for the next few quarters are roughly equal. With underlying inflation still expected to be relatively low, the Committee believes that policy accommodation can be removed at a pace that is likely to be measured. Nonetheless, the Committee will respond to changes in economic prospects as needed to fulfill its obligation to maintain price stability.

Regulatory Flexibility Act Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Board certifies that the new primary and secondary credit rates will not have a significant adverse economic impact on a substantial number of small entities because the final rule does not impose any additional requirements on entities affected by the regulation.

Administrative Procedure Act

The Board did not follow the provisions of 5 U.S.C. 553(b) relating to notice and public participation in connection with the adoption of these amendments because the Board for good cause determined that delaying implementation of the new primary and secondary credit rates in order to allow notice and public comment would be unnecessary and contrary to the public interest in fostering price stability and sustainable economic growth. For these same reasons, the Board also has not provided 30 days prior notice of the effective date of the rule under section 553(d).

12 CFR Chapter II

List of Subjects in 12 CFR Part 201

Banks, Banking, Federal Reserve System, Reporting and recordkeeping.

Authority and Issuance

■ For the reasons set forth in the preamble, the Board is amending 12 CFR chapter II to read as follows:

PART 201—EXTENSIONS OF CREDIT BY FEDERAL RESERVE BANKS (REGULATION A)

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 12 U.S.C. 248(i)–(j), 343 *et seq.*, 347a, 347b, 347c, 348 *et seq.*, 357, 374, 374a, and 461.

■ 2. Section 201.51, paragraphs (a) and (b) are revised to read as follows:

§ 201.51 Interest rates applicable to credit extended by a Federal Reserve Bank.[1]

(a) *Primary credit.* The interest rates for primary credit provided to depository institutions under § 201.4(a) are:

Federal Reserve Bank	Rate	Effective
Boston	2.25	June 30, 2004.
New York	2.25	June 30, 2004.
Philadelphia	2.25	June 30, 2004.
Cleveland	2.25	June 30, 2004.
Richmond	2.25	June 30, 2004.
Atlanta	2.25	June 30, 2004.
Chicago	2.25	June 30, 2004.
St. Louis	2.25	July 1, 2004.
Minneapolis	2.25	June 30, 2004.
Kansas City	2.25	June 30, 2004.
Dallas	2.25	June 30, 2004.
San Francisco	2.25	June 30, 2004.

(b) *Secondary credit.* The interest rates for secondary credit provided to depository institutions under 201.4(b) are:

Federal Reserve Bank	Rate	Effective
Boston	2.75	June 30, 2004.
New York	2.75	June 30, 2004.
Philadelphia	2.75	June 30, 2004.
Cleveland	2.75	June 30, 2004.
Richmond	2.75	June 30, 2004.
Atlanta	2.75	June 30, 2004.
Chicago	2.75	June 30, 2004.
St. Louis	2.75	July 1, 2004.
Minneapolis	2.75	June 30, 2004.
Kansas City	2.75	June 30, 2004.
Dallas	2.75	June 30, 2004.
San Francisco	2.75	June 30, 2004.

* * * * *

By order of the Board of Governors of the Federal Reserve System, July 2, 2004.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 04–15580 Filed 7–8–04; 8:45 am]

BILLING CODE 6210–01–P

[1] The primary, secondary, and seasonal credit rates described in this section apply to both advances and discounts made under the primary, secondary, and seasonal credit programs, respectively.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–18538; Directorate Identifier 2004–NE–29–AD; Amendment 39–13711; AD 2004–14–02]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce Corporation (Formerly Allison Engine Company, Allison Gas Turbine Division, and Detroit Diesel Allison) Models 250–C28, –C28B, and –C28C Turboshaft Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for Rolls-Royce Corporation (formerly Allison Engine Company, Allison Gas Turbine Division, and Detroit Diesel Allison) (RRC) models 250–C28, –C28B, and –C28C turboshaft engines with certain serial number (SN) third-stage turbine wheels, part number (P/N) 6899383. This AD requires replacing certain SN third-stage turbine wheels, P/N 6899383, before reaching new reduced life limits. This AD results from three reports of third-stage turbine blade and shroud failures. We are issuing this AD to prevent loss of power and uncommanded engine shutdown due to failure of third-stage turbine blades and shrouds.

DATES: This AD becomes effective July 26, 2004.

We must receive any comments on this AD by September 7, 2004.

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 20590–001.
- 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.

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

FOR FURTHER INFORMATION CONTACT: John Tallarovic, Aerospace Engineer, Chicago Aircraft Certification Office, FAA, 2300 East Devon Avenue, Des Plaines, IL 60018–4696; telephone (847) 294–8180; fax (847) 294–7834.

SUPPLEMENTARY INFORMATION: On May 4, 2004, we became aware of three reports of third-stage turbine wheel blade and shroud failures on RRC model 250–C28 series turboshaft engines. Investigation by RRC revealed that high cycle fatigue caused the third-stage turbine blade and shroud failures. Investigation has also revealed that this high cycle fatigue condition is limited to a population of 73 third-stage turbine wheels that were manufactured and accepted with a blueprint variance. The turbine wheel original life limits were 4,550 operating hours and 6,000 cycles-in-service. This condition, if not corrected, could result in loss of power and uncommanded engine shutdown due to failure of third-stage turbine blades and shrouds.

FAA's Determination and Requirements of This AD

The unsafe condition described previously is likely to exist or develop on other RRC 250–C28 series engines of the same type design. We are issuing this AD to prevent loss of power and uncommanded engine shutdown due to failure of third-stage turbine blades and shrouds. This AD requires replacing the third-stage turbine wheels, P/N 6899383, with SNs listed in the compliance section of this proposed AD at the following:

- For any turbine wheel with fewer than 250 operating hours time since new (TSN) on the effective date of the proposed AD, before accumulating 300 operating hours TSN; and
- For any turbine wheel with 250 or more operating hours TSN on the effective date of the proposed AD, before accumulating an additional 50 operating hours.

FAA's Determination of the Effective Date

Since an unsafe condition exists that requires the immediate adoption of this AD, we have found that notice and opportunity for public comment before issuing this AD are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

Docket Management System (DMS)

We have implemented new procedures for maintaining AD dockets electronically. As of May 17, 2004, we posted new AD actions on the DMS and assigned a DMS docket number. We track each action and assign a corresponding Directorate identifier. The DMS docket No. is in the form "Docket No. FAA–2004–18538." Each DMS docket also lists the Directorate identifier ("Old Docket Number") as a cross-reference for searching purposes.

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 submit any written relevant data, views, or arguments regarding this AD. Send your comments to an address listed under **ADDRESSES.** Include "AD Docket No. FAA–2004–18538; Directorate Identifier 2004–NE–29–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*.

We are reviewing the writing style we currently use in regulatory documents. We are interested in your comments on whether the style of this document is clear, and your suggestions to improve the clarity of our communications with you. You can get more information about plain language at *http://www.faa.gov/language* and *http://www.plainlanguage.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 DMS Docket Offices 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.

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 at the address listed under **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, 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:

2004–14–02 Rolls-Royce Corporation (formerly Allison Engine Company, Allison Gas Turbine Division, and Detroit Diesel Allison): Amendment 39–13711. Docket No. FAA–2004–18538; Directorate Identifier 2004–NE–29–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective July 26, 2004.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Rolls-Royce Corporation (formerly Allison Engine Company, Allison Gas Turbine Division, and Detroit Diesel Allison) (RRC) models 250–C28, –C28B, and –C28C turboshaft engines with third-stage turbine wheels, part number (P/N) 6899383, listed by serial number (SN) in the following Table 1:

TABLE 1.—SNs OF AFFECTED THIRD STAGE TURBINE WHEELS

HX91922	X523242	X523281
HX91923	X523243	X523283
HX91925	X523244	X523284
HX91926	X523246	X523287
HX91928	X523249	X523288
HX91929	X523250	X523289
HX91930	X523251	X523290
HX91932	X523253	X523291
HX91934	X523255	X523292
HX91936	X523257	X523293
HX91937	X523260	X523294
HX91939	X523261	X523295
HX91940	X523262	X523296
HX91960	X523263	X523297
HX91962	X523264	X523298
HX91966	X523265	X523300
HX91976	X523266	X523305
HX91977	X523268	X523309
HX91979	X523269	X523313
HX91980	X523270	X523315
X523236	X523271	X523317
X523237	X523273	X523319
X523238	X523276	X523320
X523239	X523277	N/A
X523241	X523278	N/A

These engines are installed on, but not limited to, Bell Helicopter Textron 206L–1; Eurocopter Deutschland BO 105 LS A–1; and Eurocopter Canada BO 105 LS A–3 helicopters.

Unsafe Condition

(d) This AD results from three reports of third-stage turbine wheel blade and shroud failures. We are issuing this AD to prevent loss of power and uncommanded engine shutdown due to failure of the third-stage turbine wheel blade and shroud.

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.

(f) For any third-stage turbine wheel with fewer than 250 operating hours time since new (TSN) on the effective date of this AD, replace turbine wheel before accumulating 300 operating hours TSN.

(g) For any third-stage turbine wheel with 250 or more operating hours TSN on the effective date of this AD, replace turbine wheel before accumulating an additional 50 operating hours.

Definition

(h) For the purposes of this AD, a replacement third-stage turbine wheel is a turbine wheel that does not have a SN listed in this AD.

(i) After the effective date of this AD, do not install third-stage turbine wheels that are listed in Table 1 of this AD, into any engine.

Alternative Methods of Compliance

(j) The Manager, Chicago Aircraft 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.

Special Flight Permits

(k) Under 14 CFR 39.23, we are prohibiting special flight permits for this AD.

Material Incorporated by Reference

(l) None.

Related Information

(m) Rolls-Royce Corporation Alert Commercial Engine Bulletin No. CEB-A–72–2202, dated May 6, 2004, pertains to the subject of this AD.

Issued in Burlington, Massachusetts, on July 1, 2004.

Francis A Favara,

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

[FR Doc. 04–15508 Filed 7–8–04; 8:45 am]

BILLING CODE 4913–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NM–162–AD; Amendment 39–13710; AD 2004–14–01]

RIN 2120–AA64

Airworthiness Directives; Fokker Model F.28 Mark 0070 and 0100 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to certain Fokker Model F.28 Mark 0100 series airplanes, that currently requires repetitive inspections of certain main landing gear (MLG) main fittings to detect forging defects, and rework of the main fittings if necessary. This amendment requires either replacement of each MLG with a MLG that has main fittings that have been inspected and reworked, or various one-time inspections of the main fittings and rework if necessary. Either of these actions constitutes terminating action for the repetitive inspections. This action also revises the applicability by adding airplanes. The actions specified by this AD are intended to detect forging defects of the MLG main fittings, which could lead to cracking and result in significant structural damage to the airplane and possible injury to the occupants. This action is intended to address the identified unsafe condition.

DATES: Effective August 13, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 13, 2004.

The incorporation by reference of a certain other publication, as listed in the regulations, was approved previously by the Director of the Federal Register as of December 20, 2001 (66 FR 63159, December 5, 2001).

ADDRESSES: The service information referenced in this AD may be obtained from Fokker Services B.V., P.O. Box 231, 2150 AE Nieuw-Vennep, the Netherlands. This information may be

examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; 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/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1137; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 2001–24–10, amendment 39–12527 (66 FR 63159, December 5, 2001), which is applicable to certain Fokker Model F.28 Mark 0100 series airplanes, was published in the **Federal Register** on March 17, 2004 (69 FR 12582). The action proposed to continue to require either replacement of each MLG with a MLG that has main fittings that have been inspected and reworked, or various one-time inspections of the main fittings and rework if necessary. Either of those actions would constitute terminating action for the repetitive inspections. The action also proposed to revise the applicability by adding airplanes.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

Support for the Proposed AD

The Air Transport Association of America, on behalf of its members, generally supports the intent of the proposed AD.

Request to Include an Additional Terminating Action

The commenter, an operator, notes that its fleet of Fokker Model F.28 Mark 0100 series airplanes is not affected by the proposed AD. The commenter suggests adding an additional terminating action to paragraph (f) of the proposed AD to allow the installation of Menasco main landing gear (MLG) main fittings made of steel, in accordance with Fokker Service Bulletin F100–32–090.

The FAA acknowledges the commenter's request, but the unsafe condition addressed in this AD pertains to cracking associated with Messier-Dowty MLG main fittings as called out in the applicability statement of this AD. This AD is applicable to airplanes equipped with specific Messier-Dowty MLG and main fitting sub-assembly part numbers. This AD is not applicable to airplanes with MLGs and fittings manufactured by Menasco. No change to this AD is necessary.

Change Made to This AD

Paragraph (f)(1) of this AD has been reworded to comply with the Office of the Federal Register's guidelines for material incorporated by reference.

Conclusion

After careful review of the available data, including the comments noted above, we have determined that air safety and the public interest require the adoption of the rule with the change previously described.

Cost Impact

There are approximately 70 airplanes of U.S. registry that will be affected by this AD.

The actions that are currently required by AD 2001–24–10 take approximately 2 work hours per airplane to accomplish, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of the previously required actions on U.S. operators is estimated to be $9,100, or $130 per airplane, per inspection cycle.

Should an operator rework a MLG per Part 1 of Fokker Service Bulletin SBF100–32–134, it will take approximately 44 work hours per airplane at an average labor rate of $65 per work hour. Based on these figures, the cost impact of the modification is estimated to be $2,860 per airplane.

Should an operator do the inspections specified in Messier-Dowty Service Bulletin F100–32–102, it will take approximately 2 work hours per airplane at an average labor rate of $65 per work hour. Based on these figures, the cost impact of the inspections is estimated to be $130 per airplane.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations adopted herein 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. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (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. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, pursuant to 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. Section 39.13 is amended by removing amendment 39–12527 (66 FR 63159, December 5, 2001), and by adding a new airworthiness directive (AD), amendment 39–13710, to read as follows:

2004–14–01 Fokker Services B.V.: Amendment 39–13710. Docket 2003–NM–162–AD. Supersedes AD 2001–24–10, Amendment 39–12527.

Applicability: Model F.28 Mark 0070 and 0100 series airplanes, certificated in any category, equipped with a Messier-Dowty main landing gear (MLG) unit having a part number (P/N) with a main fitting sub-assembly, as listed in Table 1 of this AD.

TABLE 1.—APPLICABILITY

P/N—	Which includes a Main fitting sub-assembly P/N—
201072011	201072283, 201072284, or 201251258 (main fitting P/N 201072383, 201072384, or 201072389).
201072012	201072283, 201072284, or 201251258 (main fitting P/N 201072383, 201072384, or 201072389).
201072013	201072283, 201072284, or 201251258 (main fitting P/N 201072383, 201072384, or 201072389).
201072014	201072283, 201072284, or 201251258 (main fitting P/N 201072383, 201072384, or 201072389).
201072015	201072283, 201072284, or 201251258 (main fitting P/N 201072383, 201072384, or 201072389).
201072016	201072283, 201072284, or 201251258 (main fitting P/N 201072383, 201072384, or 201072389).

Compliance: Required as indicated, unless accomplished previously.

To detect forging defects of the MLG main fittings, which could lead to cracking and result in significant structural damage to the airplane and possible injury to the occupants, accomplish the following:

Restatement of the Requirements of AD 2001–24–10

Initial and Repetitive Inspections

(a) For Fokker Model F.28 Mark 0100 series airplanes: Before the accumulation of 1,000 total landings on a new MLG, or within 30 days after December 20, 2001 (the effective date of AD 2001–24–10, amendment 39–12527), whichever occurs later, do an initial eddy current inspection on all MLG main fittings to detect forging defects, per Messier-Dowty Service Bulletin No. F100–32–101, including Appendices A and B, dated October 25, 2001. After accomplishment of the initial inspection, repeat the eddy current inspection thereafter at intervals not to exceed 500 landings or 6 months, whichever occurs first, per the service bulletin. Accomplishment of the actions required by paragraph (f) of this AD terminates the repetitive inspections. Although this service bulletin specifies to submit certain information to the part manufacturer, this AD does not include such a requirement.

Rework

(b) For Fokker Model F.28 Mark 0100 series airplanes: After any inspection required by paragraph (a) of this AD, before further flight, accomplish the applicable actions required by paragraph (b)(1) or (b)(2) of this AD.

(1) If any cracking is found within the limits specified in Messier-Dowty Service Bulletin No. F100–32–101, including Appendices A and B, dated October 25, 2001: Rework the MLG main fitting per the service bulletin.

(2) If any cracking is found that exceeds the limits specified in Messier-Dowty Service Bulletin No. F100–32–101, including Appendices A and B, dated October 25, 2001: Rework the MLG main fitting per a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the Civil Aviation Authority—The Netherlands (CAA–NL) (or its delegated agent).

Exception to Service Information

(c) During any action required by this AD, if the service bulletin specifies to contact Messier-Dowty for an appropriate action: Before further flight, repair per a method approved by the Manager, International Branch, ANM–116; or the CAA–NL (or its delegated agent).

New Actions Required by This AD

Initial and Repetitive Inspections

(d) For Fokker Model F.28 Mark 0070 series airplanes: Before the accumulation of 1,000 total landings on a new MLG, or within 30 days after the effective date of this AD, whichever occurs later, do an initial eddy current inspection on all MLG main fittings to detect forging defects, per Messier-Dowty Service Bulletin No. F100–32–101, including Appendices A and B, dated October 25, 2001. After accomplishment of the initial inspection, repeat the inspection thereafter at intervals not to exceed 500 landings or 6 months, whichever occurs first, per the service bulletin. Accomplishment of the actions required by paragraph (f) of this AD terminates the repetitive inspections.

Rework

(e) For Fokker Model F.28 Mark 0070 series airplanes: After any inspection required by paragraph (d) of this AD, before further flight, accomplish the applicable actions required by paragraph (e)(1) or (e)(2) of this AD.

(1) If any cracking is found within the limits specified in Messier-Dowty Service Bulletin No. F100–32–101, including Appendices A and B, dated October 25, 2001: Rework the MLG main fitting per the service bulletin.

(2) If any cracking is found that exceeds the limits specified in Messier-Dowty Service Bulletin No. F100–32–101, including Appendices A and B, dated October 25, 2001: Rework the MLG main fitting per a method approved by the Manager, International Branch, ANM–116; or the CAA–NL (or its delegated agent).

Terminating Actions

(f) For all airplanes: Before the accumulation of 16,000 total landings on a new MLG, do the actions in paragraph (f)(1) or (f)(2) of this AD. Accomplishment of paragraph (f)(1) or (f)(2) of this AD constitutes terminating action for the repetitive inspections required by paragraphs (a) and (d) of this AD.

(1) Replace the main fitting of the MLG with a main fitting that has had a detailed inspection to detect forging defects and has been reworked, per paragraph 2.B., Part 1, of the Accomplishment Instructions of Fokker Service Bulletin SBF100–32–134, dated March 24, 2003. Any discrepancy found during the detailed inspection must be repaired before further flight per a method approved by the Manager, International Branch, ANM–116; or the CAA–NL (or its delegated agent). Accomplishment of the applicable actions in the Fokker 100 Aircraft Maintenance Manual and Messier-Dowty Component Maintenance Manual, Chapter 32–11–04, is one approved method.

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

Note 2: Fokker Service Bulletin SBF100–32–134, dated March 24, 2003, references Messier-Dowty Service Bulletin F100–32–102, including Appendices A, B, and C, dated February 24, 2003, as an additional source of service information for reworking the main fitting of each MLG.

(2) Do eddy current and etch penetrant inspections, as applicable, to detect forging defects; and rework the main fitting of each MLG, as applicable; by accomplishing all of the actions in paragraph 3.C. of the Accomplishment Instructions of Messier-Dowty Service Bulletin F100–32–102, including Appendices A, B, and C, dated February 24, 2003. Do all of the actions per the service bulletin. Any rework must be done before further flight.

Parts Installation

(g) As of the effective date of this AD, no person may install a MLG, MLG main fitting sub-assembly, or MLG main fitting having a P/N listed in Messier-Dowty Service Bulletin F100–32–102, including Appendices A, B, and C, dated February 24, 2003, on any airplane unless the part has been inspected

and reworked, as applicable, per that service bulletin.

Alternative Methods of Compliance

(h) In accordance with 14 CFR 39.19, the Manager, International Branch, ANM–116, is authorized to approve alternative methods of compliance for this AD.

Incorporation by Reference

(i) Unless otherwise specified in this AD, the actions shall be done in accordance with Fokker Service Bulletin SBF100–32–134, dated March 24, 2003; Messier-Dowty Service Bulletin No. F100–32–101, including Appendices A and B, dated October 25, 2001; and Messier-Dowty Service Bulletin F100–32–102, including Appendices A, B, and C, dated February 24, 2003; as applicable.

(1) The incorporation by reference of Fokker Service Bulletin SBF100–32–134, dated March 24, 2003; and Messier-Dowty Service Bulletin F100–32–102, including Appendices A, B, and C, dated February 24, 2003; is approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

(2) The incorporation by reference of Messier-Dowty Service Bulletin No. F100–32–101, including Appendices A and B, dated October 25, 2001, was approved previously by the Director of the Federal Register as of December 20, 2001 (66 FR 63159, December 5, 2001).

(3) Copies may be obtained from Fokker Services B.V., P.O. Box 231, 2150 AE Nieuw-Vennep, the Netherlands. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; 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/code_of_federal_regulations/ibr_locations.html.*

Note 3: The subject of this AD is addressed in Dutch airworthiness directive 2003–040, dated March 31, 2003.

Effective Date

(j) This amendment becomes effective on August 13, 2004.

Issued in Renton, Washington, on June 24, 2004.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–15368 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–352–AD; Amendment 39–13707; AD 2004–13–25]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A330, A340–200, and A340–300 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to certain Airbus Model A330, A340–200, and A340–300 series airplanes, that currently requires repetitive inspections to check the play of the eye-end of the piston rod of the elevator servo-controls, and follow-on corrective actions if necessary. This amendment requires the replacement of certain elevator servo-controls with new, improved servo-controls. The actions specified by this AD are intended to detect and correct excessive play of the eye-end of the piston rod of the elevator servo-controls, which could result in failure of the elevator servo-control. This action is intended to address the identified unsafe condition.

DATES: Effective August 13, 2004.

The incorporation by reference of certain publications, as listed in the regulations, is approved by the Director of the Federal Register as of August 13, 2004.

The incorporation by reference of certain other publications, as listed in the regulations, was approved previously by the Director of the Federal Register as of July 20, 2000 (65 FR 37476, June 15, 2000).

ADDRESSES: The service information referenced in this AD may be obtained from Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; 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/code_of_federal_regulations/ibr_locations.html.*

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: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 2000–12–06, amendment 39–11784 (65 FR 37476, June 15, 2000), which is applicable to certain Airbus Model A330 and A340 series airplanes, was published in the **Federal Register** on March 25, 2004 (69 FR 15262). The action proposed to continue to require the replacement of certain elevator servo-controls with new, improved servo-controls.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comment received from a single commenter.

Request To Change Applicability

The commenter, the airplane manufacturer, requests that the applicability of the proposed AD be changed to match the applicability as shown in the French airworthiness directives. The commenter notes that the applicability of the French airworthiness directives lists the affected airplanes by specific model dash numbers (*i.e.*, A330 aircraft, model –202, –223, –243, –301, etc.) The basis of the commenter's request is to limit the applicability of the proposed AD to airplane models that either contain or will contain the terminating modification in the airplane's type design, and to avoid making the proposed AD applicable to airplane models that do not have the affected servo-control part numbers specified in the proposed AD. We infer that the manufacturer wants to clarify that Airbus Model A340–541 and –642 airplanes are not affected by the proposed AD.

We partially agree with the commenter's request to change the applicability. We have changed the applicability of this final rule, but it does not match the applicability as shown in the French airworthiness directives. To avoid accidentally omitting airplane models that are listed on a U.S. type certificate data sheet (TCDS), we usually identify airplane series instead of individual model dash numbers in the applicability of our AD. The U.S. TCDS for the Model A340 includes the Model A340–200 series, comprising A340–211, –212, and –213 airplanes; the Model A340–300 series, comprising A340–311, –312, and –313 airplanes; and Model A340–541 and

A340–642 airplanes. In this case Model A340–541 and –642 airplanes are not included in the applicability of the parallel French airworthiness directive. For clarification purposes, we have changed the applicability of this final rule to "Airbus Model A330 and Model A340–200 and –300 series airplanes equipped with any "SAMM" elevator servo-control having any part number (P/N) SC4800–2, SC4800–3, SC4800–4, SC4800–5, SC4800–6, SC4800–7, or SC4800–8; certificated in any category; except those with Airbus Modification 47674 installed in production."

Conclusion

After careful review of the available data, including the comment noted above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

There are approximately 9 airplanes of U.S. registry that will be affected by this AD.

The actions that are currently required by AD 2000–12–06 and retained in this AD take approximately 2 work hours per airplane to accomplish, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of the currently required repetitive inspections is estimated to be $1,170, or $130 per airplane, per inspection cycle.

The new actions that are required by this new AD will take between 15 and 20 work hours per airplane to accomplish, at an average labor rate of $65 per work hour. Required parts will be provided at no cost. Based on these figures, the cost impact of the part replacement is estimated to be between $975 and $1,300 per airplane.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Currently, there are no Airbus Model A340–200 or A340–300 series airplanes on the U.S. Register. However, should an affected airplane be imported and placed on the U.S. Register in the future, it would take between 15 and 20 work hours per airplane to accomplish the proposed part replacement, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of part replacement would be between $975 and $1,300 per airplane.

Regulatory Impact

The regulations adopted herein 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. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (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. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, pursuant to 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. Section 39.13 is amended by removing amendment 39–11784 (65 FR 37476, June 15, 2000), and by adding a new airworthiness directive (AD), amendment 39–13707, to read as follows:

2004–13–25 Airbus: Amendment 39–13707. Docket 2001–NM–352-AD. Supersedes AD 2000–12–06, Amendment 39–11784.

Applicability: Model A330 and A340–200 and –300 series airplanes equipped with any "SAMM" elevator servo-control having any part number (P/N) SC4800–2, SC4800–3, SC4800–4, SC4800–5, SC4800–6, SC4800–7, or SC4800–8; certificated in any category; except those with Airbus Modification 47674 installed in production.

Compliance: Required as indicated, unless accomplished previously.

To detect and correct excessive play of the eye-end of the piston rod of the elevator servo-controls, which could result in failure of the elevator servo-control, accomplish the following:

Restatement of Requirements of AD 2000–12–06

(a) Within 30 months since date of manufacture of the airplane, or within 500 flight hours after July 20, 2000 (the effective date of AD 2000–12–06), whichever occurs later, perform an inspection to check the play of the piston rod eye-ends of the elevator servo-controls, in accordance with Airbus Service Bulletin A330–27–3062 (for Model A330 series airplanes), Revision 01, dated July 21, 1999, or Revision 02, dated February 11, 2000, or Revision 03, dated August 9, 2000, or Revision 04, dated January 30, 2001; or Airbus Service Bulletin A340–27–4072 (for Model A340 series airplanes), Revision 01, dated July 21, 1999, or Revision 02, dated February 11, 2000, or Revision 03, dated August 9, 2000, or Revision 04, dated January 30, 2001; as applicable. Thereafter, repeat the inspection at intervals not to exceed 15 months, until accomplishment of paragraph (b) of this AD.

(1) If any play that is 0.0059 inch (0.15 mm) or greater and less than 0.0118 inch (0.30 mm) is detected: Prior to further flight, replace the rod eye-end with a new SARMA or NMB rod eye-end, in accordance with the applicable service bulletin.

(2) If any play that is 0.0118 inch (0.30 mm) or greater is detected: Prior to further flight, perform a dye penetrant inspection to detect cracking of the servo-control, in accordance with the applicable service bulletin.

(i) If no crack is detected: Prior to further flight, replace the rod eye-end with a new SARMA or NMB rod eye-end, in accordance with the applicable service bulletin.

(ii) If any crack is detected: Prior to further flight, replace the servo-control with a new servo-control, in accordance with the applicable service bulletin.

Note 1: Accomplishment of an inspection in accordance with Airbus Service Bulletin A330–27–3062 (for Model A330 series airplanes) or A340–27–4072 (for Model A340 series airplanes), both dated February 5, 1999; is considered acceptable for compliance with the initial inspection requirements of paragraph (a) of this AD.

Note 2: The Airbus service bulletins reference SAMM Service Bulletin SC4800–27–34–06, dated January 2, 1999, as an additional source of service information for accomplishment of the dye penetrant inspection specified by paragraph (a)(2) of this AD.

New Requirements of This AD

Replacement

(b) Within 34 months after the effective date of this AD, replace any elevator servo-control having any P/N SC4800–2, SC4800–

3, SC4800–4, SC4800–5, SC4800–6, SC4800–7, or SC4800–8, with an elevator servo-control having P/N SC4800–7A or SC4800–9; in accordance with Airbus Service Bulletin A330–27–3076 (for Model A330 series airplanes) or A340–27–4083 (for Model A340 series airplanes), both Revision 02, both dated July 11, 2002; as applicable. Accomplishment of this replacement terminates the repetitive inspections required by paragraph (a) of this AD.

Note 3: The Airbus service bulletins reference TRW Service Bulletin SC4800–27–34–09, Revision 1, dated November 9, 2001, as an additional source of service information for accomplishment of the part replacement.

Alternative Methods of Compliance

(c) In accordance with 14 CFR 39.19, the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, is authorized to approve alternative methods of compliance for this AD.

Incorporation by Reference

(d) Unless otherwise specified in this AD, the actions shall be done in accordance with the Airbus service bulletins listed in Table 1 of this AD, as applicable.

TABLE 1.—AIRBUS SERVICE BULLETINS INCORPORATED BY REFERENCE

Service bulletin—	Revision—	Date—
A330–27–3062	01	July 21, 1999.
A330–27–3062	02	February 11, 2000.
A330–27–3062	03	August 9, 2000.
A330–27–3062	04	January 30, 2001.
A330–27–3076	02	July 11, 2002.
A340–27–4072	01	July 21, 1999.
A340–27–4072	02	February 11, 2000.
A340–27–4072	03	August 9, 2000.
A340–27–4072	04	January 30, 2001.
A340–27–4083	02	July 11, 2002.

(1) The incorporation by reference of the Airbus Service Bulletins in Table 2 of this AD is approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51:

TABLE 2.—NEW AIRBUS SERVICE BULLETINS INCORPORATED BY REFERENCE

Service bulletin—	Revision—	Date—
A330–27–3062	02	February 11, 2000.
A330–27–3062	03	August 9, 2000.
A330–27–3062	04	January 30, 2001.
A330–27–3076	02	July 11, 2002.
A340–27–4072	02	February 11, 2000.
A340–27–4072	03	August 9, 2000.
A340–27–4072	04	January 30, 2001.
A340–27–4083	02	July 11, 2002.

(2) The incorporation by reference of Airbus Service Bulletin A330–27–3062, Revision 01, dated July 21, 1999; and Airbus Service Bulletin A340–27–4072, Revision 01, dated July 21, 1999; was approved previously by the Director of the Federal Register as of July 20, 2000 (65 FR 37476, June 15, 2000).

(3) Copies may be obtained from Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; 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/code_of_federal_regulations/ibr_locations.html.*

Note 4: The subject of this AD is addressed in French airworthiness directives 2001–518(B) and 2001–519(B), both dated October 31, 2001.

Effective Date

(e) This amendment becomes effective on August 13, 2004.

Issued in Renton, Washington, on June 24, 2004.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–15369 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–201–AD; Amendment 39–13706; AD 2004–13–24]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A310 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to all Airbus Model A310

series airplanes, that requires inspecting the pressure-off brakes (POBs) installed on the power control units of the slats and flaps to determine their serial numbers; and replacing any POBs having affected serial numbers with new, serviceable, or modified POBs. This action is necessary to prevent failure of the retaining ring on the POBs, which could result in slat or flap blowback or runaway, with consequent reduced controllability of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective August 13, 2004.

The incorporation by reference of a certain publication listed in the regulations is approved by the Director of the Federal Register as of August 13, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; 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/code_of_federal_regulations/ibr_locations.html.*

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: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to all Airbus Model A310 series airplanes was published in the **Federal Register** on April 1, 2004 (69 FR 17111). That action proposed to require inspecting the pressure-off brakes (POBs) installed on the power control units of the slats and flaps to determine their serial numbers; and replacing any POBs having affected serial numbers with new, serviceable, or modified POBs.

Comments

We provided the public the opportunity to participate in the development of this AD. No comments have been submitted on the proposed AD or on the determination of the cost to the public.

Conclusion

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

Cost Impact

We estimate that 46 airplanes of U.S. registry will be affected by this AD, that it will take approximately 1 work hour per airplane to accomplish the required actions, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $2,990, or $65 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations adopted herein 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. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (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. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, pursuant to 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. Section 39.13 is amended by adding the following new airworthiness directive:

2004–13–24 Airbus: Amendment 39–13706. Docket 2001–NM–201–AD.

Applicability: All Model A310 series airplanes, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent failure of the retaining ring on the pressure-off brakes (POBs) of the power control units of the slats and flaps, which could result in slat or flap blowback or runaway, with consequent reduced controllability of the airplane, accomplish the following:

Inspection

(a) Within 18 months after the effective date of this AD: Inspect the identification plates of the POBs installed on the power control units of the slats and flaps to determine the serial numbers of the POBs, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A310–27–2096, Revision 01, dated September 19, 2001.

Note 1: Airbus Service Bulletin A310–27–2096, Revision 01, dated September 19, 2001, refers to Liebherr-Aerospace Lindenberg Service Bulletin 511A0100–27–03, dated November 16, 2000, as the appropriate source for identifying affected serial numbers of POBs, and as an additional source of service information for replacing affected POBs.

Replacement

(b) For any POB with an affected serial number, as identified in Airbus Service Bulletin A310–27–2096, Revision 01, dated September 19, 2001: Before further flight, replace the POB with a new or serviceable POB that does not have an affected serial number, or with a POB that has been modified per the Accomplishment Instructions of Airbus Service Bulletin A310–27–2096, Revision 01, dated September 19, 2001. Replace the POB per the Accomplishment Instructions of Airbus Service Bulletin A310–27–2096, Revision 01, dated September 19, 2001.

Actions Accomplished Previously

(c) Inspections and replacements accomplished before the effective date of this AD per Airbus Service Bulletin A310–27–2096, dated March 21, 2001, are acceptable for compliance with the corresponding actions required by this AD.

Parts Installation

(d) As of the effective date of this AD, no person may install, on any airplane, a POB with a part number and serial number listed in Airbus Service Bulletin A310–27–2096, Revision 01, dated September 19, 2001.

No Reporting or Return of Parts Is Required

(e) Although the service bulletins referenced in this AD specify to submit certain information and return POBs with affected serial numbers to the POB manufacturer, this AD does not include such a requirement.

Alternative Methods of Compliance

(f) In accordance with 14 CFR 39.19, the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, is authorized to approve alternative methods of compliance for this AD.

Incorporation by Reference

(g) Unless otherwise specified in this AD, the actions shall be done in accordance with Airbus Service Bulletin A310–27–2096, Revision 01, dated September 19, 2001. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; 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/code_of_federal_regulations/ibr_locations.html.*

Note 2: The subject of this AD is addressed in French airworthiness directive 2001–185(B), dated May 16, 2001.

Effective Date

(h) This amendment becomes effective on August 13, 2004.

Issued in Renton, Washington, on June 24, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–15370 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–177–AD; Amendment 39–13718; AD 2004–14–09]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A320–111, –211, –212, and –231 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to certain Airbus Model A320–111, –211, –212, and –231 series airplanes, that currently requires repetitive inspections to detect fatigue cracking of the lower surface panel on the wing center box, and repair if necessary. That AD also requires modification of the lower surface panel on the wing center box, which constitutes terminating action for the repetitive inspections. This amendment reduces the compliance times for the inspections required by the existing AD. The actions specified by this AD are intended to prevent fatigue cracking of the lower surface panel on the wing center box, which could result in reduced structural integrity of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective August 13, 2004.

The incorporation by reference of Airbus Service Bulletin A320–57–1082, Revision 03, dated April 30, 2002; and Airbus Service Bulletin A320–57–1043, Revision 05, dated April 30, 2002; as listed in the regulations; is approved by the Director of the Federal Register as of August 13, 2004.

The incorporation by reference of Airbus Service Bulletin A320–57–1082, Revision 01, dated December 10, 1997; and Airbus Service Bulletin A320–57–1043, Revision 02, dated May 14, 1997; as listed in the regulations; was approved previously by the Director of the Federal Register as of November 27, 1998 (63 FR 56542, October 22, 1998).

ADDRESSES: The service information referenced in this AD may be obtained from Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; 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/code_of_federal_regulations/ibr_locations.html.*

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: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 98–22–05, amendment 39–10851 (63 FR 56542, October 22, 1998), which is applicable to certain Airbus Model A320 series airplanes, was published in the **Federal Register** on February 6, 2004 (69 FR 5790). The action proposed to continue to require repetitive inspections to detect fatigue cracking of the lower surface panel on the wing center box, and repair if necessary. That action also proposed to continue to require modification of the lower surface panel on the wing center box, which would constitute terminating action for the repetitive inspections. That action also proposed to reduce the compliance times for the inspections required by the existing AD.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received from a single commenter.

Request To Remove Paragraph (c)(1) of the Proposed AD

The commenter states that paragraph (c)(1) of the proposed AD (Restatement of Requirements of AD 98–22–05), conflicts with paragraph (g) of the proposed AD (New Requirements of This AD). The commenter notes that paragraph (c)(1) requires accomplishment of the modification of the lower surface panel on the wing center box per Airbus Service Bulletin A320–57–1043, Revision 02 or Revision 05, if no cracking is found during the inspection required by paragraph (c) of the proposed AD, but paragraph (g) specifies repeating the inspection per Airbus Service Bulletin A320–57–1082, Revision 01 or Revision 03, if no cracking is found. The commenter adds that French airworthiness directive 2002–342(B), dated June 26, 2002 (referenced in the proposed AD), and French airworthiness directive 97–309–104(B), dated October 27, 1997 (referenced in the existing AD), issued by the Direction Générale de l'Aviation Civile, which is the airworthiness authority for France, require accomplishment of the actions specified in Airbus Service Bulletin A320–57–1043, Revision 02 or Revision 05 only, if no cracking is found. The commenter asks that paragraph (c)(1) be removed for the reasons stated above.

The FAA partially agrees. Paragraph (g) of this AD requires repeating the inspection required by paragraph (a) or (f) of the AD if no cracking is found during either of those inspections. The inspection specified in paragraph (f) is

for airplanes on which the inspection required by paragraph (a) has not been done as of the effective date of the AD, and accomplishment of the inspection constitutes terminating action for the requirements of paragraph (a). Paragraph (c)(1) specifies that accomplishment of the modification per Airbus Service Bulletin A320–57–1043, Revision 02 or Revision 05, also constitutes terminating action for the requirements of paragraph (a). Therefore, if the commenter has done the modification required by paragraph (c)(1), the repetitive inspections required by paragraph (g) are not required. We have changed paragraphs (f) and (g) for clarification, as follows: We have changed paragraph (f) to state "For airplanes on which neither the inspection required by paragraph (a) of this AD, nor the modification required by paragraph (c)(1) of this AD has been done before the effective date of this AD:" We have changed paragraph (g) to add "Accomplishment of the modification required by paragraph (c)(1) of this AD terminates the requirements of this paragraph."

Additionally, the applicability of this AD is for Model A320 series airplanes on which Airbus Modification 22418 (reference Airbus Service Bulletin A320–57–1043) has not been done. French airworthiness directive 2002–342(B), does not require accomplishment of the actions specified in Airbus Service Bulletin A320–57–1043, but requires accomplishment of the actions specified in Airbus Service Bulletin A320–57–1082. French airworthiness directive 97–309–104(B), was cancelled upon issuance of French airworthiness directive 2002–342(B). The applicability in French airworthiness directive 2002–342(B), in part, excludes airplanes on which the actions specified in Service Bulletin A320–57–1043 have been done. No change to the AD is necessary in this regard.

Request To Change Compliance Time

The commenter states that the compliance time for the inspection required by paragraph (f)(2) of the proposed AD specifies "Prior to the accumulation of 20,000 total flight cycles, or within 3,500 flight cycles after the effective date of this AD, whichever is first." The commenter notes that the compliance time should be "whichever occurs later." No justification is provided for this comment.

We have coordinated this issue with the manufacturer and determined that the compliance time required by paragraph (f)(2) of this AD should specify "Prior to the accumulation of 20,000 total flight cycles, or within 3,500 flight cycles after the effective date of this AD, whichever is later." The referenced French airworthiness directive and service information did not provide this criterion. We have determined that extending the compliance time for the inspection will continue to provide an acceptable level of safety for the affected fleet. Paragraph (f)(2) of this AD has been changed accordingly.

Request To Change Applicability

The commenter states that the models listed in French airworthiness directive 2002–342(B), dated June 26, 2002 (referenced in the proposed AD), are Airbus Model A320–111, –211, –212, and –231 series airplanes. The commenter asks that the models listed in the proposed AD (Model A320 series airplanes) be changed to match the models listed in the referenced French airworthiness directive.

We agree. French airworthiness directive 97–309–104(B), dated October 27, 1997 (referenced in the existing AD), listed Model A320 series airplanes and has since been cancelled. Therefore, we have changed the models listed in this AD to specify Model A320–111, –211, –212, and –231 series airplanes. This change corresponds with the models specified in French airworthiness directive 2002–342(B).

Conclusion

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

Cost Impact

There are approximately 60 airplanes of U.S. registry that will be affected by this AD. This AD reduces the compliance time for the inspections required by AD 98–22–05, and consequently adds no additional costs or work. The current costs associated with that AD are repeated as follows for the convenience of affected operators:

The inspections that are currently required by AD 98–22–05, and retained in this AD, take about 2 work hours per airplane to accomplish, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of the currently required inspections is estimated to be $130 per airplane, per inspection cycle.

The modification that is currently required by AD 98–22–05, and retained in this AD, will take about 2 work hours per airplane to accomplish, at an average labor rate of $65 per work hours. There are no parts necessary to accomplish the modification. Based on these figures, the cost impact of the modification currently required is estimated to be $130 per airplane.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations adopted herein 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. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (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. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, pursuant to 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. Section 39.13 is amended by removing amendment 39–10851 (63 FR 56542, October 22, 1998), and by adding a new airworthiness directive (AD), amendment 39–13718, to read as follows:

2004–14–09 Airbus: Amendment 39–13718. Docket 2002–NM–177–AD. Supersedes AD 98–22–05, Amendment 39–10851.

Applicability: Model A320–111, –211, –212, and –231 series airplanes; certificated in any category, on which Airbus Modification 22418 (reference Airbus Service Bulletin A320–57–1043) has not been done.

Compliance: Required as indicated, unless accomplished previously.

To prevent fatigue cracking of the lower surface panel on the wing center box, which could result in reduced structural integrity of the airplane, accomplish the following:

Restatement of Requirements of AD 98–22–05

Repetitive Inspections

(a) Except as provided by paragraph (e) of this AD: Prior to the accumulation of 20,000 total flight cycles, or within 60 days after November 27, 1998 (the effective date of AD 98–22–05, amendment 39–10851), whichever occurs later, perform a high frequency eddy current inspection to detect fatigue cracking of the lower surface panel on the wing center box, in accordance with Airbus Service Bulletin A320–57–1082, Revision 01, dated December 10, 1997; or Revision 03, dated April 30, 2002. Repeat the eddy current inspection thereafter at intervals not to exceed 7,500 flight cycles until the actions required by paragraph (c) of this AD are accomplished.

Repair

(b) Except as provided by paragraph (d) of this AD: If any cracking is detected during any inspection required by paragraph (a) of this AD, prior to further flight, repair in accordance with Airbus Service Bulletin A320–57–1082, Revision 01, dated December 10, 1997; or Revision 03, dated April 30, 2002. Accomplishment of the repair constitutes terminating action for the repetitive inspections for the repaired area only.

Inspection/Modification/Repair

(c) Prior to the accumulation of 25,000 total flight cycles, or within 60 days after November 27, 1998, whichever occurs later: Perform a high frequency eddy current inspection to detect fatigue cracking of the lower surface panel on the wing center box, in accordance with Airbus Service Bulletin A320–57–1082, Revision 01, dated December 10, 1997; or Revision 03, dated April 30, 2002.

(1) If no cracking is detected: Prior to further flight, modify the lower surface panel on the wing center box, in accordance with Airbus Service Bulletin A320–57–1043, Revision 02, dated May 14, 1997; or Revision 05, dated April 30, 2002. Accomplishment of the modification constitutes terminating action for the requirements of paragraph (a) of this AD.

(2) Except as provided by paragraph (d) of this AD, if any cracking is detected: Prior to further flight, repair in accordance with Airbus Service Bulletin A320–57–1082, Revision 01, dated December 10, 1997; or Revision 03, dated April 30, 2002; and modify any uncracked area in accordance with Airbus Service Bulletin A320–57–1043, Revision 02, dated May 14, 1997; or Revision 05, dated April 30, 2002. Accomplishment of the repair of cracked area(s) and modification of uncracked area(s) constitutes terminating action for the requirements of paragraph (a) of this AD.

(d) If any cracking is detected during any inspection required by paragraph (b) or (c)(2) of this AD, and the applicable service bulletin specifies to contact Airbus for an appropriate action: Prior to further flight, repair in accordance with a method approved by either the Manager, International Branch, AMN–116, FAA, Transport Airplane Directorate; or the Direction Générale de l'Aviation Civile (or its delegated agent).

(e) The actions required by paragraph (a) of this AD are not required to be accomplished if the requirements of paragraph (c) of this AD are accomplished at the time specified in paragraph (a) of this AD.

New Requirements of this AD

Initial Inspection

(f) For airplanes on which neither the inspection required by paragraph (a) of this AD, nor the modification required by paragraph (c)(1) of this AD has been done before the effective date of this AD: Perform a high frequency eddy current inspection to detect fatigue cracking of the lower surface panel on the wing center box, in accordance with Airbus Service Bulletin A320–57–1082, Revision 01, dated December 10, 1997; or Revision 03, dated April 30, 2002; at the later of the times specified in paragraphs (f)(1) and (f)(2) of this AD. Accomplishment of the inspection required by this paragraph terminates the requirements of paragraph (a) of this AD.

(1) Prior to the accumulation of 13,200 total flight cycles or 39,700 total flight hours after the effective date of this AD, whichever is first.

(2) Prior to the accumulation of 20,000 total flight cycles, or within 3,500 flight cycles after the effective date of this AD, whichever is later.

Repetitive Inspections

(g) If no cracking is detected during the inspection required by paragraph (a) or (f) of this AD: Repeat the inspection at the applicable time specified in paragraph (g)(1) or (g)(2) of this AD. Accomplishment of the modification required by paragraph (c)(1) of this AD terminates the requirements of this paragraph.

(1) For airplanes on which the inspections required by paragraph (a) of this AD have been done before the effective date of this AD: Do the next inspection within 5,700 flight cycles after accomplishment of the last inspection, or within 1,800 flight cycles after the effective date of this AD, whichever is later. Repeat the inspection thereafter at intervals not to exceed 5,700 flight cycles.

(2) For airplanes on which no inspection required by paragraph (a) of this AD has been done before the effective date of this AD: Do the next inspection within 5,700 flight cycles after accomplishment of the inspection required by paragraph (f) of this AD. Repeat the inspection thereafter at intervals not to exceed 5,700 flight cycles.

Repair/Modification

(h) If any cracking is detected during any inspection required by paragraph (f) or (g) of this AD, prior to further flight, repair in accordance with Airbus Service Bulletin A320–57–1082, Revision 01, dated December 10, 1997; or Revision 03, dated April 30, 2002; and modify any uncracked area in accordance with Airbus Service Bulletin A320–57–1043, Revision 02, dated May 14, 1997; or Revision 05, dated April 30, 2002. Where Airbus Service Bulletin A320–57–1082 specifies to contact Airbus for an appropriate repair action: Prior to further flight, repair in accordance with a method approved by either the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate; or the Direction Générale de l'Aviation Civile (DGAC) (or its delegated agent). Accomplishment of the repair of cracked area(s) and modification of uncracked area(s) constitutes terminating action for the requirements of this AD.

Actions Done per Previous Issues of Service Bulletins

(i) Accomplishment of inspections and repairs before the effective date of this AD in accordance with Airbus Service Bulletin A320–57–1082, Revision 02, dated July 26, 1999; and accomplishment of the modification before the effective date of this AD in accordance with Airbus Service Bulletin Airbus Service Bulletin A320–57–1043, dated February 16, 1993; Revision 01, dated June 14, 1996; Revision 03, dated October 24, 1997; or Revision 04, dated March 15, 1999; are considered acceptable for compliance with the applicable actions specified in this AD.

Alternative Methods of Compliance

(j) In accordance with 14 CFR 39.19, the Manager, International Branch, ANM–116, is authorized to approve alternative methods of compliance for this AD.

Incorporation by Reference

(k) Unless otherwise provided in this AD, the actions shall be done in accordance with Airbus Service Bulletin A320–57–1082, Revision 01, dated December 10, 1997; Airbus Service Bulletin A320–57–1082, Revision 03, dated April 30, 2002; Airbus Service Bulletin A320–57–1043, Revision 02, dated May 14, 1997; and Airbus Service Bulletin A320–57–1043, Revision 05, dated April 30, 2002; as applicable.

(1) The incorporation by reference of Airbus Service Bulletin A320–57–1082,

Revision 03, dated April 30, 2002; and Airbus Service Bulletin A320–57–1043, Revision 05, dated April 30, 2002; is approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

(2) The incorporation by reference of Airbus Service Bulletin A320–57–1082, Revision 01, dated December 10, 1997; and Airbus Service Bulletin A320–57–1043, Revision 02, dated May 14, 1997; was approved previously by the Director of the Federal Register as of November 27, 1998 (63 FR 56542, October 22, 1998).

(3) Copies may be obtained from Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; 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/code_of_federal_regulations/ibr_locations.html.*

Note 1: The subject of this AD is addressed in French airworthiness directive 2002–342(B), dated June 26, 2002.

Effective Date

(l) This amendment becomes effective on August 13, 2004.

Issued in Renton, Washington, on June 29, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–15372 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–175–AD; Amendment 39–13715; AD 2004–14–06]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A310 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to certain Airbus Model A310 series airplanes, that currently requires repetitive inspections of the fuselage skin to detect corrosion or fatigue cracking around and under the chafing plates of the wing root; and corrective actions, if necessary. That AD also provides an optional terminating action for the repetitive inspections. This amendment reinstates repetitive inspections in certain areas where corrosion was detected and reworked as required by the existing AD. The actions specified by this AD are intended to detect and correct fatigue cracks and corrosion around and under the chafing plates of the wing root, which could result in reduced structural integrity of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective August 13, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 13, 2004.

The incorporation by reference of certain other publications, as listed in the regulations, was approved previously by the Director of the Federal Register as of June 3, 1998 (63 FR 23377, April 29, 1998).

ADDRESSES: The service information referenced in this AD may be obtained from Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; 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/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Anthony Jopling, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2190; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 98–09–20, amendment 39–10501 (63 FR 23377, April 29, 1998), which is applicable to certain Airbus Model A310 series airplanes, was published in the **Federal Register** on December 18, 2003, (68 FR 70479). The action proposed to continue require reinstating repetitive inspections in certain areas where corrosion was detected and reworked as required by the existing AD.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comment received from a single commenter.

Request to Reference Revised Service Information

The commenter states that Airbus has issued Revision 05 to Service Bulletin A310–53–2069, dated November 12, 2002, and requests that this revision be included in the proposed AD as an acceptable source of service information. The commenter notes that Revision 05 of the service bulletin includes a revised repair drawing and, for certain airplanes, deletes an inspection at frame 39/stringer 35.

The FAA concurs with the intent of the commenter's request to include Revision 05 of the service bulletin as an appropriate source of service information. However, upon review of Revisions 04 and 05 of the service bulletin, it appears that the repair drawing was revised in Revision 04, and that the manufacturer did not remove the revision marks when Revision 05 of the service bulletin was issued. We have determined that Revision 05 of Airbus Service Bulletin A310–53–2069 adds no new requirements. We have revised paragraphs (a), (b), and (d) of this final rule to reference Airbus Service Bulletin A310–53–2069, Revision 05, dated November 12, 2002; and Revision 04, dated November 8, 2000; as additional appropriate sources of service information.

Conclusion

After careful review of the available data, including the comment noted above, we have determined that air safety and the public interest require the adoption of the rule with the change previously described. We have determined that this change will neither increase the economic burden on any operator nor increase the scope of the AD.

Cost Impact

There are approximately 46 airplanes of U.S. registry that will be affected by this AD. This AD adds no new requirements. It requires continuation of repetitive inspections for airplanes where corrosion was detected and reworked at frame 39, stringer 35. The current costs associated with AD 98–09–20 are reiterated in their entirety as follows for the convenience of affected operators:

The actions that are currently required by AD 98–09–20 take approximately 68 work hours per airplane to accomplish, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of the previously required actions on U.S. operators is estimated to be $4,420 per airplane, per inspection cycle.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations adopted herein 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. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (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. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, pursuant to 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. Section 39.13 is amended by removing amendment 39–10501 (63 FR 23377, April 29, 1998), and by adding a new airworthiness directive (AD), amendment 39–13715, to read as follows:

2004–14–06 Airbus: Amendment 39–13715. Docket 2002–NM–175–AD. Supersedes AD 98–09–20, Amendment 39–10501.

Applicability: Model A310 series airplanes on which Airbus Modifications 8888 and 8889 have not been accomplished, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To detect and correct fatigue cracking and corrosion around and under chafing plates of the wing root between fuselage frame 36 and frame 39, which could result in reduced structural integrity of the airplane, accomplish the following:

Restatement of Requirements of AD 98–09–20

Repetitive Inspections and Corrective Actions

(a) Except as provided by paragraph (b) of this AD: Within 4 years since date of manufacture, or within 12 months after June 3, 1998 (the effective date of AD 98–09–20, amendment 39–10501), whichever occurs later, perform an inspection to detect discrepancies around and under the chafing plates of the wing root, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A310–53–2069, Revision 05, dated November 12, 2002; Revision 04, dated November 8, 2000; Revision 03, dated October 28, 1997; Revision 2, dated September 23, 1996; or Revision 1, dated September 19, 1995. If any discrepancy is found, prior to further flight, accomplish follow-on corrective actions (*i.e.*, removal of corrosion, corrosion protection, high frequency eddy current inspection, x-ray inspection), as applicable, in accordance with the applicable service bulletin. Repeat the inspections thereafter at the intervals specified in the applicable service bulletin. After the effective date of this AD, repeat the inspections thereafter at the intervals specified in Revision 04 or Revision 05 of the service bulletin.

(b) If any discrepancy is found during any inspection required by paragraph (a) of this AD, and Airbus Service Bulletin A310–53–2069, Revision 05, dated November 12, 2002; Revision 04, dated November 8, 2000; Revision 03, dated October 28, 1997; Revision 2, dated September 23, 1996; or Revision 1, dated September 19, 1995; as applicable; specifies to contact Airbus for appropriate action: Prior to further flight, repair in accordance with a method approved by the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate. Where differences in the compliance times or corrective actions exist between the service bulletin and this AD, the AD prevails.

New Requirements of This AD

Optional Terminating Action

(c) Except as provided by paragraph (d) of this AD: Accomplishment of the replacement of the stainless steel chafing plates with new chafing plates made of aluminum alloy, in accordance with Airbus Service Bulletin A310–53–2070, Revision 2, dated November 8, 2000; Revision 1, dated September 23, 1996; or the original issue, dated October 3, 1994; constitutes terminating action for the repetitive inspections required by paragraph (a) of this AD.

Continuation of Repetitive Inspections

(d) Within 30 days after the effective date of this AD: Do a review of the airplane maintenance records to determine if any corrosion was detected and reworked on the left and/or right side of frame 39, stringer 35, during the accomplishment of any corrective action or repair specified in paragraphs (a) or (b) of this AD. If any corrective action or repair has been accomplished in this area, perform an inspection for fatigue cracking of frame 39, stringer 35, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A310–53–2069, Revision 05, dated November 12, 2002; or Revision 04, dated November 8, 2000. Do the initial inspection at the threshold specified in Figure 1 of the service bulletin, or within 30 days after the effective date of this AD, whichever is later. Repeat the inspection thereafter at the intervals specified in Figure 1 of the service bulletin. If any discrepancy is found, prior to further flight, accomplish the applicable follow-on corrective actions, in accordance with the Accomplishment Instructions of the service bulletin.

Submission of Information Not Required

(e) Although the service bulletins referenced in this AD specify to submit information to the manufacturer, this AD does not include such a requirement.

Alternative Methods of Compliance

(f) In accordance with 14 CFR 39.19, the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate, is authorized to approve alternative methods of compliance for this AD.

Incorporation by Reference

(g) Unless otherwise specified in this AD, the actions shall be done in accordance with the Airbus service bulletins specified in Table 1 of this AD, as applicable.

TABLE 1.—AIRBUS SERVICE BULLETINS INCORPORATED BY REFERENCE

Service bulletin—	Revision—	Date—
A310–53–2069	1	September 19, 1995.
A310–53–2069	2	September 23, 1996.

TABLE 1.—AIRBUS SERVICE BULLETINS INCORPORATED BY REFERENCE—Continued

Service bulletin—	Revision—	Date—
A310–53–2069	03	October 28, 1997.
A310–53–2069	04	November 8, 2000.
A310–53–2069	05	November 12, 2002.

(1) The incorporation by reference of the Airbus Service Bulletins in Table 2 of this AD, which contain the following effective pages, are approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51:

TABLE 2.—NEW AIRBUS SERVICE BULLETINS INCORPORATED BY REFERENCE

Service bulletin, date, and revision level—	Page no.—	Revision level shown on page—	Date shown on page—
A310–53–2069, Revision 2, September 23, 1996.	1–6, 9, 10	2	September 23, 1996.
	7, 8, 11–59	1	September 19, 1995.
A310–53–2069, Revision 03, October 28, 1997	1, 7, 15, 16, 26, 28, 29–34, 43–61	03	October 28, 1997.
	2–6, 9, 10	2	September 23, 1996.
	8, 11–14, 17–25, 27, 35–42	1	September 19, 1995.
A310–53–2069, Revision 04, 2000 November 8, 2000.	1–57	04	November 8, 2000.
A310–53–2069, Revision 05, November 12, 2002.	1–12, 20, 21, 23	05	November 12, 2002.
	13–19, 22, 24–57	04	November 8, 2000.

(2) The incorporation by reference of Airbus Service Bulletin A310–53–2069, Revision 1, dated September 19, 1995, was approved previously by the Director of the Federal Register as of June 3, 1998 (63 FR 23377, April 29, 1998).

(3) Copies may be obtained from Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; 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/code_of_federal_regulations/ibr_locations.html.*

Note 1: The subject of this AD is addressed in French airworthiness directive 2000–514–326(B) R1, dated May 15, 2002.

Effective Date

(h) This amendment becomes effective on August 13, 2004.

Issued in Renton, Washington, on June 29, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–15373 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–176–AD; Amendment 39–13714; AD 2004–14–05]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model DC–8–11, DC–8–12, DC–8–21, DC–8–31, DC–8–32, DC–8–33, DC–8–41, DC–8–42, DC–8–43, DC–8F–54, and DC–8F–55 Airplanes; and Model DC–8–50, –60, –60F, –70 and –70F Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain McDonnell Douglas airplane models, that requires inspection of the captain's and first officer's seat locking pins for minimum engagement with the detent holes in the seat tracks; inspection of the seat lockpins for excessive wear; and corrective actions, if necessary. This action is necessary to prevent uncommanded seat movement during takeoff and/or landing, which could result in interference with the operation of the airplane and consequent temporary loss of control of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective August 13, 2004.

The incorporation by reference of a certain publication listed in the regulations is approved by the Director of the Federal Register as of August 13, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplanes, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; 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/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Cheyenne Del Carmen, Aerospace Engineer, Systems and Equipment Branch, ANM–130L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5338; fax (562) 627–5210.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to

include an airworthiness directive (AD) that is applicable to certain McDonnell Douglas Model DC–8–11, DC–8–12, DC–8–21, DC–8–31, DC–8–32, DC–8–33, DC–8–41, DC–8–42, DC–8–43, DC–8F–54, and DC–8F–55 airplanes; and Model DC–8–50, –60, –60F, –70 and –70F series airplanes was published in the **Federal Register** on November 28, 2003 (68 FR 66770). That action proposed to require inspection of the captain's and first officer's seat locking pins for minimum engagement with the detent holes in the seat tracks; inspection of the seat lockpins for excessive wear; and corrective actions, if necessary.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

Request To Delay Issuance of the Proposed AD

One commenter requests that the FAA delay issuance of the proposed AD until Boeing Alert Service Bulletin DC8–25A244, Revision 02, dated June 25, 2002, has been revised. The commenter states that the following changes were discussed with and agreed upon by the airplane manufacturer: (1) Option 2, step 1, should refer to Figure 4, instead of Figure 1, to verify the measurement taken, and (2) Figure 4, step 1, should contain a note specifying that an equivalent tool may be used to raise the seat until contact is made with the underside of the seat track.

We partially agree. Since issuance of the proposed AD, we have reviewed and approved Boeing Alert Service Bulletin DC8–25A244, Revision 3, dated March 9, 2004, which describes procedures that are essentially the same as the procedures described in Revision 02 of the service bulletin. Revision 3 of the service bulletin also incorporates the changes specified above by the commenter; therefore, we do not need to delay issuance of the final rule. We have revised this final rule to specify that accomplishment of the actions required by paragraphs (a) and (b) of this final rule be done in accordance with Revision 3 of the service bulletin. We have also added paragraph (c) to this final rule to give credit for actions accomplished before the effective date of this AD in accordance with Revision 02 of the service bulletin.

Request To Extend Compliance Time

Two commenters request that the proposed compliance time for the inspection be extended from 18 months to 24 months. The commenters note that this would allow the inspection to be accomplished during the time of a regularly scheduled C-check. We infer that the commenters consider that the adoption of the proposed compliance time of 18 months would require operators to schedule special times for the accomplishment of the inspection and corrective actions, at additional expense.

We do not agree with the request to extend the compliance time. In developing an appropriate compliance time for this action, we considered the safety implications and normal maintenance schedules for the timely accomplishment of the inspection and corrective actions. In consideration of these factors, we find that an 18-month interval is appropriate. However, paragraph (d) of this final rule provides affected operators the opportunity to apply for an adjustment of the compliance time if the operator also presents data that justify the adjustment.

Request for Alternative Method of Compliance

One commenter requests that its maintenance taskcard 25–000–11–05, dated June 15, 2002, be accepted as an alternative method of compliance (AMOC) with the proposed AD. The commenter states that it currently accomplishes the inspections "repetitively every 'C' check interval, not to exceed 24 calendar months." The commenter also submitted its taskcard, which references "Service Bulletin DC8–25A244 [Revision] 1 or later approved version."

The commenter makes no specific request for a change to the proposed AD. As provided by paragraph (d) of this final rule, we may approve a request for an AMOC if data are submitted to justify that the commenter's taskcard would provide an acceptable level of safety. We recommend that the commenter review Revision 3 of the service bulletin before submitting an AMOC to the Los Angeles Aircraft Certification Office for consideration of approval. No change to the final rule is needed in this regard.

Conclusion

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule with the changes previously described. The FAA has determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

Cost Impact

There are approximately 497 airplanes of the affected design in the worldwide fleet. The FAA estimates that 360 airplanes of U.S. registry will be affected by this AD. Table 1 shows the estimated cost impact, based upon the action taken, for airplanes affected by this AD. The average labor rate is $65 per work hour.

TABLE 1.—COST IMPACT

Action	Work hours per seat	Work hours per airplane	Cost per airplane	Maximum fleet cost
Inspection for Option 1	1	2	$130	$46,800
Inspection for Option 2	3	6	390	140,400

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations adopted herein 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. Therefore, it is determined that this final rule does not

have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (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. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, pursuant to 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. Section 39.13 is amended by adding the following new airworthiness directive:

2004–14–05 McDonnell Douglas: Amendment 39–13714. Docket 2002–NM–176–AD.

Applicability: Model DC–8–11, DC–8–12, DC–8–21, DC–8–31, DC–8–32, DC–8–33, DC–8–41, DC–8–42, DC–8–43, DC–8–51, DC–8–52, DC–8–53, DC–8F–54, DC–8–55, DC–8F–55, DC–8–61, DC–8–61F, DC–8–62, DC–8–62F, DC–8–63, DC–8–63F, DC–8–71, DC–8–71F, DC–8–72, DC–8–72F, DC–8–73, and DC–8–73F airplanes; as listed in Boeing Alert Service Bulletin DC8–25A244, Revision 3, dated March 9, 2004; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent uncommanded seat movement during takeoff and/or landing, which could result in interference with the operation of the airplane and consequent temporary loss of control of the airplane, accomplish the following:

Inspection for Engagement and Excessive Wear of the Seat Locking Pins

(a) Within 18 months after the effective date of this AD, do the actions specified in paragraphs (a)(1) and (a)(2) of this AD, per either Option 1 or Option 2 of the Accomplishment Instructions of Boeing Alert Service Bulletin DC8–25A244, Revision 3, dated March 9, 2004.

(1) Do a detailed inspection of the seat locking pin for minimum engagement with the detent holes in the seat track of the captain's and first officer's seat assemblies.

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

(2) Do a detailed inspection of the seat lockpins for excessive wear.

Corrective Actions

(b) If any discrepancy is detected during the inspection required by paragraph (a) of this AD, before further flight, do the corrective action(s), per either Option 1 or Option 2 of the Accomplishment Instructions of Boeing Alert Service Bulletin DC8–25A244, Revision 3, dated March 9, 2004, as applicable. Those corrective actions include adjusting/replacing the seat locking pin with a new pin and/or adjusting/repairing/replacing the seat track with a new track.

Credit for Actions Accomplished per Previous Service Bulletin

(c) Actions accomplished before the effective date of this AD per Boeing Alert Service Bulletin DC8–25A244, Revision 02, dated June 25, 2002, are acceptable for compliance with the requirements of paragraphs (a) and (b) of this AD.

Alternative Methods of Compliance

(d) In accordance with 14 CFR 39.19, the Manager, Los Angeles Aircraft Certification Office, FAA, is authorized to approve alternative methods of compliance (AMOCs) for this AD.

Incorporation by Reference

(e) Unless otherwise specified in this AD, the actions shall be done in accordance with Boeing Alert Service Bulletin DC8–25A244, Revision 3, dated March 9, 2004. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplanes, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1-L5A (D800–0024). Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; 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/code_of_federal_regulations/ibr_locations.html.*

Effective Date

(f) This amendment becomes effective on August 13, 2004.

Issued in Renton, Washington, on June 29, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–15374 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–316–AD; Amendment 39–13720; AD 2004–14–11]

RIN 2120–AA64

Airworthiness Directives; Saab Model SAAB 2000 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to certain Saab Model SAAB 2000 series airplanes, that currently requires repetitive inspections for discrepancies of the upper and lower areas of the backup struts in the left and right nacelles; and corrective actions, if necessary. This amendment requires repetitive inspections for cracks in the lower areas of the backup struts, and corrective actions if necessary. This action also requires the eventual replacement of the backup struts with new, improved struts, which terminates the repetitive inspections. The actions specified by this AD are intended to prevent failure of the backup struts in the left and right nacelles due to fatigue cracking, which could result in loss of fail-safe redundancy in the design of the nacelle in terms of load capability, and consequent separation of the engine from the airplane and subsequent reduced controllability of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective August 13, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 13, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from Saab Aircraft AB, SAAB Aircraft Product Support, S–581.88, Linköping, Sweden. This information may be examined at the FAA, Transport Airplane Directorate, Rules Docket,

1601 Lind Avenue, SW., Renton, Washington; 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/code_of_federal_regulations/ibr_locations.html.*

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: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 2000–13–09, amendment 39–11808 (65 FR 41871, July 7, 2000), which is applicable to certain Saab Model SAAB 2000 series airplanes, was published in the **Federal Register** on March 26, 2004 (69 FR 15740). The action proposed to require repetitive inspections for cracks in the lower areas of the backup struts, and corrective actions if necessary. That action also proposed to require the eventual replacement of the backup struts with new, improved struts, which would terminate the repetitive inspections.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were submitted in response to the proposal or the FAA's determination of the cost to the public.

Conclusion

The FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

This AD will affect about 3 airplanes of U.S. registry.

The inspection of the lower ends of the backup struts will take about 4 work hours per airplane, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of this action on U.S. operators is estimated to be $780, or $260 per airplane, per inspection cycle.

Replacing all four backup struts will take about 80 work hours per airplane, at an average labor rate of $65 per work hour. Required parts will cost about $165,416 per airplane. Based on these figures, the cost impact of this action on U.S. operators is estimated to be $511,848, or $170,616 per airplane.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations adopted herein 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. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (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. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, pursuant to 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. Section 39.13 is amended by removing amendment 39–11808 (65 FR 41871, July 7, 2000), and by adding a new airworthiness directive (AD), amendment 39–13720, to read as follows:

2004–14–11 Saab Aircraft AB: Amendment 39–13720. Docket 2001–NM–316–AD. Supersedes AD 2000–13–09, Amendment 39–11808.

Applicability: Model SAAB 2000 series airplanes, certificated in any category, serial numbers –004 through –063 inclusive.

Compliance: Required as indicated, unless accomplished previously.

To prevent failure of the backup struts in the left and right nacelles due to fatigue cracking, which could result in loss of fail-safe redundancy in the design of the nacelle in terms of load capability, and consequent separation of the engine from the airplane and subsequent reduced controllability of the airplane, accomplish the following:

Inspection

(a) At the applicable time specified in Table 1 of this AD: Perform a fluorescent dye penetrant inspection for cracks of the lower ends of the backup struts in the left and right nacelles, in accordance with SAAB Service Bulletin 2000–54–025, dated September 7, 2001. Although the service bulletin specifies to submit certain information to the manufacturer, this AD does not require a report.

TABLE 1.—FLUORESCENT DYE PENETRANT INSPECTION COMPLIANCE TIMES

If, as of the effective date of this new AD, the inspection required by AD 2000–13–09, amendment 39–11808—	And if the airplane has, as of the effective date of this new AD—	Then do the inspection within—
Has been done	Fewer than 4,500 flight cycles	1,650 flight hours after accomplishment of the most recent inspection done per AD 2000–13–09.
Has been done	4,500 or more flight cycles	900 flight hours after the most recent inspection done per AD 2000–13–09.

TABLE 1.—FLUORESCENT DYE PENETRANT INSPECTION COMPLIANCE TIMES—Continued

If, as of the effective date of this new AD, the inspection required by AD 2000–13–09, amendment 39–11808—	And if the airplane has, as of the effective date of this new AD—	Then do the inspection within—
Has not been done	Any number of flight cycles	200 flight hours after the effective date of this new AD.

Follow-On/Corrective Actions

(b) If no crack is found during the inspection required by paragraph (a) of this AD: Repeat the inspection at intervals not to exceed 1,650 flight hours, until the actions required by paragraph (d) of this AD have been done.

(c) If any crack is found during any inspection required by paragraph (a) of this AD: Replace the cracked strut with a new, improved strut before further flight in accordance with SAAB Service Bulletin 2000–54–024, dated September 7, 2001. Although the service bulletin provides the option of contacting the manufacturer for repair instructions, this AD requires that any alternative repair be done in accordance with a method approved by either the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the Luftfartsverket (LFV) (or its delegated agent). Replacement of a backup strut terminates the repetitive inspections required by this AD for that strut only.

Strut Replacement

(d) Except as required by paragraph (c) of this AD: Within 36 months after the effective date of this AD, replace all four backup struts in the electrical and hydraulic bays of the nacelles with new, improved struts, in accordance with the Accomplishment Instructions of SAAB Service Bulletin 2000–54–024, dated September 7, 2001. Replacement of all four backup struts terminates the requirements of this AD.

Alternative Methods of Compliance

(e) In accordance with 14 CFR 39.19, the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate, is authorized to approve alternative methods of compliance for this AD.

Incorporation by Reference

(f) Unless otherwise specified in this AD, the actions shall be done in accordance with SAAB Service Bulletin 2000–54–024, dated September 7, 2001; and SAAB Service Bulletin 2000–54–025, dated September 7, 2001; as applicable. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Saab Aircraft AB, SAAB Aircraft Product Support, S–581.88, Linköping, Sweden. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; 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/code_of_federal_regulations/ibr_locations.html.*

Note 1: The subject of this AD is addressed in Swedish airworthiness directive 1–165, dated September 10, 2001.

Effective Date

(g) This amendment becomes effective on August 13, 2004.

Issued in Renton, Washington, on June 24, 2004.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–15377 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION (DOT)

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–18032; Directorate Identifier 2004–CE–15–AD; Amendment 39–13721; AD 2004–14–12]

RIN 2120–AA64

Airworthiness Directives; The New Piper Aircraft, Inc., Models PA–28–161, PA–28–181, PA–28R–201, PA–32R–301 (HP), PA–32R–301T, PA–32–301FT, PA–32–301XTC, PA–34–220T, PA–44–180, PA–46–350P, and PA–46–500TP Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain The New Piper Aircraft, Inc. (Piper), Models PA–28–161, PA–28–181, PA–28R–201, PA–32R–301 (HP), PA–32R–301T, PA–32–301FT, PA–32–301XTC, PA–34–220T, PA–44–180, PA–46–350P, and PA–46–500TP airplanes. This AD requires you to inspect the control wheel attaching hardware for proper installation, replace if required, add Loctite thread-locking compound to the screw installation, and install a retainer clip to the control wheel attachment. This AD is the result of inadequate control wheel attachment design. The screw used to attach the control wheel to the control column is too short in some installations, and the nut-plate does not have adequate locking features. In addition, the screw is installed from the bottom of the control wheel and will depart quickly after thread disengagement. We are issuing this AD to detect and correct inadequate control wheel attachment design features, which could result in loss of control of the ailerons and elevator. This failure could lead to loss of control of the aircraft.

DATES: This AD becomes effective on August 10, 2004.

As of August 10, 2004, the Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulation.

We must receive any comments on this AD by September 14, 2004.

ADDRESSES: Use one of the following 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 20590–001.
- *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.

You may get the service information identified in this AD from The New Piper Aircraft, Inc., 2926 Piper Drive, Vero Beach, Florida, 32960.

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

FOR FURTHER INFORMATION CONTACT: Samuel Belete, Aerospace Safety Engineer, FAA Atlanta Certfication Office, One Crown Center, 1895 Phoenix Boulevard, Suite 450, Atlanta, Georgia, 30349; telephone: (770) 703–6048; facsimile: (770) 703–6097.

SUPPLEMENTARY INFORMATION: *What events have caused this AD?* On July 7, 2003, a Piper PA–28–181 airplane crashed in the desert northeast of

Phoenix, Arizona, after the pilot lost control of the ailerons and elevator. The left control wheel single MS24964–S59 screw backed out of its nut plate and caused the control wheel to spin freely on the control column. Further investigation revealed the screw was too short and the nut plate lacked proper locking features to prevent the screw from backing out and becoming disengaged. In addition, the screw was installed on the bottom of the control wheel allowing it to fall out once it became disengaged. An investigation of sample fleets after the incident revealed that a large portion of the sampled airplanes had similar problems.

The following airplanes have a similar type design and would be subject to these same conditions: The New Piper Aircraft, Inc., Models PA–28–161, PA–28–181, PA–28R–201, PA–32R–301 (HP), PA–32R–301T, PA–32–301FT, PA–32–301XTC, PA–34–220T, PA–44–180, PA–46–350P, and PA–46–500TP airplanes.

What is the potential impact if FAA took no action? Inadequate control wheel attaching hardware could result in loss of control of the ailerons and elevator. This failure could lead to loss of control of the airplane.

Is there service information that applies to this subject? Yes, The New Piper Aircraft, Inc. has issued Service Bulletin No. 1139A, dated April 9, 2004.

What are the provisions of this service information? The service bulletin includes procedures for:

—Inspecting the control wheel attachment screw and nut plate for proper installation;
—Replacing the screw and/or nut plate, if required;
—Applying Loctite thread-locking compound; and
—Installing a retainer clip under the control wheel shaft assembly.

FAA's Determination and Requirements of the AD

What has FAA decided? 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.

Since the unsafe condition described previously is likely to exist or develop on other Piper Models PA–28–161, PA–28–181, PA–28R–201, PA–32R–301 (HP), PA–32R–301T, PA–32–301FT, PA–32–301XTC, PA–34–220T, PA–44–180, PA–46–350P, and PA–46–500TP airplanes of the same type design, we are issuing this AD to detect and correct inadequate control wheel attaching hardware, which could result in loss of control of the ailerons and elevator. This failure could lead to loss of control of the airplane.

What does this AD require? This AD requires you to incorporate the actions in the previously-referenced service bulletin.

In preparing of this rule, we contacted type clubs and aircraft operators to get technical information and information on operational and economic impacts. We did not receive any information through these contacts. If received, we would have included a discussion of any information that may have influenced this action in the rulemaking docket.

How does the revision to 14 CFR part 39 affect this AD? On July 10, 2002, we published a new version of 14 CFR part 39 (67 FR 47997, July 22, 2002), which governs FAA's AD system. This regulation now includes material that relates to altered products, special flight permits, and alternative methods of compliance. This material previously was included in each individual AD. Since this material is included in 14 CFR part 39, we will not include it in future AD actions.

Comments Invited

Will I have the opportunity to comment before you issue the rule? 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 submit any written relevant data, views, or arguments regarding this AD. Send your comments to an address listed under **ADDRESSES.** Include "Docket No. FAA–2004–18032; Directorate Identifier 2004–CE–15–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 rule that might suggest a need to modify it. If a person contacts us through a nonwritten communication, and that contact relates to a substantive part of this 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 AD in light of those comments.

Regulatory Findings

Will this AD impact various entities? 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.

Will this AD involve a significant rule or regulatory action? 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 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–2004–18032; Directorate Identifier 2004–CE–15–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

■ Accordingly, 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 (AD):

2004–14–12 The New Piper Aircraft, Inc.: Amendment 39–13721; Docket No. FAA–2004–18032; Directorate Identifier 2004–CE–15–AD.

When Does This AD Become Effective?

(a) This AD becomes effective on August 10, 2004.

Are Any Other ADs 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:

Models	Serial Nos.
(1) Group A:	
(i) PA–28–161 Warrior III	2842026 through 2842180.
(ii) PA–28–181 Archer III	2843112 through 2843565.
(iii) PA–28R–201 Arrow	2844014 through 2844099.
(iv) PA–32R–301 Saratoga II HP	3246098 through 3246214.
(v) PA–32R–301T Saratoga II TC	3257028 through 3257327.
(vi) PA–34–220T Seneca V	3449042 through 3449292.
(vii) PA–44–180 Seminole	4496020 through 4496173, and 4496175.
(viii) PA–46–350P Mirage	4636132 through 4636344, and
(ix) PA–46–500TP Meridian	4697001 through 4697162.
(2) Group B:	
(i) PA–28–161 Warrior III	2842181 through 2842203.
(ii) PA–28–181 Archer III	2843566 through 2843588.
(iii) PA–28R–201 Arrow	2844100 through 2844104.
(iv) PA–32R–301 Saratoga II HP	3246215 through 3246219.
(v) PA–32R–301T Saratoga II TC	3257328 through 3257340.
(vi) PA–32–301FT Piper 6X	3232001 through 3232013.
(vii) PA–32–301XTC Piper 6XT	3255001 through 3255014.
(viii) PA–34–220T Seneca V	3449293 through 3449301.
(ix) PA–44–180 Seminole	4496174 and 4496176 through 4496180.
(x) PA–46–350P Mirage	4636345 through 4636348, and
(xi) PA–46–500TP Meridian	4697163 through 4697174.

What Is the Unsafe Condition Presented in This AD?

(d) This AD is the result of inadequate control wheel attaching hardware. We are issuing this AD to detect and correct inadequate control wheel attachment design, which could result in loss of control of the ailerons and elevator. This failure could lead to loss of airplane.

What Must I Do to Address This Problem?

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

Actions	Compliance	Procedures
(1) For airplanes listed in Group A of paragraph (c)(1) of this AD: follow the instructions below, with the exception of airplanes listed in Group A that are already modified in accordance with The New Piper Aircraft, Inc., Service Bulletin No. 1139, dated, August 28, 2003.	Inspect within 25 hours Time-in-Service (TIS) after the effective date of this AD, August 10, 2004. Replace prior to further flight after the inspection.	Follow Part I of The New Piper Aircraft, Inc., Service Bulletin No. 1139, dated April 9, 2004.
(i) Inspect the control wheel attachment screw for property thread engagement (minimum one thread showing past the end of the nut plate), and replace the crew if insufficient thread engagement is found.		
(ii) Inspect the nut plate for sufficient locking characteristics (minimum one thread showing past the nut plate, when the screw is tightened by hand), and replace the nut plate if it is insufficient.		
(iii) After the above inspections, reassemble the control wheel onto the control wheel shaft and apply Loctite thread-locking compound.		
(2) For airplanes listed in Group A or Group B of paragraphs (c)(1) and (2) of this AD: install the retainer clip Part Number 104687–002.	Install the retainer clip within 100 hours TIS after the effective date of this AD, August 10, 2004.	Follow Part II of The New Piper Aircraft Inc., Service Bulletin No. 1139A, dated April 9, 2004.

May I Request an Alternative Method of Compliance?

(f) You may request a different method of compliance or a different compliance time for this AD by following the procedures in 14 CFR 39.19. Unless FAA authorizes otherwise, send your request to your principal inspector. The principal inspector may add comments and will send your request to the Manager, Atlanta Aircraft Certification Office, FAA. For information on any already approved alternative methods of compliance, contact Samuel Belete, Aerospace Safety Engineer, FAA Atlanta Certification Office, One Crown Center, 1895 Phoenix Boulevard, Suite 450, Atlanta, Georgia, 30349; telephone: (770) 703–6048; facsimile: (770) 703–6097.

Does This AD Incorporate Any Material by Reference?

(g) You must do the actions required by this AD following the instructions in The New Piper Aircraft, Inc., Service Bulletin No. 1139A, dated April 9, 2004. 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. You may get a copy from The New Piper Aircraft, Inc., 2926 Piper Drive, Vero Beach, Florida, 32960. You may review copies 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/code_of_federal_regulations/ibr_locations.html.* You may view the AD docket at the Docket Management Facility;

U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001.

Issued in Kansas City, Missouri, on June 29, 2004.

David R. Showers,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–15507 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–234–AD; Amendment 39–13724; AD 2004–14–15]

RIN 2120–AA64

Airworthiness Directives; Bombardier Model DHC–8–400 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to certain Bombardier Model DHC–8–400 airplanes. That AD currently requires revising the Normal and Abnormal sections of the airplane flight manual (AFM) to include procedures that enable the flightcrew to determine if the main landing gear (MLG) is extended before landing, and to take appropriate actions if necessary. This amendment adds an airplane to the applicability, and requires replacing the existing MLG downlock proximity sensors with new, improved sensors. After the replacement, this action also requires removing from the AFM the revision to the Normal and Abnormal sections required by the existing AD. The actions specified by this AD are intended to prevent failure of the MLG downlock proximity sensors on the same MLG at the same time, which could result in the MLG's failure to extend during landing, and cause injury to flightcrew and passengers. This action is intended to address the identified unsafe condition.

DATES: Effective August 13, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 13, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from Bombardier, Inc., Bombardier Regional Aircraft Division, 123 Garratt Boulevard, Downsview, Ontario M3K 1Y5, Canada. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Westbury, New York 11590; 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/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Dan Parrillo, Aerospace Engineer, Systems and Flight Test Branch, ANE–172, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Westbury, New York 11590; telephone (516) 228–7305; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 2001–11–10, amendment 39–12253 (66 FR 30305, June 6, 2001), which is applicable to certain Bombardier Model DHC–8–400 series airplanes, was published in the **Federal Register** on May 7, 2004 (69 FR 25503). The action proposed to require revising the Normal and Abnormal sections of the airplane flight manual (AFM) to include procedures that enable the flightcrew to determine if the main landing gear (MLG) is extended before landing, and to take appropriate actions if necessary. That action also proposed to require adding an airplane to the applicability, and replacing the existing MLG downlock proximity sensors with new, improved sensors. After the replacement, that action also proposed to require removing from the AFM the revision to the Normal and Abnormal sections required by the existing AD.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were submitted in response to the proposal or the FAA's determination of the cost to the public.

Conclusion

The FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

There are approximately 15 airplanes of U.S. registry that will be affected by this AD.

The revision of the AFM that is currently required by AD 2001–11–10 takes approximately 1 work hour per airplane to accomplish, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of the previously required actions on U.S. operators is estimated to be $975, or $65 per airplane.

The replacement that is required by this new AD will take approximately 4 work hours per airplane to accomplish, at an average labor rate of $65 per work hour. Required parts will be provided free of charge. Based on these figures, the cost impact of the new requirements of this AD on U.S. operators is estimated to be $3,900, or $260 per airplane.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations adopted herein 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. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (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. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, pursuant to 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. Section 39.13 is amended by removing amendment 39–12253 (66 FR 30305, June 6, 2001), and by adding a new airworthiness directive (AD), amendment 39–13724, to read as follows:

2004–14–15 Bombardier, Inc. (Formerly de Havilland, Inc.): Amendment 39–13724. Docket 2002–NM–234–AD. Supersedes AD 2001–11–10, Amendment 39–12253.

Applicability: Model DHC–8–400 airplanes, serial numbers 4001 through 4055 inclusive; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent failure of the main landing gear (MLG) downlock proximity sensors on the same MLG at the same time, which could result in the MLG's failure to extend during landing, and cause injury to flightcrew and passengers, accomplish the following:

Restatement of the Requirements of AD 2001–11–10

Airplane Flight Manual (AFM) Revision

(a) Within 14 days after June 21, 2001 (the effective date of AD 2001–11–10, amendment 39–12253), revise the Normal and Abnormal sections of the airplane flight manual (AFM) by inserting the following into Section 4.21, opposite page 4.21.1. This may be accomplished by inserting a copy of this AD in the AFM.

Caution

If illumination of LEFT gear safe (green), and LEFT gear unsafe (red), and landing gear handle (amber) advisory lights with the landing gear handle in the up position.

Or

Illumination of RIGHT gear safe (green), and RIGHT gear unsafe (red), and landing gear handle (amber) advisory lights with the landing gear handle in the up position.

1. Perform an Alternate Landing Gear extension, See paragraph 4.21.

Warning

Selection of the gear down without following the Alternate Landing Gear Extension procedure may result in the affected gear being trapped inside the nacelle.

2. Visually inspect Main Landing Gear to confirm that it has been extended.

Warning

A down and locked indication of the affected main landing gear is not a valid indication of the gear position.

3. Insert hydraulic pump handle in socket and operate for a minimum of 12 full strokes and ensure resistance to pump handle movement.

4. Observe the LEFT gear safe (green) and RIGHT gear safe (green) advisory lights are illuminated and the LEFT gear unsafe (red) and RIGHT gear unsafe (red) and the landing handle (amber) advisory lights are extinguished."

New Requirements of This AD

Replacement

(b) Within 6 months after the effective date of this AD, replace the left-hand and right-hand MLG downlock proximity sensors with new, improved sensors having new part numbers, per the Accomplishment Instructions of Bombardier Service Bulletin 84–32–09, Revision A, dated November 20, 2001. Once the sensors have been replaced, the AFM revision required by paragraph (a) of this AD must be removed from the AFM.

Note 1: Bombardier Service Bulletin 84–32–09 references Menasco Aerospace Service Bulletin 46400–32–09, dated May 15, 2001, as an additional source of service information for accomplishment of the replacement. The Menasco service bulletin is included in the Bombardier service bulletin.

Replacements Accomplished per Previous Issue of Service Bulletin

(c) Replacements accomplished before the effective date of this AD per Bombardier Service Bulletin 84–32–09, dated May 18, 2001, are considered acceptable for compliance with the corresponding action specified in this AD.

Alternative Methods of Compliance

(d) In accordance with 14 CFR 39.19, the Manager, New York Aircraft Certification Office (ACO), FAA, is authorized to approve alternative methods of compliance (AMOCs) for this AD.

Incorporation by Reference

(e) Unless otherwise specified in this AD, the actions shall be done in accordance with Bombardier Service Bulletin 84–32–09, Revision A, dated November 20, 2001. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Bombardier, Inc., Bombardier Regional Aircraft Division, 123 Garratt Boulevard, Downsview, Ontario M3K 1Y5, Canada. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, suite 410, Westbury, New York; 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/code_of_federal_regulations/ibr_locations.html.*

Note 2: The subject of this AD is addressed in Canadian airworthiness directive CF–2001–16R1, dated June 3, 2002.

Effective Date

(f) This amendment becomes effective on August 13, 2004.

Issued in Renton, Washington, on June 30, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–15509 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NM–37–AD; Amendment 39–13723; AD 2004–14–14]

RIN 2120–AA64

Airworthiness Directives; Israel Aircraft Industries, Ltd., Model 1121, 1121A, 1121B, 1123, 1124, and 1124A Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to all Israel Aircraft Industries, Ltd., Model 1121, 1121A, 1121B, 1123, 1124, and 1124A series airplanes, that requires a one-time inspection to detect cracking and other discrepancies of both sides of the rudder skins and ribs, forward to aft on each spar, to detect cracks below the skin surface; and corrective action if necessary. This action is necessary to detect and correct cracking of the skins of the rudder assembly, which could result in reduced structural capability of the rudder and reduced controllability of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective August 13, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 13, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from Gulfstream Aerospace Corporation, P.O. Box 2206, Mail Station D25, Savannah, Georgia 31402. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; 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/*

code_of_federal_regulations/ibr_locations.html.

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: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to all Israel Aircraft Industries, Ltd., Model 1121, 1121A, 1121B, 1123, 1124, and 1124A series airplanes was published in the **Federal Register** on May 7, 2004 (69 FR 25517). That action proposed to require a one-time inspection to detect cracking and other discrepancies of both sides of the rudder skins and ribs, forward to aft on each spar, to detect cracks below the skin surface; and corrective action if necessary.

Comments

We provided the public the opportunity to participate in the development of this AD. No comments have been submitted on the proposed AD or on the determination of the cost to the public.

Conclusion

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

Cost Impact

This AD will affect about 300 airplanes of U.S. registry. It will take about 3 work hours per airplane to do the required actions, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $58,500, or $195 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations adopted herein 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. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (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. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, pursuant to 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. Section 39.13 is amended by adding the following new airworthiness directive:

2004–14–14 Israel Aircraft Industries, LTD: Amendment 39–13723. Docket 2003–NM–37–AD.

Applicability: All Model 1121, 1121A, 1121B, 1123, 1124, and 1124A series airplanes; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To detect and correct cracking of the skins of the rudder assembly, which could result in reduced structural capability of the rudder and reduced controllability of the airplane, accomplish the following:

Inspections

(a) Within 50 flight hours after the effective date of this AD, do detailed and x-ray inspections to detect discrepancies (including cracking, loose rivets, and distorted rivet heads) of both sides of the rudder skins and ribs, forward to aft on each spar, in accordance with the applicable service bulletin identified in Table 1 of this AD. Although the service bulletin referenced in this AD specifies to submit certain information to the manufacturer, this AD does not include such a requirement.

TABLE 1.—SERVICE INFORMATION REFERENCE

For—	Inspect in accordance with—
Model 1121, 1121A, and 1121B series airplanes	1121 Commodore Jet (Israel Aircraft Industries) Service Bulletin 1121–55–030, Revision 1, dated June 23, 2003.
Model 1123 series airplanes	1123—Westwind (Israel Aircraft Industries) Service Bulletin 1123–55–056, Revision 1, dated June 23, 2003.
Model 1124 and 1124A series airplanes	1124—Westwind (Israel Aircraft Industries) Service Bulletin 1124–55–150, Revision 1, dated June 23, 2003.

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

Corrective Action

(b) If any discrepancy is found during any inspection required by paragraph (a) of this AD: Before further flight, repair it in accordance with a method approved by either the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate; or the Civil Aviation Administration of Israel (CAAI) (or its delegated agent).

Part Installation

(c) As of the effective date of this AD, no person may install a rudder on any airplane,

unless the actions required by this AD have been accomplished.

Alternative Methods of Compliance

(d) In accordance with 14 CFR 39.19, the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, is authorized to approve alternative methods of compliance for this AD.

Incorporation by Reference

(e) Unless otherwise specified in this AD, the actions must be done in accordance with the applicable service bulletin listed in Table 2 of this AD.

TABLE 2.—SERVICE BULLETINS INCORPORATED BY REFERENCE

Service bulletin	Revision level	Date
1121—Commodore Jet (Israel Aircraft Industries) Service Bulletin 1121–55–030	1	June 23, 2003.
1123—Westwind (Israel Aircraft Industries) Service Bulletin 1123–55–056	1	June 23, 2003
1124—Westwind (Israel Aircraft Industries) Service Bulletin 1124–55–150	1	June 23, 2003

This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Gulfstream Aerospace Corporation, P.O. Box 2206, Mail Station D25, Savannah, Georgia 31402. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; 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/code_of_federal_regulations/ibr_locations.html.*

Note 2: The subject of this AD is addressed in Israeli airworthiness directive 55–02–12–04R1, dated December 10, 2003.

Effective Date

(f) This amendment becomes effective on August 13, 2004.

Issued in Renton, Washington, on June 30, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–15510 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2004–NM–46–AD; Amendment 39–13716; AD 2004–14–07]

RIN 2120–AA64

Airworthiness Directives; BAE Systems (Operations) Limited (Jetstream) Model 4101 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to all BAE Systems (Operations) Limited (Jetstream) Model 4101 airplanes, that requires a test for free movement of the capsule/bearing of the nose landing gear (NLG), and related investigative, significant, and corrective actions. This action is necessary to prevent failure of the NLG to extend fully, which could result in reduced controllability of the airplane during landing. This action is intended to address the identified unsafe condition.

DATES: Effective August 13, 2004.

The incorporation by reference of a certain publication listed in the regulations is approved by the Director of the Federal Register as of August 13, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; 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/code_of_federal_regulations/ibr_locations.html.*

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: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to all BAE Systems (Operations) Limited (Jetstream) Model 4101 airplanes was published in the **Federal Register** on May 12, 2004 (69 FR 26331). That action proposed to require a test for free movement of the capsule/bearing of the nose landing gear (NLG), and related investigative, significant, and corrective actions.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were submitted in response to the proposal or the FAA's determination of the cost to the public.

Conclusion

The FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

The FAA estimates that 57 airplanes of U.S. registry will be affected by this AD, that it will take approximately 6 work hours per airplane to accomplish the required actions, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $22,230, or $390 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations adopted herein 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. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (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. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, pursuant to 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. Section 39.13 is amended by adding the following new airworthiness directive:

2004–14–07 BAE Systems (Operations) Limited (Formerly British Aerospace Regional Aircraft): Amendment 39–13716. Docket 2004–NM–46–AD.

Applicability: All Model Jetstream 4101 airplanes, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent failure of the nose landing gear (NLG) to extend fully, which could result in reduced controllability of the airplane during landing, accomplish the following:

Service Bulletin Reference and Clarifications

(a) The term "service bulletin," as used in this AD, means BAE Systems (Operations) Limited Alert Service Bulletin J41–A32–082, Revision 1, dated February 20, 2004.

(1) The term "flow chart," as used in this AD, means the flow chart following paragraph 1.M. of BAE Systems (Operations) Limited Alert Service Bulletin J41–A32–082, Revision 1.

(2) BAE Systems (Operations) Limited Alert Service Bulletin J41–A32–082, Revision 1, refers to APPH Service Bulletin AIR83586–32–22, Revision 1, dated February 2004, as an additional source of service information for accomplishing the actions in the BAE Systems (Operations) Limited service bulletin.

(3) Actions accomplished before the effective date of this AD per the Accomplishment Instructions of BAE Systems (Operations) Limited Alert Service Bulletin J41–A32–082, dated February 11, 2004, are considered acceptable for the corresponding actions required by this AD. (The original issue of BAE Systems (Operations) Limited Alert Service Bulletin J41–A32–082 refers to the original issue of APPH Service Bulletin AIR83586–32–22, dated February 2004, as an additional source of service information for accomplishing the actions in the BAE Systems (Operations) Limited service bulletin.)

(4) Where BAE Systems (Operations) Limited Alert Service Bulletin J41–A32–082, Revision 1, and APPH Service Bulletin AIR83586–32–22, Revision 1, specify to contact BAE Systems or APPH for repair instructions: Before further flight, repair per a method approved by the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate; or the Civil Aviation Authority (CAA) (or its delegated agent).

(5) Where the flow chart in BAE Systems (Operations) Limited Alert Service Bulletin J41–A32–082, Revision 1, specifies "flying hours," for the purposes of this AD, this means "flight hours."

(6) Where BAE Systems (Operations) Limited Alert Service Bulletin J41–A32–082, Revision 1, specifies to complete a reporting form and return it to the manufacturer, this AD does not require that action.

Initial Test

(b) Within 300 flight cycles or 30 days after the effective date of this AD, whichever occurs first: Perform a test for free movement of the NLG capsule/bearing, as specified in the flow chart of the service bulletin. Do all of the actions per the Accomplishment Instructions of the service bulletin.

Note 1: As specified in the flow chart in the service bulletin, only the actions in paragraph 2.A. (Part 1) of the Accomplishment Instructions of APPH Service Bulletin AIR83586–32–22, Revision 1, dated February 2004, are required by paragraph (a) of this AD.

Related Investigative, Significant, and Corrective Actions

(c) Perform related investigative, significant, and corrective actions as specified in the flow chart of the service bulletin, at the compliance times specified in the flow chart of the service bulletin. Do all of the actions per the Accomplishment Instructions of the service bulletin, except as provided by paragraph (a)(4) of this AD. During any test, if the movement of the capsule/bearing is restricted, the applicable corrective actions must be accomplished before further flight.

Parts Installation

(d) As of the effective date of this AD, no person may install an NLG on any airplane unless it is inspected per the requirements of this AD.

Alternative Methods of Compliance

(e) In accordance with 14 CFR 39.19, the Manager, International Branch, ANM–116, is authorized to approve alternative methods of compliance for this AD.

Incorporation by Reference

(f) Unless otherwise specified in this AD, the actions shall be done in accordance with BAE Systems (Operations) Limited Alert Service Bulletin J41–A32–082, Revision 1, dated February 20, 2004. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; 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/code_of_federal_regulations/ibr_locations.html.*

Note 2: The subject of this AD is addressed in British emergency airworthiness directive G–2004–0003, dated February 24, 2004.

Effective Date

(g) This amendment becomes effective on August 13, 2004.

Issued in Renton, Washington, on June 29, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–15367 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NM–74–AD; Amendment 39–13719; AD 2004–14–10]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model MD–11 and –11F Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to certain McDonnell Douglas Model MD–11 and –11F airplanes, that currently requires, among other actions, replacing the ground support bracket(s); and rerouting the ground cables of the galley external power and main external power, as applicable. This amendment requires replacing ground support brackets with new brackets, and replacing ground cables of the galley external power and main external power with new cables; as applicable. This amendment also requires an inspection to detect the

presence of a fillet seal at the ground brackets and to detect excessive length and correct terminations of the ground cables of the galley and main external power, as applicable; and corrective actions if necessary. The actions specified by this AD are intended to prevent arcing and heat damage to the attachment points of the main external and galley power receptacle ground wire, insulation blankets outboard and aft of the receptacle area, and adjacent power cables, which could result in smoke and fire in the forward cargo compartment. This action is intended to address the identified unsafe condition.

DATES: Effective August 13, 2004.

The incorporation by reference of a certain publication listed in the regulations is approved by the Director of the Federal Register as of August 13, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplanes, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; 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/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Brett Portwood, Aerospace Engineer, Systems and Equipment Branch, ANM–130L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5350; fax (562) 627–5210.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 2002–14–11, amendment 39–12811 (67 FR 47651, July 19, 2002), which is applicable to certain McDonnell Douglas Model MD–11 and –11F airplanes, was published in the **Federal Register** on January 9, 2004 (69 FR 1549). The action proposed to require replacing ground support brackets with new brackets, and replacing ground cables of the galley external power and main external power with new cables; as applicable. The action also proposed to require an inspection to detect the presence of a fillet seal at the ground brackets and to detect excessive length and correct terminations of the ground cables of the galley and main external power, as applicable; and corrective actions if necessary.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

Request to Allow Previously Approved Alternative Method of Compliance (AMOC)

One commenter requests that AMOCs approved previously per AD 2002–14–11 be considered approved as an AMOC with this AD. The commenter states that Boeing Service Bulletin MD11–24A138, Revision 1, was approved as an AMOC for AD 2002–14–11.

We agree and have revised the "Alternative Methods of Compliance" section of the final rule accordingly.

Requests for Editorial Changes

One commenter requests, for clarification purposes, that paragraphs (a)(1) and (a)(3) of Table 1 of the AD be revised to specify that the required actions must be done per applicable figure of the service bulletin.

We agree that clarification is necessary, but do not agree that the final rule needs to be changed. As specified in paragraph (a) of the AD, the actions specified in paragraphs (a)(1) through (a)(4) of Table 1 must be done "in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD11–24A138, Revision 2, dated July 11, 2003." Paragraph 3.A., Accomplishment Instructions, of the service bulletin references figures in the service bulletin for more specific instructions for accomplishing the replacements and inspections required by this AD. However, it does not specify any applicable corrective actions for the required inspections; the applicable corrective actions are only specified in the figures of the service bulletin. Therefore, for clarification purposes, we referenced the applicable figure for accomplishing the applicable corrective actions only in paragraphs (a)(2) and (a)(4) of Table 1 of the AD.

The same commenter also requests other minor editorial changes. We agree and have revised the final rule accordingly.

Conclusion

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule with the changes previously described. The FAA has determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

Cost Impact

There are approximately 154 airplanes of the affected design in the worldwide fleet. The FAA estimates that 69 airplanes of U.S. registry will be affected by this AD.

The new actions that are required in this AD action will take approximately 1 work hour per airplane to accomplish, at an average labor rate of $65 per work hour. Required parts will cost approximately between $175 and $2,002 per airplane, depending on airplane configuration. Based on these figures, the cost impact of the requirements of this AD on U.S. operators is estimated to between $240 and $2,067 per airplane, depending on airplane configuration.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions. The manufacturer may cover the cost of replacement parts associated with this AD, subject to warranty conditions. Manufacturer warranty remedies may also be available for labor costs associated with this AD. As a result, the costs attributable to the AD may be less than stated above.

Regulatory Impact

The regulations adopted herein 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. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (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. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, pursuant to 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. Section 39.13 is amended by removing amendment 39–12811 (67 FR 4751, July 19, 2002), and by adding a new airworthiness directive (AD), amendment 39–13719, to read as follows:

2004–14–10 McDonnell Douglas: Amendment 39–13719. Docket 2003–NM–74–AD. Supersedes AD 2002–14–11, Amendment 39–12811.

Applicability: Model MD–11 and –11F airplanes, as listed in Boeing Alert Service Bulletin MD11–24A138, Revision 2, dated July 11, 2003; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent arcing and heat damage to the attachment points of the main external and galley power receptacle ground wire, insulation blankets outboard and aft of the receptacle area, and adjacent power cables, which could result in smoke and fire in the forward cargo compartment, accomplish the following:

Replacement, Inspection, and Corrective Actions if Necessary

(a) Within 12 months after the effective date of this AD, accomplish the actions specified in paragraphs (a)(1) through (a)(4) of Table 1 of this AD, as applicable, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD11–24A138, Revision 2, dated July 11, 2003. Any applicable corrective action must be accomplished before further flight.

TABLE 1.—REQUIRED ACTIONS

For Group 1 airplanes listed in Revision 2 of the service bulletin on which previous issues of the service bulletin—	Actions—
(1) Have not been done	Replace the ground support brackets with new brackets, and replace the ground cables of the galley external power and main external power with new cables.
(2) Have been done	Do a general visual inspection to detect the presence of a fillet seal at the ground brackets and to detect excessive length and correct terminations of the ground cables of the galley and main external power. If any discrepancy is detected, do applicable corrective actions per Figure 3 of the service bulletin.
For Group 2 airplanes listed in Revision 2 of the service bulletin on which previous issues of the service bulletin—	**Actions—**
(3) Have not been done	Replace the ground support bracket with a new bracket, and replace the ground cables of the main external power with new cables.
(4) Have been done	Do a general visual inspection to detect the presence of a fillet seal at the ground brackets and to detect excessive length and correct terminations of the ground cables of the main external power. If any discrepancy is detected, do applicable corrective actions per Figure 4 of the service bulletin.

Note 1: For the purposes of this AD, a general visual inspection is defined as: "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 enhance visual access to all exposed 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."

Alternative Methods of Compliance

(b) In accordance with 14 CFR 39.19, the Manager, Los Angeles Aircraft Certification Office (ACO), FAA, is authorized to approve alternative methods of compliance (AMOCs) for this AD.

(c) Alternative methods of compliance, approved previously per AD 2002–14–11, amendment 39–12811, are approved as alternative methods of compliance with this AD.

Incorporation by Reference

(d) The actions shall be done in accordance with Boeing Alert Service Bulletin MD11–24A138, Revision 2, dated July 11, 2003. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplanes, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1-L5A (D800–0024). Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; 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/code_of_federal_regulations/ibr_locations.html.*

Effective Date

(e) This amendment becomes effective on August 13, 2004.

Issued in Renton, Washington, on June 29, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–15371 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2004–NM–35–AD; Amendment 39–13713; AD 2004–14–04]

RIN 2120–AA64

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

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to all BAE Systems (Operations) Limited Model BAe 146 series airplanes and Model Avro 146–RJ series airplanes, that requires performing a detailed inspection for chafing of the fuel quantity indication (FQI) system wiring, and any applicable corrective actions. These actions are necessary to prevent possible failure of the FQI system, which could cause the flightcrew to act on misleading information and possibly lead to in-flight fuel exhaustion. This action is intended to address the identified unsafe condition.

DATES: Effective August 13, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 13, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; 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/code_of_federal_regulations/ibr_locations.html.*

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: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to all BAE Systems (Operations) Limited Model BAe 146 series airplanes and Model Avro 146–RJ series airplanes was published in the **Federal Register** on April 26, 2004 (69 FR 22459). That action proposed to require performing a detailed inspection for chafing of the fuel quantity indication (FQI) system wiring, and any applicable corrective actions.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments have been submitted on the proposed AD or on the determination of the cost to the public.

Conclusion

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

The FAA estimates that 54 airplanes of U.S. registry will be affected by this AD, that it will take approximately 2 work hours per airplane to accomplish the required inspection, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $7,020, or $130 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations adopted herein 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. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (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. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, pursuant to 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. Section 39.13 is amended by adding the following new airworthiness directive:

2004–14–04 BAE Systems (Operations) Limited (Formerly British Aerospace Regional Aircraft): Amendment 39–13713. Docket 2004–NM–35–AD.

Applicability: All Model BAe 146 series airplanes and Model Avro 146–RJ series airplanes, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent possible failure of the fuel quantity indication (FQI) system, which could cause the flightcrew to act on misleading information and possibly lead to in-flight fuel exhaustion, accomplish the following:

Inspection and Corrective Actions

(a) Within 2 months after the effective date of this AD, perform a detailed inspection of the wiring of the FQI system for chafing, and do any applicable corrective actions prior to further flight, in accordance with the Accomplishment Instructions of BAE Systems (Operations) Limited Inspection Service Bulletin 28–030, dated February 21, 2003.

Note 1: For the purposes of this AD, a detailed inspection is defined as: "An intensive visual examination of a specific structural area, system, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by

the inspector. Inspection aids such as mirror, magnifying lenses, *etc.*, may be used. Surface cleaning and elaborate access procedures may be required."

No Reporting Requirement

(b) Although BAE Systems (Operations) Limited Inspection Service Bulletin 28–030, dated February 21, 2003, describes procedures for reporting inspection findings to the manufacturer, this AD does not require that action.

Alternative Methods of Compliance

(c) In accordance with 14 CFR 39.19, the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, is authorized to approve alternative methods of compliance for this AD.

Incorporation by Reference

(d) The actions shall be done in accordance with BAE Systems (Operations) Limited Inspection Service Bulletin 28–030, dated February 21, 2003. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; 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/code_of_federal_regulations/ibr_locations.html.*

Note 2: The subject of this AD is addressed in British airworthiness directive 007–02–2003, dated May 2003.

Effective Date

(e) This amendment becomes effective on August 13, 2004.

Issued in Renton, Washington, on June 29, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–15375 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NM–228–AD; Amendment 39–13712; AD 2004–14–03]

RIN 2120–AA64

Airworthiness Directives; BAE Systems (Operations) Limited (Jetstream) Model 4101 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to all BAE Systems (Operations) Limited (Jetstream) Model 4101 airplanes, that requires a one-time inspection of the ailerons to determine if certain actions were accomplished previously, and related investigative and corrective actions if necessary. This action is necessary to prevent damage to the rear spar rib-to-rib attachment cleats and the aft rib elements of the fixed tabs of the ailerons. Such damage could lead to reduced structural integrity and consequent failure of the ailerons, which could result in reduced controllability of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective August 13, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 13, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; 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/code_of_federal_regulations/ibr_locations.html.*

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: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to all BAE Systems (Operations) Limited (Jetstream) Model 4101 airplanes was published in the **Federal Register** on May 7, 2004 (69 FR 25521). That action proposed to require a one-time inspection of the ailerons to determine if certain actions were accomplished previously, and related investigative and corrective actions if necessary.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were submitted in response to the proposal or the FAA's determination of the cost to the public.

Conclusion

We have determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

We estimate that 57 airplanes of U.S. registry will be affected by this AD, that it will take approximately 2 work hours per airplane to accomplish the required actions, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $7,410, or $130 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations adopted herein 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. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (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. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, pursuant to 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. Section 39.13 is amended by adding the following new airworthiness directive:

2004–14–03 BAE Systems (Operations) Limited (Formerly British Aerospace Regional Aircraft): Amendment 39–13712. Docket 2003–NM–228–AD.

Applicability: All Model Jetstream 4101 airplanes, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent failure of the ailerons, and consequent reduced controllability of the airplane, accomplish the following:

One-Time Inspection

(a) Within 6 months or 600 flight cycles after the effective date of this AD, whichever is earlier: Do a one-time general visual inspection of the ailerons to determine if an early production change to the ailerons was installed, by doing all the actions per Part 1, paragraph (2) of the Accomplishment Instructions of BAE (Operations) Limited Service Bulletin J41–57–028, dated June 27, 2003. Instead of a general visual inspection of the ailerons, a review of airplane maintenance records is acceptable, by doing all the actions per Part 1, paragraph (1) of the Accomplishment Instructions of the service bulletin, if it can be positively determined from that review that one or both of the actions specified in Part 1, paragraph (1) of the Accomplishment Instructions of the service bulletin have been done.

(1) If the production change was not installed, or one or both of the actions specified in Part 1, paragraph (1) of the Accomplishment Instructions of the service bulletin were done, no further action is required by this AD.

(2) If the production change was installed: Do a radiographic inspection for damage by doing all the actions per Part 1, paragraph (3) of the Accomplishment Instructions of the service bulletin. If no damage is found, no further action is required by this AD. If any damage is found, before further flight, do the corrective actions required by paragraph (b) of this AD.

Note 1: For the purposes of this AD, a general visual inspection is defined as: "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 enhance visual access to all exposed 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."

Corrective Actions

(b) If any damage is found during the inspection required by paragraph (a)(2) of this AD: Before further flight, do all of the applicable corrective actions per Part 2 of the Accomplishment Instructions of BAE Systems (Operations) Limited Service Bulletin J41–57–028, dated June 27, 2003. Where the service bulletin specifies to contact the manufacturer for repair information, do the repair per a method approved by either the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the Civil Aviation Authority (or its delegated agent).

Submission of Information Not Required

(c) Although the service bulletin referenced in this AD specifies to submit certain information to the manufacturer, this AD does not include such a requirement.

Alternative Methods of Compliance

(d) In accordance with 14 CFR 39.19, the Manager, International Branch, ANM–116, is authorized to approve alternative methods of compliance for this AD.

Incorporation by Reference

(e) Unless otherwise specified by this AD, the actions shall be done in accordance with BAE Systems (Operations) Limited Service Bulletin J41–57–028, dated June 27, 2003. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; 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/code_of_federal_regulations/ibr_locations.html.*

Note 2: The subject of this AD is addressed in British airworthiness directive 006–06–2003.

Effective Date

(f) This amendment becomes effective on August 13, 2004.

Issued in Renton, Washington, on June 29, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–15376 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NM–251–AD; Amendment 39–13705; AD 2004–13–23]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas DC–9–82 (MD–82) and DC–9–83 (MD–83) Airplanes; and Model MD–88 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain McDonnell Douglas DC–9–82 (MD–82) and DC–9–83 (MD–83) airplanes; and Model MD–88 airplanes, that requires inspection of the captain's and first officer's seat track locking pins for insufficient engagement caused by seat track misalignment, and corrective actions if necessary. This action is necessary to prevent uncommanded movement of the captain's and first officer's seats during takeoff and landing, which could result in interference with the operation of the airplane and consequent temporary loss of control of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective August 13, 2004.

The incorporation by reference of a certain publication listed in the regulations is approved by the Director of the Federal Register as of August 13, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplanes, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; 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/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Cheyenne Del Carmen, Aerospace Engineer, Systems and Equipment Branch, ANM–130L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5338; fax (562) 627–5210.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain McDonnell Douglas DC–9–82 (MD–82) and DC–9–83 (MD–83) airplanes; and Model MD–88 airplanes; was published in the **Federal Register** on March 11, 2004 (69 FR 11550). That action proposed to require inspection of the captain's and first officer's seat track locking pins for insufficient engagement caused by seat track misalignment, and corrective actions if necessary.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were submitted in response to the proposal or the FAA's determination of the cost to the public.

Conclusion

The FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

There are approximately 1,166 airplanes of the affected design in the worldwide fleet. The FAA estimates that 672 airplanes of U.S. registry will be affected by this AD, that it will take approximately 1 work hour per airplane to accomplish the required inspection, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $43,680 or $65 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions. Manufacturer warranty remedies may be available for labor costs associated with this AD. As a result, the costs attributable to the AD may be less than stated above.

Regulatory Impact

The regulations adopted herein 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. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (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. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, pursuant to 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. Section 39.13 is amended by adding the following new airworthiness directive:

2004–13–23 McDonnell Douglas: Amendment 39–13705. Docket 2003–NM–251–AD.

Applicability: Model DC–9–82 (MD–82) and DC–9–83 (MD–83) airplanes, and Model MD–88 airplanes; as listed in Boeing Alert Service Bulletin MD80–25A367, Revision 01, dated June 14, 2002; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent uncommanded movement of the captain's and first officer's seats during takeoff and landing, which could result in interference with the operation of the airplane and consequent temporary loss of control of the airplane, accomplish the following:

Inspection and Corrective Actions

(a) Within 6 months after the effective date of this AD, perform a detailed inspection of the captain's and first officer's seat track locking pins for sufficient engagement, and any applicable corrective actions by accomplishing all the actions in the Accomplishment Instructions of Boeing Alert Service Bulletin MD80–25A367, Revision 01, dated June 14, 2002. Do the actions per the service bulletin. Any applicable corrective actions must be accomplished before further flight.

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

Inspection/Corrective Actions Accomplished per Previous Issue of Service Bulletin

(b) Any inspection/corrective action accomplished before the effective date of this AD per Boeing Alert Service Bulletin MD80–25A367, dated December 6, 1999, is considered acceptable for compliance with the corresponding inspection/corrective action specified in this AD.

Alternative Methods of Compliance

(c) In accordance with 14 CFR 39.19, the Manager, Los Angeles Aircraft Certification Office, FAA, is authorized to approve alternative methods of compliance for this AD.

Incorporation by Reference

(d) Unless otherwise specified in this AD, the actions shall be done in accordance with Boeing Alert Service Bulletin MD80–25A367, Revision 01, dated June 14, 2002. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplanes, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; 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/code_of_federal_regulations/ibr_locations.html.*

Effective Date

(e) This amendment becomes effective on August 13, 2004.

Issued in Renton, Washington, on June 24, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–15378 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NM–149–AD; Amendment 39–13725; AD 2004–14–16]

RIN 2120–AA64

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

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, that requires repetitive detailed and eddy current inspections on the main fittings of the main landing gears (MLG) to detect discrepancies, and related investigative/corrective actions if necessary. This action also requires servicing the shock strut of the MLGs; inspecting the shock strut of the MLGs for nitrogen pressure, visible chrome dimension, and oil leakage; and servicing any discrepant strut. This action is necessary to detect and correct premature cracking of the main fittings of the MLGs, which could result in failure of the fittings and consequent collapse of the MLGs during landing. This action is intended to address the identified unsafe condition.

DATES: Effective August 13, 2004.

The incorporation by reference of a certain publication listed in the regulations is approved by the Director of the Federal Register as of August 13, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from Bombardier, Inc., Canadair, Aerospace Group, P.O. Box 6087, Station Centre-ville, Montreal, Quebec H3C 3G9, Canada. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, suite 410, Westbury, New York; 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/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Serge Napoleon, 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) 228–7312; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes was published in the **Federal Register** on March 17, 2004 (69 FR 12587). That action proposed to require repetitive detailed and eddy current inspections on the main fittings of the main landing gears (MLG) to detect discrepancies, and related investigative/corrective actions if necessary. That action also proposed to require servicing the shock strut of the MLGs; inspecting the shock strut of the MLGs for nitrogen pressure, visible chrome dimension, and oil leakage; and servicing any discrepant strut.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

Request To Change Fax Number for Reporting Requirement

One commenter, the manufacturer, requests that the fax number for reporting inspection results, as specified in paragraph (f) of the proposed AD, be revised.

The FAA agrees. We have revised the fax number specified in paragraph (f) of the final rule accordingly.

Request To Require Reporting of Only Positive Eddy Current Inspection Findings

The other commenter requests that the reporting requirement of the proposed AD be changed to require reporting of only the positive eddy current inspection findings. The commenter states that the repetitive detailed inspection interval of every 100 flight hours occurs within one week for many operators. Additionally, it estimates that there will be nearly 15,000 positive and negative findings as a result of the current requirement, an amount it considers to be excessive for the manufacturer's review and analysis of relevant data. The commenter asserts that reporting negative findings would serve no useful purpose.

We agree with the commenter that reporting of negative findings serves no useful purpose. Also, Transport Canada Civil Aviation, which is the airworthiness authority for Canada, has informed us that reporting of the positive findings of only the eddy current inspections is sufficient for the requirements of this AD. Therefore, we have changed paragraph (f) of the final rule accordingly.

Editorial Change

In the heading for paragraph (d) of the proposed rule, we inadvertently added the words "* * *and Serving If Necessary." For clarification purposes, we have removed that phrase from the final rule.

Conclusion

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule with the changes described previously. The FAA has determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

Cost Impact

The FAA estimates that 288 airplanes of U.S. registry will be affected by this AD, that it will take approximately 4 work hours per airplane to accomplish the required actions, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $74,880, or $260 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up,

planning time, or time necessitated by other administrative actions. Manufacturer warranty remedies may be available for certain labor costs associated with this AD. As a result, the costs attributable to the AD may be less than stated above.

Regulatory Impact

The regulations adopted herein 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. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (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. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, pursuant to 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. Section 39.13 is amended by adding the following new airworthiness directive:

2004–14–16 Bombardier, Inc. (Formerly Canadair): Amendment 39–13725. Docket 2003–NM–149–AD.

Applicability: Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, equipped with main fittings, part numbers (P/N) 601R85001–81 and 601R85001–82 (Messier Dowty Incorporated P/N 17064–105 and 17064–106), of the main landing gears (MLG); certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To detect and correct premature cracking of the main fittings of the MLGs, which could result in failure of the fittings and consequent collapse of the MLGs during landing, accomplish the following:

Note 1: Where this AD differs from the referenced service bulletin, the AD prevails.

Detailed Inspection of Main Fittings of the MLGs

(a) Before the accumulation of 2,500 total flight cycles on the MLGs, or within 250 flight cycles after the effective date of this AD, whichever occurs later: Do a detailed inspection on the main fittings of the MLGs to detect discrepancies (*i.e.*, linear paint cracks or lack of paint (paint peeling), any other paint damage, adhesion, paint bulging, or corrosion), in accordance with Part A of the Accomplishment Instructions of Bombardier Alert Service Bulletin (ASB) A601R–32–088, dated February 20, 2003. Repeat the inspection thereafter at intervals not to exceed 100 flight cycles.

Note 2: For the purposes of this AD, a detailed inspection is defined as: "An intensive visual examination of a specific structural area, system, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by the inspector. Inspection aids such as mirror, magnifying lenses, etc., may be used. Surface cleaning and elaborate access procedures may be required."

Related Investigative/Corrective Actions

(b) If any discrepancy is detected during any inspection required by paragraph (a) of this AD, before further flight: Do the related investigative/corrective actions in accordance with Part B or F of the Accomplishment Instructions of Bombardier ASB A601R–32–088, including Appendices A and C, dated February 20, 2003. If an eddy current inspection (a related investigative action specified in Part B) is used to confirm the detailed inspection findings, the next eddy current required by paragraph (c) of this AD must be conducted within 500 flight cycles after the eddy current inspection specified in this paragraph, and thereafter at intervals not to exceed 500 flight cycles.

Eddy Current Inspection of Main Fittings of the MLGs

(c) At the time specified in paragraph (a) of this AD, do an eddy current inspection on the main fittings of the MLGs to detect cracks in accordance with Part B of the Accomplishment Instructions of Bombardier ASB A601R–32–088, including Appendix A, dated February 20, 2003. Repeat the eddy current inspection thereafter at intervals not to exceed 500 flight cycles. If any crack is found, before further flight, replace the affected main fittings of the MLGs with new or serviceable fittings in accordance with paragraph E.(5) of Part B of the Accomplishment Instructions of service bulletin.

Servicing of Shock Struts

(d) Before the accumulation of 2,500 total flight cycles on the MLGs, or within 500 flight cycles after the effective date of this AD, whichever occurs later, service the shock strut of the MLGs in accordance with Part C or D, as applicable, of the Accomplishment Instructions of Bombardier ASB A601R–32–088, including Appendix B, dated February 20, 2003.

Shock Strut Inspection

(e) Within 500 flight cycles after completing the servicing required by paragraph (d) of this AD, inspect the shock strut of the MLGs for nitrogen pressure, visible chrome dimension, and oil leakage in accordance with Part E of the Accomplishment Instructions of Bombardier ASB A601R–32–088, including Appendix B, dated February 20, 2003. Repeat the inspection thereafter at intervals not to exceed 500 flight cycles. If the nitrogen pressure and visible chrome dimensions are found outside the limits (the service bulletin refers to the airplane maintenance manual as the source of defined limits) and/or oil leakage is found, before further flight, service the affected shock strut of the MLGs in accordance with Part C or D, as applicable, of the Accomplishment Instructions of the service bulletin.

Reporting

(f) Submit a report of any positive finding of any eddy current inspection done per paragraph (b) or (c) of this AD, after each such inspection required by this AD, to Bombardier Aerospace, In-Service Engineering, attention Jean Gauthier, fax (514) 855–7708, e-mail *jean.gauthier@notes.canadair.ca*, at the applicable time specified in paragraph (f)(1) or (f)(2) of this AD. Under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements contained in this AD and has assigned OMB Control Number 2120–0056.

(1) If any eddy current inspection is done after the effective date of this AD: Submit the report within 30 days after the applicable inspection.

(2) If any eddy current inspection was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

(g) Although the Accomplishment Instructions of the service bulletin referenced in this AD specifies to submit a comment sheet related to service bulletin quality and a sheet recording compliance to the airplane manufacturer, this AD does not include such a requirement.

Alternative Methods of Compliance

(h) In accordance with 14 CFR 39.19, the Manager, New York Aircraft Certification Office, FAA, is authorized to approve alternative methods of compliance for this AD.

Incorporation by Reference

(i) The actions shall be done in accordance with Bombardier Alert Service Bulletin

A601R–32–088, including Appendices A, B, and C, dated February 20, 2003. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Bombardier, Inc., Canadair, Aerospace Group, P.O. Box 6087, Station Centre-ville, Montreal, Quebec H3C 3G9, Canada. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, suite 410, Westbury, New York; 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/code_of_federal_regulations/ibr_locations.html.*

Note 3: The subject of this AD is addressed in Canadian airworthiness directive CF–2003–09, dated April 23, 2003.

Effective Date

(j) This amendment becomes effective on August 13, 2004.

Issued in Renton, Washington, on June 30, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–15511 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 383

[Docket No. OST–2004–18560]

RIN 2105–AD40

Civil Penalties

AGENCY: Office of the Secretary (OST), DOT.

ACTION: Final rule.

SUMMARY: The recently enacted Vision 100—Century of Aviation Reauthorization Act revised the civil penalty provisions applicable to violations of the aviation economic requirements of Title 49. By this rule, the Department is revising 14 CFR Part 383 to reflect these revised civil penalties.

DATES: *Effective Date:* This rule is effective on August 9, 2004. However, the statutory amendments it reflects became effective on December 12, 2003, by their own terms.

FOR FURTHER INFORMATION CONTACT: Nicholas Lowry, Attorney, Office of Aviation Enforcement and Proceedings (C–70), Office of the General Counsel, Department of Transportation, 400 7th St., SW., Washington, DC 20590, (202) 366–9349.

SUPPLEMENTARY INFORMATION: Vision 100 revised the civil penalty provisions applicable to violations of Title 49. With respect to violations of economic requirements contained in Title 49, chapters 401 through 421, and rules and orders issued thereunder, the new civil penalty provisions are as follows:

(1) A general civil penalty of not more than $25,000 (or $1,100 for individuals or small businesses) instead of the prior general penalty of $1,000 (adjusted by regulation to $1,100 to reflect inflation), applies to violations of statutory provisions and rules or orders issued under those provisions, other than those listed below. (see 49 U.S.C. 46301(a)(1));

(2) With respect to small businesses and individuals, notwithstanding the general $1,100 civil penalty, the statute provides for:

(a) A maximum civil penalty of $10,000 for violations of most provisions of Chapter 401, including the anti-discrimination provisions of sections 40127 (general provision), and 41705 (discrimination against the disabled) or rules or orders issued thereunder (see 49 U.S.C. 46301 (a)(5) (A));

(b) A maximum civil penalty of $5,000 for violations of section 41719 or rules or orders issued thereunder (49 U.S.C. 46301 (a)(5)(C); and

(c) A maximum civil penalty of $2,500 for violations of section 41712 or consumer protection rules or orders (49 U.S.C. 46301 (a)(5)(D)).

This amendment incorporates these Vision 100 penalty revisions into 14 CFR Part 383, the regulatory codification of the related civil penalty provisions.

Regulatory Analyses and Notices

In developing this final rule, we are waiving the usual notice of proposed rulemaking and public comment procedures set forth in the Administrative Procedure Act (APA) (5 U.S.C. 553). The APA provides an exception to the notice and comment procedures when an agency finds there is good cause for dispensing with such procedures when they are impracticable, unnecessary or contrary to the public interest. We have determined that under 5 U.S.C. 553(b)(3)(B) good cause exists for dispensing with the notice of proposed rulemaking and public comment procedures for this rule. Specifically, this rulemaking is consistent with the statutory authority set forth in Vision 100, and raises no issues of policy discretion. Accordingly, we believe that opportunity for prior comment is unnecessary and contrary to the public interest, and we are issuing these revised regulations as a final rule.

This final rule is exempt from review by the Office of Management and Budget (OMB) in accordance with provisions of Executive Order 12866, because it is limited to the adoption of statutory language, without interpretation. The great majority of persons covered by these regulations do not engage in the prohibited conduct subject to the revised civil penalty provisions, and as a result, we believe that any aggregate economic impact of these revised regulations will be minimal, affecting only those who do not comply with the pertinent statutes or regulations. As a result, this final rule should have no effect on Federal or State expenditures.

In addition, we must prepare a regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (5 U.S.C. 601–602) unless we certify that a regulation will not have a significant economic impact on a substantial number of small entities. In this case the revision of the civil penalty amounts will raise potential penalties for all aviation businesses; however, there are special reduced penalties for individuals and small businesses with regard to specific kinds of violations. It is primarily the nature of the violations that has determined OST enforcement action in the past, although the size of an entity has been taken into account in determining what, if any, civil penalty is appropriate. The aggregate economic impact of this rulemaking on small entities should, therefore, be minimal, affecting only those who engage in conduct prohibited by statute or the related regulations.

Therefore, we have concluded and certify that this final rule will not have a significant economic impact on a substantial number of small entities, and that a regulatory flexibility analysis is not required for this rulemaking.

Paperwork Reduction Act

This final rule imposes no new reporting or record keeping requirements necessitating paperwork clearance by OMB.

Unfunded Mandates Reform Act of 1995

OST has determined that the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply to this rulemaking.

List of Subjects in 14 CFR Part 383

Administrative practice and procedures, Penalties.

■ Accordingly, the Department of Transportation revises Part 383 of Title 14, as set forth below:

PART 383—CIVIL PENALTIES

Sec.
383.1 Basis and purpose.
383.2 Amount of penalty.

Authority: Sec. 503, Pub. L. 108–176, 117 Stat. 2490.

§ 383.1 Basis and purpose.

(a) Basis. This part implements the civil penalty provisions of Vision 100—Century of Aviation Reauthorization Act (Pub. L. 108–176; 117 Stat. 2490, December 12, 2003, section 503) (Vision 100). Because this statute revises or reaffirms all civil penalty provisions under 49 U.S.C. 46301, no further adjustments to account for inflation are required under the terms of Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, 104 Stat. 890) and the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, section 31001). The latter requires that federal agencies adjust civil penalties at least every four years to reflect any inflation which may have occurred.

(b) Purpose. This part incorporates the civil penalty liability amounts prescribed in 49 U.S.C. 46301(a), as modified by Vision 100.

§ 383.2 Amount of penalty.

Civil penalties payable to the U.S. Government for violations of Title 49, Chapters 401 through 421, pursuant to 49 U.S.C. 46301(a) as revised by Vision 100, are as follows:

(a) A general civil penalty of not more than $25,000 (or $1,100 for individuals or small businesses) applies to violations of statutory provisions and rules or orders issued under those provisions, other than those listed in paragraph (b) of this section, (see 49 U.S.C. 46301(a)(1));

(b) With respect to small businesses and individuals, notwithstanding the general $1,100 civil penalty, the following civil penalty limits apply:

(1) A maximum civil penalty of $10,000 applies for violations of most provisions of Chapter 401, including the anti-discrimination provisions of sections 40127 (general provision), and 41705 (discrimination against the disabled) and rules and orders issued thereunder (see 49 U.S.C. 46301 (a)(5)(A));

(2) A maximum civil penalty of $5,000 applies for violations of section 41719 and rules and orders issued thereunder (see 49 U.S.C. 46301 (a)(5)(C)); and

(3) A maximum civil penalty of $2,500 applies for violations of section 41712 or consumer protection rules or orders (see 49 U.S.C. 46301 (a)(5)(D)).

Issued this 26th day of June, 2004, in Washington, DC.

Norman Y. Mineta,

Secretary.

[FR Doc. 04–15549 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–62–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1, 4, 31, 140, 145 and 190

Corrections to Regional Office Information, References to Section 4d(2) and Criteria for CPO Registration Exemption

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission ("Commission") is amending its regulations to make a series of technical corrections, as follows: To delete references to the Western Regional Office, which was closed in 2003; to update addresses for other regional offices; to correct references to section 4d(2) of the Commodity Exchange Act to read section 4d(a)(2) instead; and to clarify that the participant criteria for exemption from commodity pool operator ("CPO") registration under Rule 4.13(a)(3) include persons who meet the participant criteria of Rule 4.13(a)(4).

DATES: Effective: July 9, 2004.

FOR FURTHER INFORMATION CONTACT: Thelma Diaz, Special Counsel, at (202) 418–5137, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st St., NW., Washington DC 20581; electronic mail at *tdiaz@cftc.gov*.

SUPPLEMENTARY INFORMATION:

I. Amendments To Update Regional Office Information

Commission Rule 140.2 describes the organization of four regional offices for the Commission (the Eastern, Central, Southwestern and Western Regional offices). Among other things, Rule 140.2 specifies for each regional office a list of states for which the office is "responsible for enforcement of the [Commodity Exchange Act] and administration of programs of the Commission".[1] In 2002, the Eastern and Central Regional Offices moved to new locations, and the Western Regional Office was closed in 2003. The Commission is therefore amending Rule 140.2 to update the address information for the Eastern and Central Regional Offices, and to delete the reference to the Western Regional Office. Rule 140.2 is also amended to add to the list of states for the Southwestern Regional Office those states that are currently in the list for the Western Regional Office (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming).[2]

Commission Rules 1.10, 1.12, 1.17 and 31.13 must also be revised to reflect the closing of the Western Regional Office. These rules specify various reports or notices that are to be filed with the Commission, and state further that such reports and notices are considered filed when received by the regional office that is the nearest to a firm's principal place of business, with the proviso that firms under the jurisdiction of the Western Regional Office should file with the Southwestern Regional Office instead. The proviso is no longer necessary, and the Commission is accordingly amending each of these regulations to delete the proviso.

The Commission is also amending the list of addresses provided in Rule 145.6 for requests for public records directed to regional offices. As amended, the rule will no longer include the address of the closed Division of Enforcement office in the Western Region.

II. Amendments To Update References to Section 4d

Several Commission regulations include references to section 4d(2) of the Commodity Exchange Act. With the enactment of Commodity Futures Modernization Act of 2000 ("CFMA"), section 4d(2) has now been redesignated as section 4d(a)(2).[3] The Commission is therefore amending Rules 1.16, 1.17, 1.23, 1.30, 31.13, and 190.07 to change the references to section 4d(2) to read section 4d(a)(2).

[1] The Commodity Exchange Act may be found at 7 U.S.C. 1 *et seq.* (2000).

[2] The Commission is also making a technical correction to Rule 140.99, which currently includes two different paragraphs that are both designated as paragraph (d)(2). In 2002, the Commission adopted amendments to Rule 140.99 that added the text in the first paragraph designated as (d)(2) and deleted the text found in the second paragraph. *See* 67 FR 62350, 62353–4 (October 7, 2002). The publisher of the Code of Federal Regulations, however, incorrectly included the text of both paragraphs, and this final rule adopts a technical correction to delete the second of the two paragraphs designated as (d)(2).

[3] Sec. 1(a)(5) of Pub. L. 106–554 (title II, Sec. 251(f)).

III. Amendments To Clarify That the Participant Criteria for Exemption From CPO Registration Under Rule 4.13(a)(3) Include Persons Who Meet the Criteria of Rule 4.13(a)(4)

In August 2003, the Commission adopted rules that provide for additional exemptions from registration as a CPO.[4] To be eligible for exemption from CPO registration under Rule 4.13(a)(3), the CPO seeking exemption must operate pools whose participants meet certain sophistication criteria[5] and that abide by restrictions on the amount of the pool's commodity interest trading. To be eligible for exemption under Rule 4.13(a)(4), the CPO must operate pools whose participants meet significantly higher sophistication criteria.[6] The latter rule does not restrict the amount of the pool's commodity interest trading. The Commission is amending Rule 4.13(a)(3) to make clear that participants who meet the higher sophistication criteria of Rule 4.13(a)(4) may also participate in a pool for which the operator claims exemption from CPO registration under Rule 4.13(a)(3).[7]

Related Matters

A. Administrative Procedure Act

The Administrative Procedure Act ("APA") generally requires notice of proposed agency rulemaking and procedures for public comment prior to the adoption of final rules.[8] The APA provides for an exception from this process for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," or whenever the agency for good cause finds that such notice and comment opportunity are "impracticable, unnecessary, or contrary to the public interest."[9] The APA also provides that the required publication of a substantive rule shall be made not less than 30 days before its effective date, but provides several express exceptions to this requirement, including where the rule "grants or recognizes an exemption or relieves a restriction."[10]

The amendments to revise office address information in Rules 1.10, 1.12, 1.17, 31.13, 140.2, and 145.6 relate to the agency's internal organization, and will also benefit the public by providing correct information for the filing of required documents with the Commission.[11] Moreover, when adopting amendments to Rules 4.13(a)(3) and (4) last year to provide exemptive relief from CPO registration, the Commission determined that such amendments would be effective immediately because they granted or recognized an exemption or relieved a restriction.[12] The amendments to Rule 4.13(a) hereby adopted clarify and further confirm for industry participants the availability of exemptive relief under the rule amendments adopted in August of 2003. Accordingly, the Commission has determined to make the amendments adopted in this final rulemaking effective immediately upon publication in the **Federal Register**.

B. Cost-Benefit Analysis

Section 15 of the Commodity Exchange Act, as amended by the CFMA, requires the Commission to consider the costs and benefits of its action before promulgating a new regulation under the Act.[13] The Commission undertook such an analysis last year when adopting amendments to Rules 4.13(a)(3) and (a)(4) to provide exemptive relief from CPO registration.[14] The amendments to Rule 4.13(a) adopted in this final rulemaking do not affect nor alter the Commission's prior analysis, and the Commission has further determined that its prior analysis supports the adoption of such amendments to Rule 4.13(a).

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA") imposes certain requirements on federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA.[15] The rule amendments do not require a new collection of information on the part of any entities subject to such rule amendments. Accordingly, for purposes of the PRA, the Commission certifies that these rule amendments will not impose any new reporting or recordkeeping requirements.

Lists of Subjects

17 CFR Part 1

Brokers, Commodity futures, Reporting and recordkeeping requirements.

17 CFR Part 4

Advertising, Commodity pool operators, Commodity trading advisors, Commodity futures, Commodity options, Customer protection, Reporting and Recordkeeping.

17 CFR Part 31

Leverage transactions; Reporting and recordkeeping requirements.

17 CFR Part 140

Authority delegations (Government agencies), Organization and functions (Government agencies).

17 CFR Part 145

Confidential business information, Freedom of information.

17 CFR Part 190

Bankruptcy.

■ Accordingly, 17 CFR parts 1, 4, 31, 140, 145 and 190 are amended as follows:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

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

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6j, 6k, 6l, 6m, 6n, 6o, 6p, 7, 7a, 7b, 8, 9, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 19, 21, 23, and 24, as amended by the Commodity Futures Modernization Act of 2000, Appendix E of Pub. L. 106–554, 114 Stat. 2763 (2000).

§ 1.10 [Amended]

■ 2. Section 1.10 is amended by:

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[4] *See* 68 FR 47221 (August 8, 2003).

[5] Each participant must be an "accredited investor" or "knowledgeable employee" under the Federal securities laws, a trust formed by an accredited investor for a family member, or a "qualified eligible person" under Rule 4.7(a)(2)(viii)(A). 17 CFR 4.7(a)(2)(viii)(A) (2003).

[6] Each natural person participant must be a "qualified eligible person" under Rule 4.7(a)(2) and each non-natural person must be a "qualified eligible person" under Rule 4.7 or an "accredited investor" under sub-paragraphs (a)(1) through (a)(3), (a)(7) or (a)(8) of Rule 501 under the Securities Act of 1933. 17 CFR 230.501(a)(1)–(3), (a)(7) or (a)(8) (2003).

[7] In this regard, by letter dated April 14, 2004, Commission staff confirmed that persons who meet the participant criteria of Rule 4.13(a)(4) may also participate in a pool operated pursuant to Rule 4.13(a)(3). *See* CFTC Interpretative Letter No. 04–13, available on the Commission's Web site at *http://www.cftc.gov/tm/letters/04letters/tm04–13.htm*.

[8] 5 U.S.C. 551 *et. seq.*

[9] 5 U.S.C. 553(b).

[10] 5 U.S.C. 553(d).

[11] The public will also benefit from the correction of obsolete references to section 4d(2) in Rules 1.16, 1.17, 1.23, 1.30, 31.13, 140.99, and 190.07.

[12] 68 FR at 47230.

[13] Section 15(a)(2) specifies that such costs and benefits shall be evaluated in light of five broad areas of market and public concern: Protection of market participants and the public; efficiency, competitiveness, and financial integrity of futures markets; price discovery; sound risk management practices; and other public interest considerations. Because the amendments that update address information relate to internal agency organization, the Commission has determined that none of the considerations enumerated in section 15(a) are applicable to such amendments. Furthermore, the amendments that update references to the Commodity Exhange Act in the Commission's rules do not revise any existing regulatory requirement, and therefore do not change any existing cost or benefit associated with such regulation.

[14] 68 FR at 47230.

[15] 44 U.S.C. 3501 *et seq.*

■ a. Removing from paragraph (c) the two parentheticals that currently read "(except that a registrant under the jurisdiction of the Commission's Western Regional Office must file such reports with the Southwestern Regional Office)" and "(except that an applicant under the jurisdiction of the Commission's Western Regional Office must file such reports with the Southwestern Regional Office)", and
■ b. Removing from paragraphs (e)(1), (e)(2), and (f)(2) the parentheticals that currently read "(except that an applicant under the jurisdiction of the Commission's Western Regional Office must file such a notice with the Southwestern Regional Office)".

§ 1.12 [Amended]

■ 3. Section 1.12 is amended by removing from paragraph (i)(1) the parenthetical that currently reads "(except that an applicant, registrant or self regulatory organization under the jurisdiction of the Commission's Western Regional Office must file such notices and reports with the Southwestern Regional Office)".

§ 1.16 [Amended]

■ 4. Section 1.16 is amended by removing from paragraph (d)(1) the words "section 4d(2)" wherever they appear in the paragraph and adding in their place the words "section 4d(a)(2)".

§ 1.17 [Amended]

■ 5. Section 1.17 is amended by removing from paragraph (h)(3)(vi) the parenthetical that currently reads "(except that a registrant under the jurisdiction of the Commission's Western Regional Office shall file such copies with the Southwestern Regional Office)".

§ 1.23 [Amended]

■ 6. Section 1.23 is amended by removing the words "section 4d(2)" and adding in their place the words "section 4d(a)(2)".

§ 1.30 [Amended]

■ 7. Section 1.30 is amended by removing the words "section 4d(2)" and adding in their place the words "section 4d(a)(2)".

PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

■ 8. The authority citation for part 4 continues to read as follows:

Authority: 7 U.S.C. 1a, 2,4, 6(c), 6b, 6c, 6*l*, 6m, 6n, 6*o*, 12a and 23.

■ 9. Section 4.13 is amended by:
■ a. Revising paragraph (a)(3)(iii)(C) and paragraph (a)(3)(iii)(D), and
■ b. Adding new paragraph (a)(3)(iii)(E), to read as follows:

§ 4.13 Exemption from registration as a commodity pool operator.

(a) * * *
(3) * * *
(iii) * * *
(C) A "knowledgeable employee," as that term is defined in § 270.3c–5 of this title;
(D) A "qualified eligible person," as that term is defined in § 4.7(a)(2)(viii)(A) of this chapter; or
(E) A person eligible to participate in a pool for which the pool operator can claim exemption from registration under paragraph (a)(4) of this section; and
* * * * *

PART 31—LEVERAGE TRANSACTIONS

■ 10. The authority citation for part 31 continues to read as follows:

Authority: 7 U.S.C. 12a and 23, unless otherwise noted.

§ 31.13 [Amended]

■ 11. Section 31.13 is amended by:
■ a. Removing from paragraph (c) the words "section 4d(2)" and adding in their place the words "section 4d(a)(2)", and
■ b. Removing from paragraph (e) all of the text following the colon until the end of the paragraph, and by removing the colon and adding a period instead.

PART 140—ORGANIZATION, FUNCTIONS, AND PROCEDURES OF THE COMMISSION

■ 12. The authority citation for part 140 continues to read as follows:

Authority: 7 U.S.C. 2 and 12a.

■ 13. Section 140.2 is revised read as follows:

§ 140.2 Regional Offices—Regional Directors.

Each of the Regional offices described herein functions as set forth in this section under the direction of a Regional Director, who is delegated authority and responsibility for the enforcement of the Act and administration of the programs of the Commission in the particular Region.

(a) The Eastern Regional Office is located at 140 Broadway, New York, New York, 10005 and is responsible for enforcement of the Act and administration of programs of the Commission in the States of Alabama, Connecticut, Delaware, Florida, Georgia, Kentucky, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, and West Virginia.

(b) The Central Regional Office is located at 525 West Monroe Street, Suite 1100, Chicago, Illinois 60661 and is responsible for enforcement of the Act and administration of programs of the Commission in the States of Illinois, Indiana, Michigan, Ohio and Wisconsin.

(c) The Southwestern Regional office is located at 4900 Main Street, Suite 721, Kansas City, Missouri 64112, with a sub-office at Room 510, Grain Exchange Building, Fourth Street and Fourth Avenue, South, Minneapolis, Minnesota 55415, and is responsible for enforcement of the Act and administration of the programs of the Commission in the States of Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Iowa, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.

§ 140.99 [Amended]

■ 14. Section 140.99 is amended by removing the second of the two paragraphs that are currently both designated (d)(2).

PART 145—COMMISSION RECORDS AND INFORMATION

■ 15. The authority citation for Part 145 continues to read as follows:

Authority: Pub. L. 99–570, 100 Stat. 3207; Pub. L. 89–554, 80 Stat. 383; Pub. L. 90–23, 81 Stat. 54; Pub. L. 98–502, 88 Stat. 1561–1564 (5 U.S.C. 552); Sec. 101(a), Pub. L. 93–463, 88 Stat. 1389 (5 U.S.C. 4a(j)); unless otherwise noted.

■ 16. Section 145.6 is amended by revising paragraph (a) to read as follows:

§ 145.6 Commission offices to contact for assistance; registration records available.

(a) Whenever this part directs that a request be directed to the FOI, Privacy and Sunshine Acts compliance staff at the principal office of the Commission in Washington, DC, the request shall be made in writing and shall be addressed or otherwise directed to the Assistant Secretary for FOI, Privacy and Sunshine Acts Compliance, Office of the Secretariat, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Requests for public records directed to a regional office of the Commission pursuant to §§ 145.0(c) and 145.2 should be sent to:

Commodity Futures Trading Commission, 140 Broadway, New York, New York 10005, Telephone: (646) 746–9700

Commodity Futures Trading Commission, 525 West Monroe Street, Suite 1100 North, Chicago, Illinois 60661, Telephone: (312) 596–0700

Commodity Futures Trading Commission, 510 Grain Exchange Building, Minneapolis, Minnesota 55415, Telephone: (612) 370–3255

Commodity Futures Trading Commission, 4900 Main Street, Suite 721, Kansas City, Missouri 64112, Telephone: (816) 931–7600

* * * * *

PART 190—BANKRUPTCY

■ 17. The authority citation for part 190 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 4a, 6c, 6d, 6g, 7a, 12, 19, and 24, and 11 U.S.C. 362, 546, 548, 556, and 761–766, unless otherwise noted.

§ 190.07 [Amended]

■ 18. Section 190.07 is amended by removing from paragraph (b)(3)(v) the words "section 4d(2)" and adding in their place the words "section 4d(a)(2)".

Issued in Washington, DC, on July 1, 2004, by the Commission.

Catherine D. Dixon,

Assistant Secretary of the Commission.

[FR Doc. 04–15523 Filed 7–8–04; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 510, 520, and 524

New Animal Drugs; Change of Sponsor

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect a change of sponsor for four new animal drug applications (NADAs) from PM Resources, Inc., to Virbac AH, Inc.

DATES: This rule is effective July 9, 2004.

FOR FURTHER INFORMATION CONTACT: David R. Newkirk, Center for Veterinary Medicine (HFV–100), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–6967, e-mail: *davidnewkirk@fda.gov.*

SUPPLEMENTARY INFORMATION: PM Resources, Inc., 13001 St. Charles Rock Rd., Bridgeton, MO 63044, has informed FDA that it has transferred ownership of, and all rights and interest in, the following four approved NADAs to Virbac AH, Inc., 3200 Meacham Blvd., Ft. Worth, TX 76137:

Application No.	21 CFR Section	Trade Name
NADA 007–076	520.2325a	SULFA–NOX (sulfaquinoxaline) Liquid
NADA 008–244	520.2325a	SULFA–NOX (sulfaquinoxaline) Concentrate
NADA 043–215	524.900	PURINA Grub-Kill (famphur)
NADA 092–150	520.2045	PURINA Horse & Colt Wormer (pyrantel tartrate)

Accordingly, the agency is amending the regulations in 21 CFR 520.2045, 520.2325a, and 524.900 to reflect the transfer of ownership.

Following these changes of sponsorship, PM Resources, Inc., is no longer the sponsor of an approved application. Accordingly, § 510.600(c) is being amended to remove the entries for PM Resources, Inc.

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

21 CFR Part 510

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

21 CFR Parts 520 and 524

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 parts 510, 520, and 524 are amended as follows:

PART 510—NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 510 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 360b, 371, 379e.

§ 510.600 [Amended]

■ 2. Section 510.600 is amended in the table in paragraph (c)(1) by removing the entry for "PM Resources, Inc." and in the table in paragraph (c)(2) by removing the entry for "060594".

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

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

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

§ 520.2045 [Amended]

■ 4. Section 520.2045 is amended in paragraph (b)(2) by removing "060594" and by adding in its place "051311".

§ 520.2325a [Amended]

■ 5. Section 520.2325a is amended in paragraph (a)(2) by removing "060594" and by adding in its place "051311".

PART 524—OPHTHALMIC AND TOPICAL DOSAGE FORM NEW ANIMAL DRUGS

■ 6. The authority citation for 21 CFR part 524 continues to read as follows:

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

§ 524.900 [Amended]

■ 7. Section 524.900 is amended in paragraph (c) by removing "060594" and by adding in its place "051311".

Dated: June 18, 2004.

Steven D. Vaughn,

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

[FR Doc. 04–15568 Filed 7–8–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 520

Oral Dosage Form New Animal Drugs; Penicillin G Potassium in Drinking Water

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 an abbreviated new animal drug application (ANADA) filed by G. C. Hanford Manufacturing Co. The ANADA provides for the use of penicillin G potassium in the drinking water of turkeys for the treatment of erysipelas caused by Erysipelothrix rhusiopathiae.

DATES: This rule is effective July 9, 2004.

FOR FURTHER INFORMATION CONTACT: Lonnie W. Luther, Center for Veterinary Medicine (HFV–104), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 301–827–8549, e-mail: *lonnie.luther@fda.gov*.

SUPPLEMENTARY INFORMATION: G. C. Hanford Manufacturing Co., P.O. Box 1017, Syracuse, NY 13201, filed ANADA 200–372 that provides for use of Penicillin G Potassium, USP, in the drinking water of turkeys for the treatment of erysipelas caused by Erysipelothrix rhusiopathiae. G. C. Hanford Manufacturing Co.'s HAN–PEN (penicillin G potassium, USP) is approved as a generic copy of Fort Dodge Animal Health's Penicillin G Potassium, USP, approved under NADA 55–060. The ANADA is approved as of May 21, 2004, and the regulations are amended in 21 CFR 520.1696b 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.

The agency 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.

■ 2. Section 520.1696b is amended by revising paragraph (b) to read as follows:

§ 520.1696b Penicillin G potassium in drinking water.

* * * * *

(b) *Sponsors.* See Nos. 010515, 046573, 053501, 059130, 059320, and 061623 in § 510.600(c) of this chapter.

* * * * *

Dated: June 17, 2004.

Stephen F. Sundlof,

Director, Center for Veterinary Medicine.

[FR Doc. 04–15657 Filed 7–8–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 228

RIN 0596–AC17

Clarification as to When a Notice of Intent and/or Plan of Operations Is Needed for Locatable Mineral Operations on National Forest System Lands

AGENCY: Forest Service, USDA.

ACTION: Interim rule; request for comments.

SUMMARY: This interim rule sets forth technical amendments which clarify the regulations regarding the requirement for filing a notice of intent or a plan of operations for locatable mineral operations on National Forest System lands. The Forest Service invites written comments on this interim rule.

DATES: This interim rule is effective August 9, 2004. Comments on this interim rule must be received in writing by September 7, 2004.

ADDRESSES: Send written comments to Forest Service, USDA, Attn: Director, Minerals and Geology Management (MGM) Staff, (2810), Mail Stop 1126, Washington, DC 20250–1125; by electronic mail to *36cfr228a@fs.fed.us*; by fax to (703) 605–1575; or by the electronic process available at Federal eRulemaking portal at *http://www.regulations.gov*. If comments are sent by electronic mail or by fax, the public is requested not to send duplicate written comments via regular mail. Please confine written comments to issues pertinent to the interim rule; explain the reasons for any recommended changes; and, where possible, reference the specific wording being addressed. All comments, including names and addresses when provided, will be placed in the record and will be available for public inspection and copying. The public may inspect comments received on this interim rule in the Office of the Director, MGM Staff, 5th Floor, Rosslyn Plaza Central, 1601 North Kent Street, Arlington, Virginia, on business days between the hours of 8:30 a.m. and 4 p.m. Those wishing to inspect comments are encouraged to call ahead at (703) 605–4646 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Sam Hotchkiss, Minerals and Geology Management Staff, (703) 605–4852.

SUPPLEMENTARY INFORMATION:

Public Notification and Request for Comments

The Department will make every effort to ensure locatable mineral operators, locatable mineral related organizations and associations, and other interested parties are informed of the availability of the interim rule. In order to ensure the widest distribution, the interim rule shall be distributed by paper copy mailings, e-mail notices, posting on the Forest Service Minerals and Geology Management Staff internet Web site, as well as published notices in local newspapers. Copies of the interim rule will also be provided to the appropriate Congressional Committee members.

Background and Need for Interim Rule

Since 1974, the Forest Service has applied the regulations at 36 CFR part 228, subpart A, to minimize adverse environmental impacts from mineral operations by requiring mineral operators to file proposed plans of operations for mineral operations which the District Ranger determines will likely cause significant surface disturbance to National Forest System (NFS) lands. These regulated operations may include the construction of storage facilities, mills, and mill buildings; placement of trailers or other personal equipment; residential occupancy and use; storage of vehicles and equipment;

excavation of holes, trenches, and pits by non-mechanized procedures; diversion of water; use of sluice boxes and portable devices for separating gold from sediments; off highway vehicle use; road and bridge construction; handling and disposal of mine and other wastes; and signing and fencing to restrict public use of the National Forest area affected by mining. The Forest Service and the courts have consistently required locatable mineral operators to obtain approval of a plan of operations whenever such operations would likely cause a significant surface disturbance whether or not those operations would always involve mechanized earth moving equipment or the cutting of trees. However, last year a District Court departed from this consistent interpretation and ruled that 36 CFR 228.4 (a)(2)(iii) allows a mining operation to occur on NFS lands without prior notification to the Forest Service or Forest Service approval when the operation, irrespective of the impact of its surface disturbing activities, does not involve mechanized earthmoving equipment or the cutting of trees. This unprecedented ruling severely restricts the ability of the Forest Service to regulate miners engaged in surface disturbing operations which have serious environmental impacts although they do not involve mechanized earth moving equipment or the cutting of trees. Moreover, this new interpretation of 36 CFR 228.4 (a)(2)(iii), if left unclarified, will result in significant and unnecessary impacts to NFS lands and resources, including impacts to water quality, visual quality, natural features, species listed under the Endangered Species Act, and conflicts with other National Forest users.

The technical changes contained in this interim rule, for which prior notice and opportunity for public comment is not legally required, are designed to prevent confusion as to the proper interpretation of the regulations. Specifically, the technical amendments clarify the long-standing requirement that a notice of intent and/or plan of operations is mandatory whenever the District Ranger determines that there may be significant surface disturbance to NFS lands and resources, whether or not the operation involves the cutting of trees or use of mechanized earth moving equipment.

Clarification for Submitting a Notice of Intent and a Plan of Operations

The technical amendments to § 228.4(a) clarify the requirement that a notice of intent is mandatory in any situation in which a mining operation causes a surface disturbance, regardless of whether that disturbance is caused by mechanized earth moving equipment or the removal of timber. The technical amendments to § 228.4(a) also seek to eliminate any possible confusion by more specifically addressing the issue of what level of operation requires a notice of intent and what level of operation requires a plan of operations by directing a mining operator to submit a notice of intent to operate when the proposed operation might cause a disturbance to surface resources. After a notice of intent is submitted, the District Ranger determines whether the proposed operations will likely cause a significant disturbance of surface resources. If the determination is that the proposal will likely cause a significant disturbance of surface resources, the operator is notified that a plan of operations is required.

Exemption From Notice and Comment

Prior notice and opportunity for public comment is not required to promulgate technical amendments to a regulation. Moreover, even if the changes to 36 CFR 228.4(a) adopted herein were not technical amendments to that provision, the Administrative Procedure Act (the "APA") allows agencies to promulgate rules without notice and comment when an agency, for good cause, finds that notice and public comment are "impracticable, unnecessary, or contrary to the public interest." (5 U.S.C. 553(b)(3)(B)). Furthermore, the APA exempts certain rulemakings from its notice and comment requirements, including rulemakings involving "public property" (5 U.S.C. 553(a)(2)).

In 1971, Secretary of Agriculture Hardin announced a voluntary partial waiver from the APA notice and comment rulemaking exemptions. (July 24, 1971; 36 FR 13804). Thus, USDA agencies proposing rules generally provide notice and an opportunity for public comment on proposed rules. However, the Hardin policy permits agencies to publish final rules without prior notice and opportunity for public comment when an agency finds for good cause that notice and comment procedures would be impracticable, unnecessary, or contrary to the public interest. The courts have recognized this good cause exception of the Hardin policy and have indicated that since the publication requirement was adopted voluntarily, the Secretary should be afforded "more latitude" in making a good cause determination. *See Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984).

To the extent that 5 U.S.C. 553 applies to this interim rule, good cause exists to exempt this rulemaking from advance notice and comment. (5 U.S.C. 553(b)(B) and 553(d)(3)). There has been widespread dissemination of the district court decision among groups of small miners who have long objected to obtaining prior approval for their mining operations, and who frequently believe that mining operations invariably justify residential occupancy of NFS lands. This, coupled with the fact that the season for locatable mineral operations has already begun in many areas of the country due to favorable weather conditions, including unusually low snow pack levels in much of the west, has resulted in the initiation of many mining operations on NFS lands for which a notice of intent to operate or a plan of operations has always been required without the submission of a notice of intent to operate or the approval of a plan of operations. Consequently, many operations are already ongoing and a much larger number are imminent which will unnecessarily and unjustifiably adversely impact NFS lands and resources, including water quality, visual quality, natural features and species listed under the Endangered Species Act. The only means by which such significant adverse environmental effects can be avoided during this field season for locatable mineral operations is to promulgate the amended rule immediately. Under these circumstances, the Department has determined that prior notice and opportunity for public comment are not practicable and are contrary to the public interest.

Comments received on this interim rule will be considered in adoption of a final rule, notice of which will be published in the **Federal Register**. The final rule will include a response to comments received and identify any revisions made to the rule as a result of the comments.

Regulatory Impact

This interim rule has been reviewed under USDA procedures and Executive Order 12866 on Regulatory Planning and Review. It has been determined that this interim rule is not significant. It will not have an annual effect of $100 million or more on the economy nor adversely affect productivity, competition, jobs, the environment, public health or safety, nor State or local governments. This interim rule would not interfere with an action taken or planned by another agency nor raise new legal or policy issues. Finally, this action will not alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and

obligations of recipients of such programs.

Moreover, this interim rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), and it has been determined that this action will not have a significant economic impact on a substantial number of small entities as defined by that act. Therefore, a regulatory flexibility analysis is not required.

Environmental Impacts

This interim rule more clearly establishes the criteria for determining when a notice of intent to operate or a plan of operations should be submitted by the operator. Section 31.1b of Forest Service Handbook 1909.15 (57 FR 43168; September 18, 1992) excludes from documentation in an environmental assessment or impact statement "rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instruction." This interim rule clearly falls within this category of actions and no extraordinary circumstances exist which would require preparation of an environmental assessment or an environmental impact statement.

Energy Effects

This interim rule has been reviewed under Executive Order 13211 of May 18, 2001, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use." It has been determined that this interim rule does not constitute a significant energy action as defined in the Executive Order.

Controlling Paperwork Burdens on the Public

This interim rule does not contain any new record keeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or not already approved for use. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

Federalism

The agency has considered this interim rule under the requirements of Executive Order 13132, Federalism, and Executive Order 12875, Government Partnerships. The agency has made a preliminary assessment that the interim rule conforms with the federalism principles set out in these Executive orders; would not impose any compliance costs on the States; and would 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. Based on comments received on this interim rule, the agency will consider if any additional consultations will be needed with the State and local governments prior to adopting a final rule.

Consultation and Coordination With Indian Tribal Governments

This interim rule does not have tribal implications as defined by Executive Order 13175, Consultation and Coordination With Indian Tribal Governments, and, therefore, advance consultation with tribes is not required.

No Takings Implications

This interim rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630. It has been determined that the interim rule does not pose the risk of a taking of private property.

Civil Justice Reform

This interim rule has been reviewed under Executive Order 12988 on civil justice reform. If this interim rule were adopted, (1) all State and local laws and regulations that are in conflict with this interim proposed rule or that impedes its full implementation would be preempted; (2) no retroactive effect would be given to this interim proposed rule; and (3) it would not require administrative proceedings before parties may file suit in court challenging its provisions.

Unfunded Mandates

Pursuant to title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), which the President signed into law on March 22, 1995, the agency has assessed the effects of this interim rule on State, local, and tribal governments and the private sector. This interim rule would not compel the expenditure of $100 million or more by any State, local, or tribal government or anyone in the private sector. Therefore, a statement under section 202 of the act would not be required.

List of Subjects in 36 CFR Part 228

Environmental protection, Mines, National forests, Oil and gas exploration, Public lands—mineral resources, Public lands—rights-of-way, Reporting and recordkeeping requirements, Surety bonds, Wilderness areas.

■ Therefore, for the reasons set forth in the preamble, amend part 228 of title 36 of the Code of Federal Regulations as follows:

PART 228—MINERALS

Subpart A—Locatable Minerals

■ 1. The authority citation for part 228 continues to read as follows:

Authority: 30 Stat. 35 and 36, as amended (16 U.S.C. 478, 551); 41 Stat. 437, as amended sec. 5102(d), 101 Stat. 1330–256 (30 U.S.C. 226); 61 Stat. 681, as amended (30 U.S.C. 601); 61 Stat. 914, as amended (30 U.S.C. 352); 69 Stat. 368, as amended (30 U.S.C. 611); and 94 Stat. 2400.

■ 2. Revise § 228.4(a) to read as follows:

§ 228.4 Plan of operations—notice of intent—requirements.

(a) If the District Ranger determines that any operation is causing or will likely cause significant disturbance of surface resources, the operator shall submit a proposed plan of operations to the District Ranger.

(1) Unless the District Ranger determines that an operation is causing or will likely cause a significant disturbance of surface resources, the requirements to submit a plan of operations shall not apply:

(i) To operations which will be limited to the use of vehicles on existing public roads or roads used and maintained for National Forest purposes;

(ii) To individuals desiring to search for and occasionally remove small mineral samples or specimens;

(iii) To prospecting and sampling which will not involve removal of more than a reasonable amount of mineral deposit for analysis and study;

(iv) To marking and monumenting a mining claim; or

(v) To subsurface operations.

(2) Except as provided in this paragraph, a notice of intent to operate is required from any person proposing to conduct operations which might cause disturbance of surface resources. Such notice of intent shall be submitted to the District Ranger having jurisdiction over the area in which the operations will be conducted. Each notice of intent to operate shall provide information sufficient to identify the area involved, the nature of the proposed operations, the route of access to the area of operations, and the method of transport. If a notice of intent is filed, the District Ranger will, within 15 days of receipt thereof, notify the operator whether a plan of operations is required. A notice of intent need not be filed:

(i) Where a plan of operations is submitted for approval in lieu thereof;

(ii) For operations excepted in paragraph (a)(1) of this section from the requirement to file a plan of operations; or

(iii) For operations which will not involve the use of mechanized earthmoving equipment such as bulldozers or backhoes or the cutting of trees, unless those operations otherwise might cause a disturbance of surface resources.

* * * * *

Dated: June 30, 2004.

Mark Rey,

Under Secretary, Natural Resources and Environment.

[FR Doc. 04–15483 Filed 7–8–04; 8:45 am]

BILLING CODE 3410–11–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[HI 001–001a; FRL–7778–5]

Revisions to the Hawaii State Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve a revision to the Hawaii State Implementation Plan (SIP). Under authority of the Clean Air Act as amended in 1990 (CAA or the Act), we are approving an amendment to the Air Quality Surveillance Network.

DATES: This rule is effective on September 7, 2004 without further notice, unless EPA receives adverse comments by August 9, 2004. If we receive such comments, we will publish a timely withdrawal in the **Federal Register** to notify the public that this direct final rule will not take effect.

ADDRESSES: Send comments to Andy Steckel, Rulemaking Office Chief (AIR–4), U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901 or e-mail to *steckel.andrew@epa.gov,* or submit comments at *http://www.regulations.gov.*

You can inspect copies of the submitted SIP revision, EPA's technical support document (TSD), and public comments at our Region IX office during normal business hours by appointment. You may also see copies of the submitted SIP revision by appointment at the following locations:

Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, Room B–102, 1301 Constitution Avenue, NW., (Mail Code 6102T), Washington, DC 20460.

Hawaii Department of Public Health, Environmental Protection and Health Services Division, 1250 Punchbowl Street, Honolulu, Oahu, Hawaii 96801.

FOR FURTHER INFORMATION CONTACT: Julie A. Rose, EPA Region IX, (415) 947–4126, *rose.julie@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us" and "our" refer to EPA.

Table of Contents

I. The State's Submittal

A. What Revision Did the State Submit?

The Hawaii Department of Health (HDH) submitted a revision to their air quality surveillance network for particulate matter of 10 microns or less (PM–10).

B. Are There Other Versions of the Network?

The air quality surveillance network was submitted on August 21, 1980 and approved in the **Federal Register** on August 10, 1981.

C. What Is the Purpose of the Submitted Revision?

In accordance with 40 CFR parts 51 and 58, States are required to submit a plan that provides for the establishment of an air quality surveillance system. The system must consist of a network of monitoring stations designated as State and Local Air Monitoring Stations (SLAMS) and National Air Monitoring Stations (NAMS) which measure ambient concentrations of pollutants for which standards have been established. The HDH revised their air quality surveillance network for particulate to accommodate the PM–10 provisions. The ambient particulate samplers were converted to the EPA-approved ambient PM–10 samplers on July 1, 1989 for the SLAMS and on July 1, 1988 for the NAMS. The HDH also committed to keep the descriptions of these networks updated and available to the public.

II. EPA's Evaluation and Action

A. How Is EPA Evaluating the Revision?

This revision updates the State's air quality surveillance network to include PM–10. The network must meet the requirements of 40 CFR parts 51 and 58.

B. Does the Revision Meet the Evaluation Criteria?

This revision is consistent with the relevant policy and guidance regarding air quality surveillance networks.

C. Public Comment and Final Action

As authorized in section 110(k)(3) of the Act, EPA is fully approving the submitted plan revision because we believe they fulfill all relevant requirements. We do not think anyone will object to this approval, so we are finalizing it without proposing it in advance. However, in the Proposed Rules section of this **Federal Register**, we are simultaneously proposing approval of the same submitted plan revision. If we receive adverse comments by August 9, 2004, we will publish a timely withdrawal in the **Federal Register** to notify the public that the direct final approval will not take effect and we will address the comments in a subsequent final action based on the proposal. If we do not receive timely adverse comments, the direct final approval will be effective without further notice on September 7, 2004. This will incorporate these rules into the federally enforceable SIP.

III. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action merely approves State law as meeting Federal requirements and imposes no additional requirements beyond those imposed by State law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This rule also does not have tribal implications because it will 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, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does 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 (64 FR 43255, August 10, 1999). This action merely approves a State rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 7, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

Dated: June 15, 2004.

Wayne Nastri,

Regional Administrator, Region IX.

■ Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart M—Hawaii

■ 2. Section 52.620 is amended by adding paragraph (c)(17) to read as follows:

§ 52.620 Identification of plan.

* * * * *

(c) * * *

(17) The following amendment to the plan was submitted on September 14, 1988, by the Governor's designee.

(i) Incorporation by reference.

(A) Hawaii Department of Health.

(*1*) Section XII, Air Quality Surveillance Network adopted on August 16, 1988.

* * * * *

[FR Doc. 04–15527 Filed 7–8–04; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–1737, MB Docket No. 04–78, RM–10866]

Digital Television Broadcast Service; Ponce, PR

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Siete Grande Television, Inc., substitutes DTV channel 8c for DTV channel 66 at Ponce, Puerto, Rico. *See* 69 FR 19363, April 13, 2004. DTV channel 8c can be allotted to Ponce in compliance with the principle community coverage requirements of section 73.625(a) at reference coordinates 18–02–52 N. and 66–39–16 W. with a power of 50, HAAT of 88 meters and with a DTV service population of 1047 thousand. With this action, this proceeding is terminated.

DATES: Effective August 16, 2004.

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MB Docket No. 04–78, adopted June 18, 2004, and released June 30, 2004. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., CY–B402, Washington, DC, 20554, telephone (202) 863–2893, facsimile (202) 863–2898, or via e-mail *qualexint@aol.com*. The Commission will send a copy of this Report and Order in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, *see* 5 U.S./c,801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Digital television broadcasting, Television.

■ Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.622 [Amended]

■ 2. Section 73.622(b), the Table of Digital Television Allotments under Puerto Rico, is amended by removing DTV channel 66 and adding DTV channel 8c at Ponce.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Division, Media Bureau.

[FR Doc. 04–15637 Filed 7–8–04; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[I.D. 070104K]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Closure of the 2004 Deep-Water Grouper Commercial Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of closure.

SUMMARY: NMFS closes the commercial fishery for deep-water grouper (misty grouper, snowy grouper, yellowedge grouper, warsaw grouper, and speckled hind) in the exclusive economic zone (EEZ) of the Gulf of Mexico. NMFS has determined that the deep-water grouper quota for the commercial fishery will have been reached by July 15, 2004. This closure is necessary to protect the deep-water grouper resource.

DATES: Closure is effective 12:01 a.m., local time, July 15, 2004, until 12:01 a.m., local time, on January 1, 2005.

FOR FURTHER INFORMATION CONTACT: Phil Steele, telephone 727–570–5305, fax 727–570–5583, e-mail *Phil.Steele@noaa.gov.*

SUPPLEMENTARY INFORMATION: The reef fish fishery of the Gulf of Mexico is managed under the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP). The FMP was prepared by the Gulf of Mexico Fishery Management Council and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622. Those regulations set the commercial quota for deep-water grouper in the Gulf of Mexico at 1.02 million lb (463,636 kg) for the current fishing year, January 1 through December 31, 2004.

Under 50 CFR 622.43(a), NMFS is required to close the commercial fishery for a species or species group when the quota for that species or species group is reached, or is projected to be reached, by filing a notification to that effect in the **Federal Register**. Based on current statistics, NMFS has determined that the available commercial quota of 1.02 million lb (463,636 kg) for deep-water grouper will be reached on or before July 15, 2004. Accordingly, NMFS is closing the commercial deep-water grouper fishery in the Gulf of Mexico EEZ from 12:01 a.m., local time, on July 15, 2004, until 12:01 a.m., local time, on January 1, 2005. The operator of a vessel with a valid reef fish permit having deep-water grouper aboard must have landed and bartered, traded, or sold such deep-water grouper prior to 12:01 a.m., local time, July 15, 2004.

During the closure, the bag and possession limits specified in 50 CFR 622.39(b) apply to the harvest or possession of deep-water grouper in or from the Gulf of Mexico EEZ, and the sale or purchase of deep-water grouper taken from the EEZ is prohibited. The prohibition on sale or purchase does not apply to sale or purchase of deep-water grouper that were harvested, landed ashore, and sold prior to 12:01 a.m., local time, July 15, 2004, and were held in cold storage by a dealer or processor.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, finds that the need to immediately implement this action to close the fishery constitutes good cause to waive the requirements to provide prior notice and opportunity for public comment pursuant to the authority set forth in 5 U.S.C. 553(b)(3)(B), as such procedures would be unnecessary and contrary to the public interest. Similarly, there is a need to implement these measures in a timely fashion to prevent an overrun of the commercial quota of Gulf deep-water grouper, given the capacity of the fishing fleet to harvest the quota quickly. Any delay in implementing this action would be impractical and contrary to the Magnuson-Steven Act, the FMP, and the public interest. NMFS finds for good cause that the implementation of this action cannot be delayed for 30 days. Accordingly, under 5 U.S.C. 553(d), a delay in the effective date is waived.

This action is taken under 50 CFR 622.43(a) and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: July 2, 2004.

Alan D. Risenhoover,

Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 04–15547 Filed 7–2–04; 5:01 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 69, No. 131
Friday, July 9, 2004

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 HOUSING AND URBAN DEVELOPMENT

24 CFR Part 570

[Docket No. FR–4699–P–01]

RIN 2506–AC12
HUD–2004–0002

Community Development Block Grant Program Revision of CDBG Eligibility and National Objective Regulations

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would revise the Community Development Block Grant (CDBG) program regulations to clarify the eligibility of brownfields cleanup, development, or redevelopment within existing program eligibility categories. In part, these changes respond to a 1999 statutory direction with respect to brownfields-related eligible activities. In addition, this proposed rule would make changes to CDBG national objectives that relate to brownfields and clarify regulatory language.

The proposed rule would expand the "slums or blight" national objective criteria to include known and suspected environmental contamination, as well as economic disinvestments, as blighting influences. The proposed rule would require grantees to establish definitions of blighting influences and to retain records. In addition, an area slums or blight designation would be required to be redetermined every five years for continued qualification. The proposed rule would include the abatement of asbestos hazards and lead-based paint hazard evaluation and reduction as eligible rehabilitation activities. The proposed rule would eliminate duplicative text concerning the treatment of lead-based paint hazards. Finally, the proposed rule would require that acquisition or relocation must be a precursor to other activities which eliminate specific conditions of blight or physical decay when addressing slums or blight on a spot basis.

DATES: *Comments Due Date:* September 7, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–0500. Communications should refer to the above docket number and title. Facsimile (fax) comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address.

Interested persons are also invited to submit comments electronically through *http://www.epa.gov/feddocket.* Follow the link to "View Open HUD Dockets." Commenters should follow the electronic submission instructions given on that site. A copy of public comments submitted, and, if applicable, other supporting documents, will be available for viewing at that site.

FOR FURTHER INFORMATION CONTACT: Steve Johnson, Director, State and Small Cities Division, Office of Block Grant Assistance, Office of Community Planning and Development, Room 7184, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–7000; telephone (202) 708–1322 (this is not a toll-free number). Hearing-or speech-impaired individuals may access the telephone number listed in this section via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339. Copies of studies mentioned in this rule are available for a fee from HUD User at (800) 245–2691 (a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

While the cleanup and redevelopment of brownfields can be accomplished using any number of categories of eligible activities, qualifying such an activity under the existing criteria concerning the slums or blight national objective has often been confusing and problematic. On May 31, 1994 (59 FR 28176), HUD issued a proposed CDBG Economic Development rule and invited public comment on the concept of broadening the slums or blight national objective criteria to incorporate environmental contamination and economic disinvestment as blighting conditions. Commenters generally supported this concept, but few provided specific recommendations or quantifiable responses to the questions raised in the preamble dealing with the definition of "contamination." When the final CDBG Economic Development rule was published on January 5, 1995 (60 FR 1922), the Department decided to wait until a later date to publish new proposed rules that specifically addressed changes to the slums or blight criteria.

In 1996, HUD consulted with a task force of local officials organized by the U.S. Conference of Mayors to seek new approaches to adding environmental contamination as a blighting influence. The Department also consulted with other federal agencies, including the Environmental Protection Agency (EPA), on the possibility of increasing CDBG grantees' flexibility to undertake environmental remediation.

In 1997, HUD contracted with Research Triangle, Inc., to survey CDBG grantees and report on their familiarity with brownfields issues and their use of CDBG funds to remediate or redevelop brownfields sites. In 1998, HUD contracted with the National Association of Local Government Environmental Professionals (NALGEP) to evaluate the impact of current CDBG regulations on brownfields redevelopment and to present recommendations based on their local government perspective on revising the CDBG program to better deal with brownfields projects. The conclusions of these reports, described in section II of this **SUPPLEMENTARY INFORMATION** section, have been particularly useful to HUD in identifying and developing policy alternatives.

In the Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, 1999 (Pub. L. 105–276, approved October 21, 1998) (FY1999 Appropriations Act), Congress outlined the eligibility of environmental cleanup and economic development activities under the CDBG program. Section 205 of the FY1999 Appropriations Act stated:

> For fiscal years 1998, 1999, and all fiscal years thereafter, States and entitlement communities may use funds allocated under

the community development block grants program under title I of the Housing and Community Development Act of 1974 for environmental cleanup and economic development activities related to Brownfields projects in conjunction with the appropriate environmental regulatory agencies, as if such activities were eligible under section 105(a) of such Act.

In addition, in 1997, HUD's Office of the Inspector General (OIG) issued a report on the use of the national objective criteria for eliminating slums or blight on a spot basis in a specific project. This report recommended that HUD consider revising the criteria to eliminate ambiguity and the possibility for misuse of the spot slums or blight criteria.

With this information, HUD revisited the conceptual approach proposed in the 1994 rule, and now publishes this new proposed rule to allow for additional comment.

II. Changes Proposed by This Rule

Eligible Activities, Generally

HUD has determined that section 205 of the FY1999 Appropriations Act does not add any new eligibility categories to Title I of the Housing and Community Development Act of 1974 (HCDA). The intent of the language is to clarify that costs of environmental remediation, development, or redevelopment of environmentally contaminated sites are indeed eligible costs within the existing categories of eligible activities. Therefore, this proposed rule does not create any new eligibility categories, but would expand the scope of the current description of existing eligible activities in 24 CFR part 570, subpart C, entitled, "Eligible Activities," subpart I, entitled "State Community Development Block Grant Program," and subpart M, entitled "Loan Guarantees," to include environmental remediation, development, or redevelopment of contaminated sites. Other conforming changes are proposed in association with the slums or blight national objective criteria.

It should be noted throughout this rule, that the terms "CDBG funding" and "CDBG programs" refer to, in addition to the Entitlement and State programs, those programs covered by 24 CFR 570.1 (*e.g.*, the Section 108 Loan Guarantee program, the Economic Development Initiative, the Brownfields Economic Development Initiative, the HUD-administered Small Cities and Insular CDBG programs).

CDBG Entitlement Program Eligible Activities

Under this proposed rule, assessment and remediation of sites with known or suspected environmental contamination would be listed as eligible activities under § 570.201(d), which addresses clearance. Development or redevelopment of properties with known or suspected contamination would be specifically identified as eligible under § 570.203, special economic development activities, and § 570.204, special activities by community-based development organizations. The proposed rule would allow for some site assessment costs to be eligible as planning costs, while others may be actual project delivery costs. For example, preliminary studies to determine whether a site is contaminated, the cause of the contamination, and the extent of the contamination, would generally be planning costs. Studies to determine what type or level of remediation must be undertaken to develop a specific property for a specific use would qualify under other eligibility categories as project implementation costs. HUD further proposes to revise § 570.202(a)(3), to make clear that for a private, for-profit business, abatement of asbestos hazards and lead-based paint hazard evaluation and reduction are eligible. This is proposed because elimination of these conditions results in a health and safety benefit to the public. Abatement of these conditions through demolition is also eligible, provided that there is compliance with environmental requirements. HUD also proposes to revise § 570.202(b)(2), to include "improvements" to the list of items eligible for rehabilitation and preservation activities. "Improvements" would be added to maintain greater consistency with the introductory language of § 570.202.

State CDBG Program Eligible Activities

The State CDBG program regulations do not contain a list of eligible activities. Section 570.482 would be revised to clarify that project-specific assessment or remediation of contaminated properties with known or suspected environmental contamination may be considered as eligible under section 105(a)(14), (15), or (17) of the HCDA, as amended. To incorporate this additional language, some minor renumbering of the existing language at § 570.482 would occur. Other sections of the CDBG Entitlement eligible activity regulations that are being revised do not have a counterpart section in the State CDBG program regulations. States have latitude to interpret the eligibility provisions of the HCDA, and of course, may use the CDBG Entitlement program eligibility regulations as interpretive guidance.

Section 108 Loan Guarantee Program Eligible Activities

Section 570.703, which governs eligible activities in the Section 108 Loan Guarantee program, the Economic Development Initiative, and the Brownfields Economic Development Initiative, would be revised to add project-specific assessment and remediation of known or suspected environmental contamination to paragraph (e), which addresses clearance, paragraph (f), which addresses site preparation; and paragraph (l), which addresses public facilities. Each of these eligible activity provisions contains limitations concerning the situations in which they may be used; therefore, incorporating project-specific assessment and remediation into all three paragraphs would increase grantees' flexibility. Language would be added to paragraphs (e) and (f) of § 570.703 to clarify that eligible remediation could include certain environmental assessment costs (as activity delivery costs) that would not be considered as planning costs. Planning costs eligible under § 570.205 are not statutorily eligible under the Section 108 Loan Guarantee program. Historic preservation would be added to paragraph (l), public facilities, of § 570.703. Historic preservation is currently permitted by policy as an eligible form of rehabilitation or reconstruction of a public facility financed under the Section 108 Loan Guarantee Program. The addition of historic preservation to the regulations is intended to give public notice of this policy.

Public Benefit Standards

Economic development projects funded under §§ 570.203 and 570.204 of the CDBG entitlement regulations, and sections 105(a)(14), (15), and (17) of the HCDA, are subject to the public benefit standards regulations found in § 570.209 (for the entitlement CDBG program) and § 570.482 (for the State CDBG program). Note that environmental assessment or remediation work carried out under other eligibility categories of the HCDA or the regulations are not subject to the public benefit standards.

Because treatment and redevelopment of brownfields is one of the administration's major community development initiatives, HUD proposes to add development or redevelopment of environmentally contaminated sites to the list of "important national interest" economic development activities that a grantee may exclude from the aggregate public benefit test. To be excluded from the aggregate

public benefit standards, such an activity must directly involve the economic development of property known to be environmentally contaminated. CDBG-funded activities must either directly pay for the development or redevelopment activities or be an integral precursor activity to development paid for from other sources.

National Objective Standards for Addressing Slums or Blight on an Area Basis

The existing regulations contain four criteria for activities addressing slums or blight on an area basis:

1. The area must meet a state or local definition of a slum, blighted, deteriorated, or deteriorating area.
2. The area must contain a substantial number of deteriorated or deteriorating buildings or the public improvements must be in a general state of deterioration.
3. The assisted activity must address one or more of the conditions that contributed to the deterioration of the area.
4. The recipient must keep records sufficient to document its findings that a project meets the national objective of prevention or elimination of slums or blight.

HUD proposes to significantly expand the second of these criteria. In addition to deteriorated or deteriorating buildings, HUD proposes to expand this criterion to include physical deterioration of improvements on private property. HUD also proposes to include several other factors that recognize economic disinvestment and environmental contamination as blighting influences. These are:

1. Abandonment of properties;
2. Chronic high turnover rates or chronic high vacancy rates in occupancy of commercial or industrial buildings;
3. Significant declines in property values or abnormally low property values relative to other areas in the community; and
4. Known or suspected environmental contamination of properties.

Grantees would be able to "mix and match" these factors. Some individual properties in an area might qualify because of abandonment, others might qualify because of environmental contamination, still others because of building conditions. The expansion of the deteriorating or deteriorated buildings criterion to include physical deterioration of improvements on private property recognizes that certain improvements that are not maintained can have blighting influences. Some examples of this include: Retaining walls that are in a state of disrepair; abandoned industrial equipment on land; or a deteriorated pedestrian bridge. HUD would expect a significant level of deterioration to be present in order to meet this criterion. Situations involving minor deterioration such as cracked sidewalks, chipped paint, or other insignificant items would not meet this criterion.

The rule would refer more generally to "properties" rather than just buildings, as vacant properties may exhibit some of the other proposed blighting influences. Note, however, that two of the criteria specifically relate to conditions of buildings themselves. This proposed rule would retain the existing provision allowing an area to qualify as blighted based on the deterioration of public improvements. This is an alternative, stand-alone criterion that cannot be "mixed and matched" with the other criteria. This latter criterion would be clarified to specify that the deteriorated state of public improvements must exist throughout the designated area, not just on a few blocks or in one corner of an area.

Grantees would be required to establish definitions and retain records to substantiate how the area met the slums or blighted area criteria. Specifically, grantees would be required to define deteriorating or deteriorated buildings or improvements, abandonment of properties, chronic high turnover rates, chronic high vacancy rates, significant declines in property values, abnormally low property values, and environmental contamination. Grantees would also be required to redetermine the slums or blighted area designation every five years and retain documentation to support continued qualification. Grantees would not be required to develop a definition for the existing regulatory standard concerning public improvements in a general state of deterioration, but the recordkeeping requirements would remain in place.

Review of Public Comments and Applicability to This Proposed Rule

In responding to HUD's 1994 proposed rule, several commenters, remarking that vacant properties are an economic disinvestment issue, asked HUD to clarify how many buildings it considers to be a "significant number" of vacant buildings. Current HUD regulations indicate that a "substantial number" of buildings must be deteriorated or deteriorating in a designated area in order to qualify as a slum or blighted area. HUD's policy determinations currently define a "substantial number" to mean at least 25 percent of the buildings in the area, unless State law specifies some other minimum. These policy determinations are contained on page 3–35 of the *Guide to National Objectives and Eligible Activities for Entitlement Communities* and on page 3–41 of the *Guide to National Objectives and Eligible Activities for the State CDBG Program.* Since this rule would recognize a wider range of blighting influences, HUD also proposes to require that a higher percentage, 33 percent, of properties in an area meet one or more of these conditions.

Several commenters on the 1994 proposed rule also asked HUD to clarify what it considers to be an "unusually high" turnover rate. To maintain grantee flexibility, HUD does not propose to quantify what constitutes chronic "high" turnover or "high" vacancy rates or "significant declines" in property values. Lease turnover rates and property values change over time and vary greatly around the country and even within a city.

Other comments responding to the 1994 proposed rule urged HUD to simply accept local certifications or determinations that an area is blighted, eliminating any additional test concerning property conditions, or to allow vacant or undeveloped land as evidence of blight. The preamble to CDBG entitlement regulations issued in September 1983 noted that the criteria in State laws are often broadly or vaguely defined and that areas could meet many State definitions despite the lack of "objectively determinable signs of blight" (which are required by the HCDA). The Federal statute sets a higher standard than is either intended or required under some State laws, which have broader purposes. Some States' laws, for example, include such conditions as "inappropriately zoned land" or "underdeveloped" land.

Although the Department proposes to allow recipients to establish the definitions of blighting influences, as described previously, HUD does not accept inappropriate zoning or the presence of vacant or undeveloped land as prima facie evidence of blighted conditions and holds to the higher standard set by the HCDA. Similarly, HUD does not accept the lack of certain public facilities in an area as equating to public facilities being in a general state of deterioration. Finally, with regard to environmental contamination, HUD strongly believes that certain widespread, generalized types of pollution, such as air pollution or non-point pollution of surface waters in the

public domain, should not be considered to be blighting influences and would object to local definitions that contained these factors.

National Objective Standards for Addressing Slums or Blight on a Spot Basis

The existing national objective criterion under the CDBG regulations for addressing slums or blight on a spot basis allows a limited number of activities to be undertaken to address spot conditions of blight or decay outside of a designated blighted area. This proposed rule would add remediation of environmental contamination and rehabilitation of improvements to the list of activities that may be undertaken using the spot slums or blight criterion. Under this criterion, rehabilitation is limited to eliminating specific conditions detrimental to public health and safety. Given the health risks associated with environmental contaminants (including lead-based paint and asbestos), rehabilitation activities involving the evaluation and reduction of lead-based paint hazards or abatement of asbestos can qualify under this criterion as eliminating conditions detrimental to public health and safety.

An additional change unrelated to environmental contamination is proposed for the spot slums or blight national objective criterion. HUD's OIG has expressed concern about the current list of activities that may be undertaken to address the spot slums or blight national objective criterion. Activities such as acquisition or relocation may be undertaken with CDBG or section 108 Loan Guarantee funds pursuant to this criterion, but if no other rehabilitation or redevelopment activity occurs, OIG questioned how the acquisition or relocation by itself eliminates conditions of decay or blight.

In this proposed rule, acquisition and relocation would continue to be eligible spot slums or blight-addressing activities, but only when they are a precursor to other activities that directly eliminate the conditions of blight or physical decay. The other development activities that actually address the blighting conditions would not have to be funded with funds from the CDBG program, Section 108 Loan Guarantee program, Economic Development Initiative, or Brownfields Economic Development Initiative. However, "stand-alone" acquisition of a property or relocation of occupants, with no further action to rehabilitate, redevelop, or demolish the building, would no longer qualify as meeting the spot slums or blight national objective. HUD believes this restriction would affect only a few potential projects. HUD particularly requests comments regarding specific situations (including those to address health and safety) where such stand-alone activities should be authorized as an activity that addresses slums or blight on a spot basis where the activity is not a precursor to an actual remedial activity.

Defining Environmental Contamination Pursuant to Changes to National Objectives and Eligibility Criteria

In developing this proposed rule, HUD grappled with several issues: Should HUD define the types of environmental contamination that may be considered blighting influences? Should the rule specify some level of contamination that should be present? Should HUD refer to other Federal or State programs' statutory or regulatory definitions of levels and types of environmental contamination or of the term "brownfields"? Are state definitions and priority listings of contaminated sites (where they exist) sufficiently comparable to Federal provisions to provide reasonable evidence of blighting conditions? HUD's studies and consultations discussed in the Background section of this proposed rule pointed out several difficulties in trying to address these issues, which include the following:

1. HUD has neither the statutory responsibility nor the technical expertise to define levels or types of environmental contamination.

2. Referring to other State or Federal laws or regulations, such as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (Superfund Act) (42 U.S.C. 9601) would cause problems. In addition, as to CERCLA, HUD has discussed that statute's recently added definition of brownfields with EPA and has learned that some parts of the definition apply only to certain EPA programs, or other limited circumstances, and do not make sense in the context of administering CDBG assistance. To incorporate by reference a list of highly technical regulations or statutes governing other programs could be confusing to grantees.

3. Other Federal laws have different statutory purposes and limitations and may exclude certain categories of contaminants.

4. There are great variations among State laws and State-established remediation programs, where they exist at all. What might be allowable in one State might not be covered in another state.

5. Some other Federal programs (notably Superfund) are designed to deal only with the most severe cases of contamination. The CDBG program is not intended to compete with programs such as Superfund in addressing severe contamination cases. The CDBG program is likely to be most effective in addressing situations involving lower levels of contamination, or sites not eligible for treatment under programs like Superfund.

6. Some remediation-related activities may be eligible for funding under other Federal programs, but not qualify for CDBG program funding. For example, Superfund money may be used to relocate occupants away from contaminated sites or to fence off a site. The slums or blight national objective requires that activities qualifying under these criteria address the conditions that led to the designation as blighted. HUD does not consider using CDBG funds simply to fence off a contaminated site to have addressed the blighting condition because the contamination remains and is still a blighting influence, even though residents are prevented from coming into direct contact with the contamination.

Under this proposed rule, grantees are responsible for determining what constitutes a contaminated property within their program and for establishing definitions for their program. As discussed previously, HUD would object to including certain generalized types of contamination in these definitions.

Known Versus Suspected Contamination

The NALGEP study recommended that the provisions of this rule not be limited to sites where environmental contamination is already known to exist. HUD accepts this recommendation. Fear of the unknown can be a powerful force for disinvestment, and a powerful disincentive to development. If a site is suspected of being contaminated, it can be a blighting influence whether or not it has been factually proven to be contaminated. HUD uses the term "known or suspected contamination" in this rule to convey this concept. However, the Department expects that a grantee will have some legitimate reason for suspecting that a site is contaminated, based on known prior uses, preliminary site studies, or proximity to sites already known to be contaminated with mobile contaminants.

Site assessment costs for a site where contamination is suspected may qualify under the proposed slums or blight

national objective criteria. Where preliminary assessments determine that a site is indeed contaminated, additional activities funded under CDBG, Section 108 Loan Guarantee program, the Brownfields Economic Development Initiative, and the Economic Development Initiative to remediate the contamination may qualify under the slums or blight criteria, either by themselves or in conjunction with further development or redevelopment activities. On the other hand, if preliminary assessments conclude that the site is in fact not contaminated, a grantee would not be able to qualify further development activities under the slums or blight criteria solely on the basis that suspected contamination is a blighting influence. Once a site is determined to be uncontaminated, it would be inappropriate to continue to claim that the unfounded perception of contamination is a blighting influence. Further development or redevelopment activity may, however, qualify under another national objective.

Compliance With Other Environmental Requirements Pursuant to Changes to National Objectives and Eligibility Criteria

HUD closely examined the language in the FY 1999 Appropriations Act concerning the eligibility of brownfields projects "in conjunction with the appropriate environmental regulatory agencies." HUD does not believe Congress intended this to mean that a grantee must undertake special, separate consultations with other environmental regulatory agencies prior to using CDBG funds for such a project. Further, HUD does not believe this means that such activities would be eligible for CDBG funding only if other Federal funding sources are financially participating in the activity. Rather, this language serves as a reminder that cleanup, development, or redevelopment of environmentally contaminated sites using CDBG funds must be undertaken in compliance with applicable environmental laws, regulations, procedures, and standards concerning the treatment of contaminated properties. The CDBG grantee may well need to consult with applicable Federal, State, or local regulatory agencies with respect to environmental compliance. The HCDA, the CDBG regulations, and other HUD regulations concerning environmental protection already require grantees to comply with and certify compliance with all applicable environmental laws. Therefore, HUD has determined that no additional regulatory language is needed specifically to require grantees to comply with all applicable environmental laws.

Request for Specific Public Comments on Additional Reporting in IDIS

In addition to soliciting public comments generally, the Department is seeking specific comments about a potential change in the Integrated Disbursement and Information System (IDIS) that would assist in assessing the extent to which communities use CDBG funding for brownfields related activities. IDIS is the draw down and reporting system for four HUD formula grant programs: CDBG, HOME, Emergency Shelter Grants Program (ESG), and Housing Opportunities for Persons with AIDS (HOPWA). The system allows grantees to request their grant funding from HUD and report on what is accomplished with these funds.

HUD is exploring the possibility of adding a data field into IDIS to assess more effectively the amount of CDBG funds that grantees use for brownfields. This would allow the Department to aggregate accomplishments and better analyze this program's efforts in responding to grantees' brownfields needs.

III. This Proposed Rule in Summary

This proposed rule would revise the CDBG program eligibility regulations in subparts C, I, and M, of 24 CFR part 570. These sections address the Entitlement program, the HUD-Administered Small Cities and Insular CDBG programs; the State CDBG program; the Section 108 Loan Guarantee program, the Brownfields Economic Development Initiative program, and the Economic Development Initiative program.

Specifically, the proposed rule would, among other things, add project-specific assessment and remediation of known or suspected environmentally contaminated sites to the list of eligible activities under § 570.201(d), which addresses clearance; would add evaluation and reduction of lead-based paint hazards and evaluation and abatement of asbestos and other contaminants to the list of eligible rehabilitation activities under § 570.202; would remove § 570.202(f) from the regulatory text as it is duplicative of § 570.202(b)(7)(iv); and would add project-specific assessment and remediation of known or suspected environmentally contaminated sites as eligible under § 570.203 and § 570.204. In addition, the national objective criteria at § 570.208 (b)(1)(ii) would be expanded to include as blighting influences the physical deterioration of improvements, known or suspected environmental contamination, and other economic disinvestments. Grantees would be required to establish certain definitions and maintain records. In addition, the proposed rule would require that the overall slums or blighted designation be redetermined every five years for continued qualification. Areas designated less than five years prior to the effective date of the final rule would be required to be redetermined on the five-year anniversary of the original designation using the criteria in effect at that time of the redetermination. Any area designated more than five years before must be redetermined before any additional funds are budgeted for new or existing activities.

The activities to address slums or blight on a spot basis would be revised to indicate that acquisition or relocation must be a precursor to other activities that directly eliminate specific conditions of blight or physical decay.

HUD proposes that the treatment, development, or redevelopment of brownfields, one of the administration's major community development initiatives, be placed on the list of "important national interest" activities found in § 570.209(b)(2)(v) and § 570.482(f)(3)(v), thereby allowing grantees to exclude these activities from the aggregate public benefit test.

Sections 570.482–483 would be revised to reflect changes in the State program pursuant to the expansion of the national objective criteria and to require grantees to establish certain definitions and maintain records. In addition, the proposed rule would require that the overall slums or blighted designation be redetermined every five years for continued qualification.

Areas designated less than five years prior to the effective date of the final rule would be required to be redetermined on the five-year anniversary of the original designation using the criteria in effect at the time of the redetermination. Any area designated more than five years prior to the effective date must be redetermined before any additional funds are budgeted for new or existing activities.

As with the Entitlement program, the State regulations would be revised to indicate that acquisition or relocation must be a precursor to other activities that directly eliminate specific conditions of blight or physical decay when addressing slums or blight on a spot basis. Finally, § 570.703, which addresses eligible activities under the Section 108 Loan Guarantee program and the related EDI and BEDI programs, has been revised to add historic

preservation, project-specific assessment, and remediation of known or suspected environmentally contaminated sites to the list of eligible activities.

IV. Findings and Certifications

Public Reporting Burden

The information collection requirements contained in this proposed rule have been 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 numbers 2506–0077 and 2506–0085. 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.

Although the information collections under this proposal have been approved by OMB, HUD invites interested parties to submit comments on the information collection requirements in this proposed rule.

Environmental Impact

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4223). The Finding of No Significant Impact is available for public inspection weekdays between the hours of 8 a.m. and 5 p.m. in the Office of the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–0500.

Impact on Small Entities

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule before publication and, by approving it, certifies that this rule does not have a significant economic impact on a substantial number of small entities. There are no anti-competitive discriminatory aspects of the rule with regard to small entities and there are not any unusual procedures that need to be complied with by small entities. Although HUD has determined that this proposed rule does not have a significant economic impact on a substantial number of small entities, HUD invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in the **SUPPLEMENTARY INFORMATION**.

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 proposed 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 on the private sector. This proposed rule does not impose a Federal mandate on any State, local, or tribal government, or on the private sector, within the meaning of the Unfunded Mandates Reform Act of 1995.

Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866, entitled "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 made to the rule as a result of that review are identified in the docket file, which is available for public inspection in the office of the Department's Rules Docket Clerk, Office of General Counsel, Room 10276, 451 Seventh Street, SW., Washington, DC 20410–0500.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance (CFDA) program numbers applicable to the various components of the CDBG program are: 14.218, Entitlement program; 14.219, HUD-Administered Small Cities program; 14.225, Insular Areas program; 14.228, State program; 14.248, Section 108 Loan Guarantee program; and 14.246, Community Development Block Grants Economic Development Initiative.

List of Subjects in 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 proposes to amend 24 CFR part 570 to read as follows:

PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS

1. The authority citation for 24 CFR part 570 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 5302–5320.

2. Section 570.201 is amended by revising paragraph (d) to read as follows:

§ 570.201 Basic eligible activities.

* * * * *

(d) *Clearance and remediation activities.* Clearance, demolition, and removal of buildings and improvements, including movement of structures to other sites and remediation of known or suspected environmental contamination. Demolition of HUD-assisted or HUD-owned housing units may be undertaken only with the prior approval of HUD. Remediation may include project-specific environmental assessment costs not otherwise eligible under § 570.205.

* * * * *

3. Section 570.202 is amended by:

a. Revising paragraph (a)(3) to read as set forth below;

b. Revising paragraph (b)(2) to read as set forth below;

c. Revising paragraph (b)(7)(iv) to read as set forth below; and

d. Removing paragraph (f).

§ 570.202 Eligible rehabilitation and preservation activities.

(a) * * *

(3) Publicly or privately owned commercial or industrial buildings, except that the rehabilitation of such buildings owned by a private for-profit business is limited to improvement to the exterior of the building, abatement of asbestos hazards, lead-based paint hazard evaluation and reduction, and the correction of code violations;

* * * * *

(b) * * *

(2) Labor, materials, and other costs of rehabilitation of properties, including repair directed toward an accumulation of deferred maintenance, replacement of principal fixtures and components of existing structures, installation of

security devices, including smoke detectors and dead bolt locks, and renovation through alterations, additions to, or enhancement of existing structures and improvements, abatement of asbestos hazards (and other contaminants) in buildings and improvements which may be undertaken singly, or in combination;

* * * * *

(7) * * *

(iv) Procedures concerning lead-based paint hazard evaluation and reduction, pursuant to § 570.608.

* * * * *

4. Section 570.203 is amended by revising the introductory paragraph to read as follows:

§ 570.203 Special economic development activities.

A recipient may use CDBG funds for special economic development activities in addition to other activities authorized in this subpart which may be carried out as part of an economic development project. Guidelines for selecting activities to assist under this section are provided at § 570.209. The recipient must ensure that the appropriate level of public benefit will be derived pursuant to those guidelines before obligating funds under this authority. Special activities authorized under this section do not include assistance for the construction of new housing. Activities eligible under this section may include costs associated with project-specific assessment or remediation of known or suspected environmental contamination. Special economic development activities include:

* * * * *

5. Section 570.204 is amended by adding a new sentence following the semicolon at the end of paragraph (a)(2).

§ 570.204 Special activities by Community-Based Development Organizations (CDBOs).

(a) * * *

(2) * * * activities under this paragraph may include costs associated with project-specific assessment or remediation of known or suspected environmental contamination;

* * * * *

6. Section 570.205 is amended by revising the first sentence of paragraph (a)(4)(iv) and adding a new paragraph (a)(4)(viii) to read as follows:

§ 570.205 Eligible planning, urban environmental design and policy-planning-management capacity building activities.

(a) * * *

(4) * * *

(iv) The reasonable costs of general environmental, urban environmental design and historic preservation studies; and general environmental assessment- and remediation-oriented planning related to properties with known or suspected environmental contamination. * * *

* * * * *

(viii) Developing an inventory of properties with known or suspected environmental contamination.

* * * * *

7. Section 570.208 is amended by revising paragraphs (b)(1)(ii), (b)(1)(iii), and (b)(2) to read as follows:

§ 570.208 Criteria for national objectives.

* * * * *

(b) * * *

(1) * * *

(ii) The area also meets the conditions in either paragraph (b)(1)(ii)(A) or (B) of this section:

(A) At least 33 percent of properties throughout the area experience one or more of the following conditions:

(*1*) Physical deterioration of buildings or improvements;

(*2*) Abandonment of properties;

(*3*) Chronic high occupancy turnover rates or chronic high vacancy rates in commercial or industrial buildings;

(*4*) Significant declines in property values or abnormally low property values relative to other areas in the community; or

(*5*) Known or suspected environmental contamination.

(B) The public improvements throughout the area are in a general state of deterioration.

(iii) Documentation is to be maintained by the recipient on the boundaries of the area and the conditions and standards used that qualified the area at the time of its designation. The recipient shall establish definitions of the conditions listed at paragraph (b)(1)(ii)(A) of this section, and maintain records to substantiate how the area met the slums or blighted criteria. The designation of an area as slum or blighted under this section is required to be redetermined every five years for continued qualification. Documentation must be retained pursuant to the recordkeeping requirements contained at § 570.506 (b)(8)(ii).

* * * * *

(2) *Activities to address slums or blight on a spot basis.* The following activities may be undertaken on a spot basis to eliminate specific conditions of blight, physical decay, or environmental contamination which are not located in a slum or blighted area: acquisition; clearance; relocation; historic preservation; remediation of environmentally contaminated properties; or rehabilitation of buildings or improvements. However, rehabilitation must be limited to eliminating those conditions that are detrimental to public health and safety. If acquisition or relocation is undertaken, it must be a precursor to other activities (funded with CDBG or other resources) that directly eliminate the specific conditions of blight or physical decay.

* * * * *

8. Section 570.209 is amended by adding paragraph (b)(2)(v)(N) to read as follows:

§ 570.209 Guidelines for evaluating and selecting economic development projects.

* * * * *

(b) * * *

(2) * * *

(v) * * *

(N) Directly involves the economic development or redevelopment of environmentally contaminated properties.

* * * * *

9. Section 570.482 is amended by:

a. Revising paragraph (c) to read as set forth below:

b. Removing and reserving paragraph (d);

c. Adding paragraph (f)(3)(v)(N) to read as follows

§ 570.482 Eligible activities.

* * * * *

(c) Special eligibility provisions. (1) Microenterprise development activities eligible under section 105(a)(23) of the Housing and Community Development Act of 1974, as amended, (42 U.S.C. 5301 *et seq.*) (the Act) may be carried out either through the recipient directly or through public and private organizations, agencies, and other subrecipients (including nonprofit and for-profit subrecipients).

(2) Provision of public services. The following activities shall not be subject to the restrictions on public services under section 105(a)(8) of the Act:

(i) Support services provided under section 105(a)(23) of the Act, and paragraph (c) of this section;

(ii) Services carried out under the provisions of section 105(a)(15) of the Act, that are specifically designed to increase economic opportunities through job training and placement and other employment support services, including, but not limited to, peer support programs, counseling, child care, transportation, and other similar services; and

(iii) Services of any type carried out under the provisions of section 105(a)(15) of the Act pursuant to a

strategy approved by a State under the provisions of § 91.315(e)(2) of this title.

(3) Environmental cleanup and economic development or redevelopment of contaminated properties. Remediation of known or suspected environmental contamination may be undertaken under the authority of section 205 of Public Law 105–276 and section 105(a)(4) of the Act. Economic development activities carried out under sections 105(a)(14), (a)(15) or (a)(17) of the Act may include costs associated with project-specific assessment or remediation of known or suspected environmental contamination.

* * * * *

(f) * * *

(3) * * *

(v) * * *

(N) Directly involves the economic development or redevelopment of environmentally contaminated properties.

* * * * *

10. Section 570.483 is amended by revising paragraphs (c)(1)(ii), (c)(1)(iv), and (c)(2) to read as follows:

§ 570.483 Criteria for national objectives.

* * * * *

(c) * * *

(1) * * *

(ii) The area also meets the conditions in either paragraph (c)(1)(ii)(A) or (c)(1)(ii)(B) of this section.

(A) At least 33 percent of properties throughout the area experience one or more of the following conditions:

(*1*) Physical deterioration of buildings or improvements;

(*2*) Abandonment of properties;

(*3*) Chronic high occupancy turnover rates or chronic high vacancy rates in commercial or industrial buildings;

(*4*) Significant declines in property values or abnormally low property values relative to other areas in the community; or

(*5*) Known or suspected environmental contamination.

(B) The public improvements throughout the area are in a general state of deterioration. * * *

(iv) The State keeps records sufficient to document its findings that a project meets the national objective of prevention or elimination of slums and blight. The State must establish definitions of the conditions listed at paragraph (c)(1)(ii)(A) of this section and maintain records to substantiate how the area met the slums or blighted criteria. The designation of an area as slum or blighted under this section is required to be redetermined every five years for continued qualification. Documentation must be retained pursuant to the recordkeeping requirements contained at § 570.490.

(2) *Activities to address slums or blight on a spot basis.* The following activities can be undertaken on a spot basis to eliminate specific conditions of blight, physical decay or environmental contamination which are not located in a slum or blighted area: Acquisition; clearance; relocation; historic preservation; remediation of environmentally contaminated properties; or rehabilitation of buildings or improvements. However, rehabilitation must be limited to eliminating those conditions which are detrimental to public health and safety. If acquisition or relocation is undertaken, it must be a precursor to other activities (funded with CDBG or other resources) that directly eliminate the specific conditions of blight or physical decay.

* * * * *

11. Section 570.703 is amended by revising paragraph (e), the introductory sentence in paragraph (f), and paragraph (l) to read as follows:

§ 570.703 Eligible activities.

* * * * *

(e) Clearance, demolition, and removal, including movement of structures to other sites, of buildings and improvements on real property acquired or rehabilitated pursuant to paragraphs (a) and (b) of this section; remediation of properties with known or suspected environmental contamination. Remediation may include project-specific environmental assessment costs not otherwise eligible under § 570.205.

(f) Site preparation, including construction, reconstruction, installation of public and other site improvements, utilities or facilities (other than buildings), or remediation of properties (remediation can include project-specific environmental assessment costs not otherwise eligible under § 570.205) with known or suspected environmental contamination, which is:

* * * * *

(l) Acquisition, construction, reconstruction, rehabilitation or historic preservation, or installation of public facilities (except for buildings for the general conduct of government) to the extent eligible under § 570.201(c), and including public streets, sidewalks, other site improvements and public utilities, and remediation of known or suspected environmental contamination in conjunction with these activities. Remediation may include project-specific environmental assessment costs not otherwise eligible under § 570.205.

* * * * *

Dated: June 9, 2004.

Roy A. Bernardi,

Assistant Secretary for Community Planning and Development.

[FR Doc. 04–15634 Filed 7–8–04; 8:45 am]

BILLING CODE 4210–29–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[HI 001–001b; FRL–7778–4]

Revision to the Hawaii State Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a revision to the Hawaii State Implementation Plan (SIP). The revision concerns the air quality surveillance network for particulate matter. We are proposing to approve this revision under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: Any comments on this proposal must arrive by August 9, 2004.

ADDRESSES: Send comments to Andy Steckel, Rulemaking Office Chief (AIR–4), U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901, or e-mail to *steckel.andrew@epa.gov*, or submit comments at *http://www.regulations.gov*.

You can inspect copies of the submitted SIP revisions, EPA's technical support documents (TSDs), and public comments at our Region IX office during normal business hours by appointment. You may also see copies of the submitted SIP revisions by appointment at the following locations:

Hawaii Department of Public Health, Environmental Protection and Health Services Division, 1250 Punchbowl Street, Honolulu, Oahu, Hawaii 96801.

FOR FURTHER INFORMATION CONTACT: Julie A. Rose, EPA Region IX, (415) 947–4126, *rose.julie@epa.gov*.

SUPPLEMENTARY INFORMATION: This proposal addresses the revision to Section XII, Air Quality Surveillance Network for the Hawaii Department of Public Health. In the Rules and Regulations section of this **Federal Register**, we are approving this revision in a direct final action without prior proposal because we believe these SIP revisions are not controversial. If we

receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: June 15, 2004.

Wayne Nastri,

Regional Administrator, Region IX.

[FR Doc. 04–15528 Filed 7–8–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–2004–0091; FRL–7367–8]

Pyridaben: Time-Limited Pesticide Tolerance Extension

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This document proposes the extension of time limited tolerances for the combined residues of tolerances for residues of pyridaben [2-tert-butyl-5-(4-tert-butylbenzylthio)-4-choropyridazin-3(2H)-one] in or on apricot and cherry (sweet and tart) under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA).

DATES: Comments, identified by docket ID number OPP–2004–0091, must be received on or before September 7, 2004.

ADDRESSES: Submit your comments, identified by docket ID number OPP–2004–0091, by one of the following methods:

Federal eRulemaking Portal: *http://www.regulations.gov/*. Follow the on-line instructions for submitting comments.

Agency Website: *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: Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID Number OPP–2004–0091.

Mail: Pyridaben; Time-Limited Pesticide Tolerance Extension, Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number OPP–2004–0091.

Hand delivery: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA, Attention: Docket ID Number OPP–2004–0091. 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 OPP–2004–0091. 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 regulations.gov websites 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 Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. This Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Melody Banks, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5413; fax number: (703) 305–6596; e-mail address: *banks.melody@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply To Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS 111)
- Animal production (NAICS 112)
- Food manufacturing (NAICS 311)
- Pesticide manufacturing (NAICS 32532)

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. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

In addition to using EDOCKET (*http://www.epa.gov/edocket/*), 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 40 CFR part 180 is available at E-CFR Beta Site Two at *http://www.gpoaccess.gov/ecfr/*.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through EDOCKET, 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 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.

C. How Can I Get Copies of This Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under docket identification (ID) number OPP–2004–0091. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket ID number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

II. Background

In the **Federal Register** of January 9, 1998 (63 FR 1456) (FRL–5762–6), EPA issued a notice of filing under section 408(d) of the FFDCA, 21 U.S.C. 346a(d), announcing the filing of a pesticide petition (PP 7F4881) by BASF Corporation, Agricultural Products, P.O. Box 13528, Research Triangle Park, NC 27709. The petition requested that 40 CFR 180.494 be amended by establishing an import tolerance for residues of the insecticide pyridaben [2-tert-butyl-5-(4-tert-butylbenzylthio)-4-chloropyridazin-3(2H)-one], in or on apricot, and cherry (sweet, tart) at at 0.05 parts per million (ppm) for each commodity respectively. This notice included a summary of the petition prepared by BASF Corporation, Agricultural Products, the registrant. There were no comments received in response to the notice of filing. On July 14, 2000 (65 FR 43704) (FRL–6593–1), EPA issued a final rule under section 408(d) of the FFDCA, 21 U.S.C. 346a(d), announcing the establishment of time-limited pesticide tolerances in conjunction to the original pesticide petition (PP 7F4881).

This tolerance was time-limited because the Agency lacked residue data on apricot and cherry (sweet, tart). All residue data has been submitted by BASF Corporation, Agricultural Products, but the Agency has been unable to complete the risk assessment prior to the expiration of the time limited tolerances, and a pending developmental neurotoxicity study is currently being conducted by BASF Corporation, Agricultural Products as required data identified by the Agency (identified in the final rule published in the **Federal Register** on July 14, 2000.) This tolerance extension will permit the Agency to review the developmental neurotoxicity study as part of the risk assessment.

III. Proposal

EPA is proposing to extend the dates of expiration for the time limited tolerances for residues of the insecticide pyridaben [2-tert-butyl-5-(4-tert-butylbenzylthio)-4-chloropyridazin-3(2H)-one], in or on apricot, and cherry (sweet, tart) at at 0.05 parts per million (ppm) for each commodity respectively, from June 30, 2004, to December 31, 2006, to provide the Agency additional time to complete the risk assessments. Subsequent to publication of the final rule described above, the Agency reviewed all available data, and concluded that these import tolerances meet the safety standard in section 408(b)(2)(A)(ii) of FFDCA, and fully discussed in final rule of July 14, 2000.

IV. Statutory and Executive Order Reviews

This proposed rule establishes a tolerance under section 408(d) of the FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this proposed rule has been exempted from review under Executive Order 12866 due to its lack of significance, this proposed 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). This proposed rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). Nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note). Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of the FFDCA, such as the tolerance in this proposed rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. In addition, the Agency has determined that this action will not have a substantial direct effect on 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, entitled *Federalism*(64 FR 43255, August 10, 1999). Executive Order 13132 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 rule directly regulates growers, food processors, food handlers and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of the FFDCA. For these same reasons, the Agency has determined that this proposed rule does not have any "tribal implications" as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). Executive Order 13175, 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 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. Thus, Executive Order 13175 does not apply to this proposed rule.

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: June 30, 2004.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

■ Therefore, it is proposed that 40 CFR chapter I be amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.494 is amended by revising the following commodities in the table in paragraph (a) to read as follows:

§ 180.494 Pyridaben; tolerances for residues.

(a) * * *

Commodity	Parts per million	Expiration/ revocation date
* * *	*	*
Apricot	0.05	12/31/06
* * *	*	*
Cherry, sweet	0.05	12/31/06
Cherry, tart	0.05	12/31/06
* * *	*	*

* * * * *

[FR Doc. 04–15354 Filed 7–8–04; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–1846, MB Docket No. 04–236, RM–11001]

Digital Television Broadcast Service; Fresno, CA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by KSEE Licensee, Inc. proposing the substitution of DTV channel 38 for DTV channel 16 for KSEE–DT at Fresno, California. DTV Channel 38 can be allotted to Fresno,

California, at reference coordinates 37–04–19 N. and 119–25–48 W. with a power of 326, a height above average terrain HAAT of 601 meters.

DATES: Comments must be filed on or before August 23, 2004, and reply comments on or before September 7, 2004.

ADDRESSES: The Commission permits the electronic filing of all pleadings and comments in proceeding involving petitions for rule making (except in broadcast allotment proceedings). *See Electronic Filing of Documents in Rule Making Proceedings,* GC Docket No. 97–113 (rel. April 6, 1998). Filings by paper can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Tom W. Davidson, Akin, Gump, Strauss, Hauer & Feld, LLP, 1333 New Hampshire Avenue, NW., Washington, DC 20036 (Counsel for KSEE License, Inc.).

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 04–236, adopted June 23, 2004, and released July 2, 2004. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC, 20554. This document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, telephone 301–816–2820, facsimile 301–816–0169, or via-e-mail *joshir@erols.com*.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Digital television broadcasting, Television.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.622 [Amended]

2. Section 73.622(b), the Table of Digital Television Allotments under California is amended by removing DTV channel 16 and adding DTV channel 38 at Fresno.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Division, Media Bureau.

[FR Doc. 04–15638 Filed 7–8–04; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

50 CFR Part 17

Fish and Wildlife Service

Endangered and Threatened Wildlife and Plants; 90-Day Finding for Petitions To List the Greater Sage-Grouse as Threatened or Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the public comment period for submitting information that is pertinent to our status review of the greater sage-grouse (*Centrocercus urophasianus*). This status review is to be completed by December 29, 2004, and will provide the basis for a decision on whether the greater sage-grouse should be proposed for listing as a threatened or endangered species and, if so, whether such a proposed listing would be precluded by higher priorities. We initiated the status review on April 21, 2004, based on our finding regarding three petitions to list the species as threatened or endangered, under the Endangered Species Act of 1973, as amended (Act). As a result of that finding, we initiated a status review and solicited information from the public concerning the status of the species and threats to it. We are reopening the comment period to allow all interested parties additional time to submit information. Comments previously submitted need not be resubmitted, because they will be incorporated in the public record as part of this reopened comment period and will be fully considered in our status review.

DATES: You may submit new information concerning this species for our consideration until July 30, 2004.

ADDRESSES: Data, information, comments, or questions concerning this finding should be submitted to the U.S. Fish and Wildlife Service, 4000 Airport Parkway, Cheyenne, Wyoming 82001. The petitions, finding, and supporting information are available for public inspection, by appointment, during normal business hours, at the above address. Submit new information, materials, comments, or questions concerning this species to the Service at the above address.

FOR FURTHER INFORMATION CONTACT: Dr. Pat Deibert, at the address given in the **ADDRESSES** section (telephone (307) 772–2374; facsimile (307) 772–2358).

SUPPLEMENTARY INFORMATION: On July 2, 2002, we received a petition from Craig C. Dremann to list the greater sage-grouse (*Centrocercus urophasianus*) as endangered across its entire range. Mr. Dremann's 7-page petition summarizes several threats to the species' habitat, based on the author's review of the Oregon Bureau of Land Management's management guidelines for the greater sage-grouse (Barett *et al.* 2000). A second petition requesting the same action was received from the Institute for Wildlife Protection on March 24, 2003. On December 29, 2003, we received a third petition from the American Lands Alliance and 20 additional conservation organizations to list the greater sage-grouse as threatened or endangered rangewide. On April 21,

2004, we published in the **Federal Register** (69 FR 21484) a finding that these petitions and additional information available in our files presented substantial information that listing the species may be warranted. We requested in that finding that commenters submit any new information concerning the species to us by June 21, 2004. To ensure that all interested parties have adequate opportunity to provide us with information, we are formally reopening the comment period until July 30, 2004.

Section 4(b)(3)(B) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), requires that, for any petition to revise the List of Threatened and Endangered Species that contains substantial information that listing may be warranted, we make a finding within 12 months of the date of the receipt of the petition on whether the petitioned action is: (a) Not warranted, or (b) warranted, or (c) warranted but that the immediate proposal of a regulation implementing the petitioned action is precluded by other pending proposals to determine whether any species is threatened or endangered, and expeditious progress is being made to add or remove qualified species from the List of Threatened and Endangered Species. We are to base this finding on the best scientific and commercial information available to us at the time we make the finding. Because of the volume and complexity of the information that must be reviewed and considered in time to meet the statutory deadline for the 12 month petition finding, we do not anticipate being able to fully consider any substantive information received after July 30, 2004, and we have structured the public comment period accordingly.

The sage-grouse is the largest North American grouse species. Sage-grouse depend on a variety of shrub-steppe habitats throughout their life cycle, and are particularly tied to several species of sagebrush (Wyoming big sagebrush (*Artemisia tridentata wyomingensis*), mountain big sagebrush (*A. t. vaseyana), and basin big sagebrush (A. t. tridentata*)). Because of the dependence of sage-grouse on sagebrush, they are rarely found outside of this habitat type (typically limited to periods of migration).

Public Information Solicited

We are conducting a review of the status of the species after making a 90-day finding that the petitions provided substantial information indicating that listing the sage-grouse may be warranted. We are requesting information primarily concerning the species' population status and trends, potential threats to the species, and ongoing management measures that may be important with regard to the conservation of the greater sage-grouse throughout the contiguous United States.

Previously submitted comments for this status review need not be resubmitted. If you wish to comment, you may submit your comments and materials concerning this finding to the Field Supervisor (*see* **ADDRESSES** section). Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Respondents may request that we withhold a respondent's identity, as allowable by law. If you wish us to withhold your name or address, you must state this request prominently at the beginning of your comment. However, we will not consider anonymous comments. To the extent consistent with applicable law, 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. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

Comments and materials received, as well as supporting documentation used in preparation of the 90-day finding and the status review of the sage-grouse, will be available for inspection, by appointment, during normal business hours, in our Wyoming Fish and Wildlife Office at the above address.

Authority: The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: July 2, 2004.

Steve Williams,

Director, Fish and Wildlife Service.

[FR Doc. 04–15588 Filed 7–8–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 224

[I.D. 040704A]

Endangered Fish and Wildlife; Advance Notice of Proposed Rulemaking (ANPR) for Right Whale Ship Strike Reduction; Extension of Public Comment Period; Notice of Public Meetings

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meetings and extension of public comment period.

SUMMARY: NMFS is conducting public meetings along the Atlantic coast in association with an ANPR published June 1, 2004, which provided that NMFS is considering regulations to implement a strategy to reduce mortalities to North Atlantic right whales as a result of vessel collisions. The public, as well as Federal, state, and local agencies are encouraged to participate in these meetings. In addition, to ensure the public has adequate time to review and comment on the ANPR, NMFS is extending the comment period on the ANPR until September 15, 2004.

DATES: Written and electronic comments on the ANPR must be received (see **ADDRESSES**) no later than 5 p.m. Eastern Standard Time on September 15, 2004. The public meetings will be held in July and August 2004. See **SUPPLEMENTARY INFORMATION** for specific dates, times, and locations.

ADDRESSES: Comments should be sent to: Chief, Marine Mammal Conservation Division, Attn: Right Whale Ship Strike Strategy, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910. Comments may be sent via fax to (301)427–2522, Attn: Right Whale Ship Strike Strategy. Comments may also be sent via email to *shipstrike.comments@noaa.gov* or to the Federal eRulemaking portal: *http://www.regulations.gov* (follow instructions for submitting comments).

The June 1, 2004, ANPR may be obtained at *www.nmfs.noaa.gov/pr/* under the 'Recent News and Hot Topics' link. Using the drop-down menu, the link 'Ship Strike Strategy' provides access to the ANPR, as well as links to background and supporting documentation related to the proposed strategy.

FOR FURTHER INFORMATION CONTACT: Aleria Jensen, Fishery Biologist, Office of Protected Resources, NMFS, at (301) 713–2322; Pat Gerrior, Fishery Biologist, Northeast Regional Office, NMFS, at (508) 495–2264; or Barb Zoodsma, Fishery Biologist, Southeast Regional Office, NMFS, at (904) 321–2806.

SUPPLEMENTARY INFORMATION: This document provides additional opportunity for public involvement in the development and implementation of a strategy to address the lack of recovery of the endangered North Atlantic right whale by reducing the likelihood and threat of ship strike mortalities to the species. The strategy is described in greater detail in the ANPR published June 1, 2004 (69 FR 30857). In summary, it is a multi-faceted plan that includes potential routing changes, speed reductions, and the use of dynamic management areas as proposed operational measures. In association with the comment period on the ANPR, NMFS is holding five public meetings to present the strategy and solicit information on the development and implementation of the proposed new operational measures. In addition, the agency intends to convene a series of smaller focal group meetings through its regional Right Whale Recovery Implementation Teams to discuss specific stakeholder questions and concerns. Comments received during the ANPR comment period and in associated meetings will assist the agency in subsequent rulemaking decisions about using this methodology to reduce the threat of ship collisions to right whales.

Schedule of Public Scoping Meetings

The dates, times, and locations of the meetings are scheduled as follows:

1. Tuesday, July 20, 2004, 3 to 6 p.m. Tip O'Neill Federal Building, Rm 335 A & B, 10 Causeway Street, Boston, MA 02222.

2. Wednesday, July 21, 2004, 3 to 6 p.m. Jersey City–Newport Courtyard Marriot, 540 Washington Blvd, Jersey City, NJ 07310.

3. Monday, July 26, 2004, 3 to 6 p.m. Hilton Riverside Wilmington, 301 N. Water Street, Wilmington, NC 28401.

4. Tuesday, July 27, 2004, 3 to 6 p.m. Radisson Riverwalk Hotel, 1515 Prudential Drive, Jacksonville, FL 32207–8133.

5. Tuesday, August 3, 2004, 3 to 6 p.m. NOAA Headquarters Science Center, 1315 East West Highway, Silver Spring, MD 20910.

NMFS is also extending the comment period on the ANPR through September 15, 2004, to include public input at the public meetings and to give the public time to comment after attending the meetings.

Special Accommodations

These meetings are physically accessible to people with disabilities. Request for sign language interpretation or other auxiliary aids should be directed to Aleria Jensen at 301–713–2322.

Laurie K. Allen,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 04–15612 Filed 7–8–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 300 and 679

[Docket No. 040607171–4171–01; I.D. 051804C]

RIN 0648–AR88

Pacific Halibut Fisheries; Subsistence Fishing

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations to amend the subsistence fishery rules for Pacific halibut in waters off Alaska. These regulations are necessary to address subsistence halibut management concerns in densely populated areas. This action is intended to be consistent with the conservation and management provisions of the Northern Pacific Halibut Act of 1982 (Halibut Act) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

DATES: Comments must be received no later than August 9, 2004.

ADDRESSES: Send comments to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Lori Durall. Comments may be submitted by:

- Mail: P.O. Box 21668, Juneau, AK 99802.
- Hand Delivery to the Federal Building: 709 West 9th Street, Room 420A, Juneau, AK.
- FAX: 907–586–7557.
- E-mail: *SUBH–0648–AR88@noaa.gov*. Include in the subject line of the e-mail the following document identifier: Subsistence Halibut RIN 0648–AR88. E-mail comments, with or without attachments, are limited to 5 megabytes.
- Webform at the Federal eRulemaking Portal: *www.regulations.gov*. Follow the instructions at that site for submitting comments.

Send comments on collection-of-information requirements to the same address and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503 (Attn: NOAA Desk Officer).

Copies of the categorical exclusion (CE) and regulatory impact review (RIR) prepared for this action and the environmental assessment (EA) prepared for the original subsistence halibut action (68 FR 18145, April 15, 2003) are available from NMFS at the above address or by calling the Sustainable Fisheries Division, Alaska Region, NMFS, at 907–586–7228.

FOR FURTHER INFORMATION CONTACT: Bubba Cook, 907–586–7425 or *bubba.cook@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Background and Need for Action

Management of the Pacific halibut (hereafter halibut) fishery in and off Alaska is based on an international agreement between Canada and the United States. This agreement, titled the "Convention Between United States of America and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea" (Convention), was signed at Ottawa, Canada on March 2, 1953, and amended by the "Protocol Amending the Convention," signed at Washington, D.C., March 29, 1979. The Convention, administered by the International Pacific Halibut Commission (IPHC), is given effect in the United States by the Halibut Act.

Generally, the IPHC develops fishery management regulations governing the halibut fisheries and makes recommendations to the U.S. Secretary of State. When approved, NMFS publishes these regulations in the **Federal Register** as annual management measures. NMFS published the current annual management measures March 7, 2003 (68 FR 10989).

The Halibut Act also provides for the North Pacific Fishery Management Council (Council) to develop halibut fishery regulations, including limited access regulations, in its geographic area of concern that would apply to nationals or vessels of the U.S. (Halibut Act, section 773(c)). Such an action by the Council is limited only to those regulations that are in addition to and

not in conflict with IPHC regulations, and they must be approved and implemented by the U.S. Secretary of Commerce (Secretary). Any allocation of halibut fishing privileges must be fair and equitable and consistent with other applicable Federal law. The Council adopted a subsistence halibut policy in October 2000 to recommend to the Secretary under the authority of the Halibut Act.

The Council does not have a "fishery management plan" (FMP) for the halibut fishery. Hence, halibut fishery management regulations developed by the Council do not follow the FMP or FMP amendment procedures set out in the Magnuson-Stevens Act. Instead, the Council follows a process that requires submission of the Council recommendation to the Secretary as a draft proposed rule for publication in the **Federal Register** along with supporting analyses as required by other applicable law.

The Secretary approved the Council's recommended subsistence halibut policy and published implementing regulations on March 7, 2003, at 68 FR 18145, and codified in 50 CFR 300–Subpart E, authorizing a subsistence fishery for halibut in Convention waters off Alaska. Previously, in an October 2000 action, the Council had incorporated a request to the State of Alaska Board of Fisheries (Board) to review the Council action on subsistence halibut during the Board's normal 2000–2001 cycle and present recommendations to the Council in June 2001. The Board complied with this request, and at that Council meeting, recommended specific restrictions on subsistence gear and harvest limits designed to address localized depletion concerns regarding halibut, rockfish, and lingcod in densely populated and easily accessible areas. In April 2002, the Council unanimously adopted modifications to its original (i.e., October 2000) action to address concerns identified by the Board about the potential local effects of subsistence halibut fishing on halibut and rockfish populations.

Additionally in April 2002, the Council adopted a preferred alternative addressing several cultural and management concerns among the IPHC areas. In areas 4C, 4D, and 4E, the Council proposed the elimination of gear restrictions to correspond with the lack of harvest restrictions. In all other areas, the Council proposed limiting the number of hooks to 3 times the per person hook limit, which in most areas would be 90 hooks. In several subareas within areas 3A and 2C the Council proposed further gear restrictions to address localized depletion and bycatch concerns, reducing the gear limits to as little as 10 hooks and harvest limits to as little as 5 halibut per day. The Council recommended that no proxy system be allowed in any area, but proposed the development of Community Harvest Permits as a mitigation measure. The Council also recommended the creation of Ceremonial and Educational Permits to address cultural concerns.

In October 2003, the Council revisited its previous decision and opted to postpone consideration of some increased restrictions until the completion of the Subsistence Halibut Survey in April 2004. The Council took final action in October 2003, however, on the remainder of the recommended provisions contained in its April 2002 action. Further information on alternatives considered and rejected can be found in the RIR for this action (see **ADDRESSES**).

Specific Elements of the Halibut Subsistence Fishery

Authorized Areas for Subsistence Halibut Harvest

Generally, eligible persons may harvest subsistence halibut in all Convention waters in and off Alaska except for areas designated as one of the four non-subsistence areas. These areas include the Ketchikan non-subsistence area, the Juneau non-subsistence area, the Anchorage/Matsu/Kenai non-subsistence area, and the Valdez non-subsistence area (see Figures 2–5 to Subpart E). In October 2003, the Council reaffirmed its April 2002 recommendation extending the southern boundary of the Anchorage/Matsu/Kenai non-subsistence area to a line extending across the entirety of Cook Inlet along latitude 59°30.40′ N based on the Board's concerns. Consequently, subsistence harvest of halibut would be prohibited in all areas of Cook Inlet north of this boundary (see revised Figure 4 to Subpart E of this proposed rule). The proposed expansion of the Anchorage/Matsu/Kenai non-subsistence area would increase the prohibited area by approximately 1146 square nautical miles or 28.6 percent. The Council took this action to address localized depletion concerns. Increased fishing pressure is expected in this area due to its easy access on the road system.

Legal Gear For Harvesting Subsistence Halibut

The Council recommended eliminating gear restrictions in Areas 4C, 4D, and 4E. The elimination of gear restrictions in these Bering Sea areas is proposed to correspond with the absence of harvest restrictions in those areas. The Council based its decision to relax gear and harvest restrictions on three reasons. First, the annual time period available for subsistence halibut fishing in Areas 4C, 4D, and 4E is reduced because of sea ice coverage. Second, once the sea ice has melted, the potential to fish for subsistence halibut is further reduced because of frequent rough seas and inclement weather. Third, existing regulations impose no daily harvest limit in Areas 4C, 4D, and 4E, so a gear limit without a harvest limit did not make sense.

In other areas the Council recommended increased restrictions. In Areas 3A, 3B, 4A, and 4B, the Council reduced the allowable gear to no more than 3 times the number of hooks on a single unit of gear per trip, provided that a sufficient number of subsistence users are on board the vessel. NMFS interprets the Council's recommendation as a per-person, per-vessel hook limit, which would reduce allowable gear to no more than 90 hooks per vessel on gear set or retrieved during subsistence halibut fishing, provided at least three individual registered subsistence fishers are on board the vessel. In other words, if one registered fisher is on board the vessel, the maximum number of hooks on the gear set or retrieved in the course of fishing would be 30. If two registered fishers are on board, the maximum number of hooks on gear set or retrieved in the course of fishing would be 60. If three or more registered fishers are on board, the maximum number of hooks on gear set or retrieved in the course of fishing would be 90. At no time may the gear used to fish for subsistence halibut exceed 30 hooks per person or 90 hooks per vessel.

The Council recommended the most stringent restrictions in Area 2C primarily to address the perception that halibut fishing effort has increased within the area. The Council proposed superseding the 30–hook-per-person restriction with a 30–hook-per-vessel restriction. The per-vessel restrictions would apply in all of Area 2C. Additional restrictions were suggested for the Low Island area within Sitka Sound in an effort to address gear conflicts among individual user groups. The Council recommended implementing a subsistence longline closure area south of Low Island in waters traditionally used by handline and rod-and-reel fishermen (see revised Figure 1 to Subpart E of this proposed rule).

In response to the concerns of Alaska Native and community groups regarding increased restrictions in Area 2C, the Council recommended a Community Harvest Permit (CHP) Program to mitigate those increased restrictions. The CHP Program allows a community or Alaska Native tribe to select individual harvesters who may possess particular expertise in halibut fishing to harvest halibut on behalf of the community or Alaska Native tribe. Using a CHP in Area 2C would allow the use of the gear restriction described above for Areas 3A, 3B, 4A, and 4B (30 hooks per person up to a maximum of 90 hooks per vessel). Also, a Ceremonial and Educational Permit Program was recommended in Areas 2C and 3A to recognize cultural uses of halibut. Ceremonial and Educational permits maintain the same gear limitations as those required when fishing under a subsistence halibut registration certificate in Areas 2C and 3A (i.e. 30 hooks per vessel in Area 2C and 30 hooks per person or up to 90 hooks per vessel in Area 3A).

Daily Bag Limit

In general, the daily harvest (bag) limit for subsistence halibut outside of Areas 4C, 4D, and 4E, is up to 20 halibut per eligible subsistence fisherman. Existing regulations at § 300.66(h) prohibit mixing halibut harvested from subsistence fishing with halibut harvested from commercial fishing or from sport fishing, except that undersized halibut (i.e. fish less than 32 inches (81.3 cm) in length) may be retained with CDQ halibut in Areas 4D or 4E (§ 300.66(h)). The Council recommended expanding this exception to allow retention of legal size (i.e. 32 inches (81.3 cm) or longer) subsistence halibut along with CDQ halibut. The proposed exception for legal sized halibut would apply only to registered fishers who land their total annual halibut harvest in Areas 4C, 4D, and 4E. The Council allowed this exception to the prohibition of mixing halibut for the same reasons that the existing rule does not impose bag limits in these areas, i.e., limited days at sea and safety concerns.

The Council recommended additional harvest restrictions in Area 2C to correspond with increased gear restrictions. In Area 2C, harvest restrictions would change to 20 halibut per vessel instead of the 20 halibut per person allowed under current regulations (§ 300.65(g)). To mitigate the effects of the increased restrictions in Area 2C, the Council proposed more liberal harvest limits for Alaska Native tribes and communities under the CHP program. Under a CHP, a community or Alaska Native tribe in Area 2C as listed in § 300.65(f)(1) and (f)(2) would be able to appoint up to three individuals to harvest an unlimited number of halibut subject to more stringent application and reporting requirements. Ceremonial and Educational Permits would allow Alaska Native tribes in Areas 2C and 3A as listed in § 300.65(f)(2) to harvest up to 25 halibut per permit. Ceremonial and Educational Permits also require more stringent application and reporting requirements. The 25–fish limit mirrors the harvest restrictions for a similar permit for salmon administered by the U.S. Fish and Wildlife Service.

Relationship to CDQ in Areas 4C, 4D, and 4E

Pacific halibut that are retained and counted against a CDQ allocation are sold and enter commerce. Such halibut do not include those retained for subsistence uses. Currently, CDQ fishermen may retain sublegal halibut in Areas 4D and 4E for subsistence purposes. Prior to the implementation of the current subsistence halibut policy, NMFS allowed the retention of sublegal halibut in Areas 4D and 4E based on the customary and traditional use of sublegal halibut in those areas and because the sublegal halibut are easily distinguishable from legal sized CDQ halibut. Fishermen in Areas 4D and 4E will continue to be able to retain sublegal halibut for subsistence based on their customary and traditional use of those fish. In addition, under this proposed rule, CDQ fishermen would be allowed to retain legal sized subsistence halibut along with their CDQ halibut in Areas 4C, 4D, and 4E if they are in possession of a subsistence halibut registration certificate. As described in the two previous sections, a reduced number of days at sea and safety concerns provide a justification for allowing CDQ fishermen in Areas 4C, 4D, and 4E to retain legal sized halibut for subsistence purposes.

In either case—sublegal or legal sized subsistence halibut—no regulatory need exists to distinguish those fish from CDQ halibut under the proposed regulation. Under existing regulations, halibut does not count against a CDQ allocation until the fish is sold to a processor. At any time before delivering halibut to a processor, a CDQ fisherman who possesses a subsistence halibut registration certificate may decide to keep one or more halibut for his subsistence use out of those fish he intends to sell and count against his CDQ allocation. Typically, subsistence halibut would be withheld prior to transfer of the remaining fish to the processor and, thus, subsistence halibut would not count against a CDQ allocation. As long as a fisherman is in possession of a subsistence halibut registration certificate he may withhold subsistence halibut in this manner. Therefore, no need exists for a regulation stating that subsistence halibut will not count against a CDQ allocation. However, subsistence fishermen would continue to be reminded to not count their CDQ halibut on their annual subsistence halibut survey.

Additionally, because no regulatory need exists to distinguish between subsistence halibut and CDQ halibut for allocation purposes, no need exists to mark fish in any manner while on board the vessel for enforcement purposes. This proposed regulation would impose no harvest or gear restriction for subsistence halibut in Areas 4C, 4D, and 4E, therefore fishermen may use any setline gear, consistent with IPHC regulations, for halibut and may retain as many subsistence halibut on board as they need for subsistence purposes. Moreover, under this proposed regulation, subsistence and CDQ halibut may be retained together in any form consistent with current halibut regulations. Because a fisherman may decide to keep any number of halibut for his subsistence use, marking the fish to distinguish legal size subsistence and CDQ halibut on board a vessel in Areas 4C, 4D, and 4E would constitute a regulatory burden with no corresponding enforcement value.

Application and Reporting for Special Permits

The proposed regulations do not change the existing registration and reporting process for the individual subsistence halibut registration certificate. However, eligible Alaska Native tribes and communities would have to adhere to additional application and reporting requirements under the specialized permits which include Community Harvest Permits (CHP), Ceremonial Permits, and Educational Permits. These specialized permits, issued to specific communities or tribes, are proposed to relieve certain gear and harvest restrictions on persons fishing under them for subsistence halibut. These specialized permits must be on board the vessel while fishing is being conducted. Persons fishing under a specialized permit would be required to also possess a subsistence halibut registration certificate, except that enrolled students fishing under a valid Educational Permit may fish for subsistence halibut without a subsistence halibut registration certificate. Furthermore, the specialized

permits would require additional reporting for halibut harvest. The applications for the proposed specialized permits and additional reporting requirements would be designed to minimize the information collection burden on subsistence halibut fishermen while retrieving essential information. The tribe or community, permit coordinator, and harvester would be held jointly and severally liable for any violations of the regulations governing special permits.

The Restricted Access Management (RAM) Program Office of the Alaska Region, NMFS, would manage the application process for specialized permits. The RAM Program manager would confirm the eligibility of applicants based on the information provided on an application form. If eligible, the applicant would receive the specialized permit for which he or she applied. Compliance with the application and reporting system for all specialized permits would be required because of the liberal harvest requirements under the specialized permits.

CHPs may be issued to Alaska Native tribes, or to eligible rural communities in the absence of a tribe, provided the tribe or community is listed in § 300.65(f)(1) or (f)(2). The information collected in an application for a CHP would include the identity of the community or Alaska Native tribe, the identity of a CHP Coordinator, contact information for the CHP Coordinator, and any previously issued CHP harvest log. To ensure consistent data quality and proper use of the permit, eligible communities and Alaska Native tribes would be limited to only one CHP Coordinator per community or tribe. To allow for the unique nature of each community or tribe, each community or Alaska Native tribe should establish independently the CHP Coordinator appointment process. The CHP would consist of a laminated permit card and a harvest log issued by RAM. An eligible community or Alaska Native tribe may possess only one CHP at any time and the CHP would expire 1 year from the date of issuance.

The CHP Coordinator would maintain possession of the harvest log at all times and issue the CHP permit card to eligible subsistence fishermen when necessary. The eligible subsistence fishermen would return the CHP permit card and report their catch to the CHP Coordinator upon completion of subsistence fishing under the permit. The CHP Coordinator would collect information regarding the halibut harvest in a harvest log. The CHP Coordinator would be required to return the CHP permit card and harvest log together upon expiration. Like any other permit, but distinct from the subsistence halibut registration certificate, a CHP would be a harvest privilege subject to the same limitations as other halibut permits or cards under 50 CFR 679.4(a).

Ceremonial and Educational Permits would be available exclusively to Alaska Native tribes. Ceremonial and Educational Permits would consist of a laminated permit card and a harvest log issued by RAM. Either permit would expire 30 days from its date of issuance and must be returned within 15 days following its expiration regardless of whether halibut were harvested using the permit. However, eligible tribes may apply for additional permits as necessary and may possess multiple permits at any given time. Like the CHP, Ceremonial and Educational Permits are a harvest privilege subject to the same limitations as other halibut permits or cards under 50 CFR 679.4(a).

The information collected in an application for a Ceremonial Permit would be minimized to identify the Alaska Native tribe requesting the permit, a Ceremonial Permit Coordinator, the Ceremonial Permit Coordinator's contact information, the occasion of cultural significance, and any previously issued Ceremonial Permit harvest log. An Educational Permit application would require the name and address of the educational institution or organization, the demonstration of enrollment of qualified students, minimum attendance requirements, standards for successful completion of the educational program, the affiliated Alaska Native tribe, the instructor, the instructor's contact information, and any previously issued Educational Permit harvest log. Additional application criteria for the Educational Permits would ensure that only legitimate educational programs receive the permits. To ensure consistent data quality and proper use of the permit, eligible Alaska Native tribes would be limited to only one Ceremonial Permit Coordinator per tribe and educational programs may appoint only one authorized instructor per program. Once again, to allow for the unique nature of each tribe, NMFS determined the Ceremonial Permit coordinator appointment process should be established independently by each Alaska native tribe.

Appeals

NMFS proposes an appeals process to address denied applications for a CHP, Ceremonial Permit, Educational Permit, or subsistence halibut registration certificate. The suggested appeals process provides a distinct procedure for addressing grievances in an open administrative process. The RAM Program Office would be responsible for issuing an Initial Administrative Decision (IAD) providing the reason for the denial of a special permit or subsistence halibut registration that details deficiencies in the application or any additional provided information. An affected party may appeal an IAD denial to the NMFS Alaska Region Office of Administrative Appeals (OAA) in accordance with 50 CFR 679.43. The Council recommended that the CHP should be revoked if abused subject to appeal. However, the Halibut Act does not provide for permit sanctions and thus, regulations authorized under the Halibut Act cannot authorize permit sanctions. The proposed appeals process would be available to any subsistence halibut fisher seeking relief under 50 CFR part 300.

Restructuring of Regulations

The regulations governing the subsistence halibut fishery and implemented under the Halibut Act authority discussed above are codified at 50 CFR 300 Subpart E. The Council's recommended changes to these regulations would require significant redesignations as indicated in the following table.

Current section and paragraph	*Proposed new location*	*Would there be a change in the text?*
Section 300.65(c) Catch sharing plan and domestic management measures in waters in and off Alaska.	Removed	Existing paragraph (i) (Guideline Harvest Level) would be redesignated as paragraph (c). The Guideline Harvest Level text remains unchanged.
Section 300.66(h) Prohibitions.	Exceptions provided in Section 300.66(h) would be split into paragraphs (h)(1) and (h)(2).	Yes, a new paragraph (h)(2) would be added to reflect an additional exception.
Section 300.66(k) Prohibitions.	Section 300.66(l)	No, but a new paragraph (k) would be added.

To avoid confusion in the amendatory language of each instruction, the full text of each paragraph that would be moved along with proposed revisions is repeated in this proposed rule. No substantive changes are proposed in existing § 300.60–300.62 and 300.64. The only substantive change related to the proposed subsistence halibut action would occur in existing § 300.63 and 300.65–300.66. Although the Guideline Harvest Level provisions of § 300.65 would be redesignated, the substance of those regulations would not change.

NMFS proposes to remove the text of the introductory paragraph preceding paragraph (a) in § 300.63. This removal represents only an editorial change to eliminate repetition in the regulatory text. Removal of the introductory paragraph in § 300.63 in no way changes the rights and obligations imposed by the regulations on regulated parties.

Additionally, NMFS proposes to remove all language addressing the terms, conditions, or other specific details suggested for harvest assessment under the individual subsistence halibut registration certificate. Future subsistence halibut surveys would continue to be voluntary and removing the survey language allows more flexibility in the information collection process. NMFS deemed the increased flexibility of information collection necessary for proper management of halibut stocks.

Classification

This proposed rule contains a collection-of-information requirement subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been submitted to OMB for approval. Public reporting burden for this collection of information is estimated to average 10 minutes per response for each permit application and 30 minutes per response for each harvest log, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Public comment is sought regarding: Whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to NMFS, Alaska Region and to the Office of Information and Regulatory Affairs (see **ADDRESSES**).

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

This proposed rule has been determined to be not significant for purposes of E.O. 12866.

The Council prepared a Regulatory Impact Review (RIR) to assess all costs and benefits of available regulatory alternatives. The Council considered all quantitative and qualitative measures and chose a preferred alternative based on those measures that maximize net benefits to affected communities and Alaska Native tribes under the Subsistence Halibut program.

The Council also prepared an Initial Regulatory Flexibility Analysis (IRFA) for this action that assesses potential impacts on small entities for purposes of the Regulatory Flexibility Act (RFA). Special permits proposed in this rule would impact small entities in the form of small government jurisdictions with fewer that 50,000 residents. Affected small government jurisdictions include 29 rural communities and 19 Alaska Native tribes in Area 2C and 14 rural communities and 19 tribes in Area 3A. The special permits represent the only aspect of the proposed rule that affects small entities. The remainder of the proposed rule bears exclusively on the non-commercial activities of "individuals," which are subsequently excluded from the RFA.

The Council analyzed two alternatives in the IRFA for each special permit under this proposed rule including a no action alternative and the selected preferred alternative. Under the no action alternative, the status quo would be maintained and no special permits would issue to Alaska Native tribes or rural communities under the Subsistence Halibut program. The Council determined that the no action alternative failed to meet the goals of the Subsistence Halibut program to provide for improved safety at sea, recognition and accommodation of traditional Native customs and practices, facilitation of efficient acquisition of subsistence food, reductions in waste and discards, and promotion of halibut conservation. Alternatively, the Council determined that the preferred alternative implementing special permits would provide a means to meet these goals by establishing a system that provides for better harvest assessment and stock monitoring while recognizing the unique character of the Alaska Native tribes and rural communities. The Council analyzed several options within the preferred alternative, including permit methods from analogous applications in other agencies such as special use permits provided by the Bureau of Indian Affairs (BIA) and the National Park Service (NPS). The Council did not select the options provided by the BIA and NPS regulations because those systems provided for more generic resource permitting systems that did not necessarily address subsistence issues. Ultimately, the Council selected a permit system modeled after the U.S. Fish and Wildlife Service's subsistence permit programs because that permit system represented a proven system that corresponded well with the similar subsistence goals of the Subsistence Halibut program.

Since the preferred alternative creates a system that only benefits the affected entities by meeting the goals described above, it likely imposes no "adverse" impacts that require consideration under the RFA. Nonetheless, the Council prepared an IFRA to fulfill the requirements of the RFA, despite the high probability that the proposed rule will not have a substantial adverse effect on a substantial number of small entities as defined by the RFA. Copies of the RIR/IRFA for this proposed rule are available from NMFS. (see **ADDRESSES**).

Detailed information and empirical data about the entities likely subject to regulation by this proposed rule are not presently available for analysis supporting the preparation of a "factual basis" upon which to "certify," under the RFA. However, because the preferred alternative creates a system that only benefits the affected entities by meeting the goals described above, it likely imposes no "adverse" impacts that require consideration under the RFA. Nonetheless, the Council prepared an IFRA to fulfill the requirements of the RFA, despite the high probability that the proposed rule will not have a substantial adverse effect on a substantial number of small entities as defined by the RFA. Copies of the RIR/IRFA for this proposed rule are available from NMFS (see **ADDRESSES**). According to NOAA Administrative Order (NAO) 216–6, including the criteria used to determine significance, this rule would not have a significant effect, individually or cumulatively, on the human environment beyond those effects identified in previous NEPA analysis. An environmental assessment

(EA) (dated January 2003) was prepared for the final rule implementing the original subsistence halibut regulations (68 FR 18145, April 15, 2003). The scope of the EA includes the potential environmental impacts of this proposed rule because the EA analyzed the original subsistence halibut policy, which included analysis of gear and harvest restrictions and their impacts on tribes and rural communities. Based on the nature of the proposed rule and the previous environmental analysis, this proposed rule is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement, in accordance with Section 5.05b of NAO 216–6. Copies of the EA for the original subsistence halibut policy and the categorical exclusion for this action are available from NMFS (see **ADDRESSES**).

List of Subjects

50 CFR Part 300

Fisheries, Pacific halibut.

50 CFR Part 679

Alaska, Determinations and appeals, Fisheries, Recordkeeping and reporting requirements.

Dated: July 1, 2004.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR parts 300 and 679 are proposed to be amended as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

SUBPART E—PACIFIC HALIBUT FISHERIES

1. The authority citation for 50 CFR part 300, subpart E continues to read as follows:

Authority: 16 U.S.C. 773–773k.

§ 300.63 [Amended]

2. In § 300.63, the introductory paragraph preceding paragraph (a) is removed.

3. In § 300.65, paragraph (c) is removed; paragraph (i) is redesignated as paragraph (c); paragraphs (d)(4) and (g) are revised; paragraph (h)(4) is removed; and new paragraphs (i) through (k) are added to read as follows:

§ 300.65 Catch sharing plan and domestic management measures in waters in and off of Alaska.

* * * * *

(c) Guideline harvest level (GHL). (1) The annual GHLs for regulatory areas 2C and 3A are determined as follows.

If the Annual Total Constant Exploitation Yield for Halibut in Area 2C is More Than:	Than the GHL for Area 2C will be:	If the Annual Total Constant Exploitation Yield for Halibut in Area 3A is More Than:	Than the GHL for Area 3A will be:
(i) 9,027,000 lbs. (4094.5 mt)	1,432,000 lbs. (649.5 mt)	21,581,000 lbs. (9,788.9 mt)	3,650,000 lbs. (1655.6 mt)
(ii) 7,965,000 lbs. (3612.9 mt)	1,217,000 lbs. (552.0 mt)	19,042,000 lbs. (8637.3 mt)	3,103,000 lbs. (1407.0 mt)
(iii) 6,903,000 lbs. (3,131.2 mt)	1,074,000 lbs. (496.7 mt)	16,504,000 lbs. (7,485.9 mt)	2,734,000 lbs. (1266.4 mt)
(iv) 5,841,000 lbs. (2,649.4 mt)	931,000 lbs. (447.2 mt)	13,964,000 lbs. (6334.0 mt)	2,373,000 lbs (1,139.9 mt)
(v) 4,779,000 lbs. (2,167.7 mt)	788,000 lbs. (357.4 mt)	11,425,000 lbs. (5,182.3 mt)	2,008,000 lbs. (910.8 mt)

(2) NMFS will publish a notice in the **Federal Register** on an annual basis establishing the GHL for Area 2C and Area 3B for that calendar year within 30 days of receiving information from the Commission which establishes the constant exploitation yield for that year.

(3) If the GHL in either Area 2C or 3A is exceeded, NMFS will notify the Council in writing that the GHL has been exceeded within 30 days of receiving information that the GHL has been exceeded.

(d) * * *

* * * * *

(4) No charter vessel, as defined at 50 CFR 300.61, shall engage in sport fishing, as defined at 50 CFR 300.61, for halibut within Sitka Sound, as defined in paragraph (d)(1)(ii) of this section, from June 1 through August 31.

(i) No charter vessel shall retain halibut caught while engaged in sport fishing, as defined at 50 CFR 300.61, for other species, within Sitka Sound, as defined in paragraph (d)(1)(ii) of this section, from June 1 through August 31.

(ii) Notwithstanding paragraphs (d)(4) and (d)(4)(i) of this section, halibut harvested outside Sitka Sound, as defined in (d)(1)(ii) of this section, may be retained onboard a charter vessel engaged in sport fishing, as defined in 50 CFR 300.61, for other species within Sitka Sound, as defined in paragraph (d)(1)(ii) of this section, from June 1 through August 31.

* * * * *

(g) * * *

(1) * * *

(i) Subsistence fishing gear set or retrieved from a vessel must not have more than 30 hooks per person registered in accordance with paragraph (h) of this section and on board the vessel and shall never exceed 3 times the per-person hook limit except that:

(A) No hook limit applies in Areas 4C, 4D, and 4E.

(B) In Area 2C, subsistence fishing gear set or retrieved from a vessel must not have more than 30 hooks per vessel unless fishing under a CHP pursuant to paragraph (i) of this section.

(C) In Area 2C within the Sitka LAMP from June 1 to August 31, setline gear may not be used in a 4 nautical mile radius extending south from Low Island at 57°00′42″ N. lat., and 135°36′34″ W. long.

(ii) * * *

(iii) * * *

(2) The daily retention of subsistence halibut in rural areas is limited to no more than 20 fish per person on board the vessel that are eligible to conduct subsistence fishing for halibut under paragraph (g) of this section, except that:

(i) No daily retention limit applies in Areas 4C, 4D, and 4E.

(ii) No daily retention limit applies to persons fishing under a community harvest permit (CHP) pursuant to paragraph (i) of this section.

(iii) The total allowable harvest for persons fishing under a Ceremonial or Educational Permit pursuant to paragraph (j) of this section is 25 fish per permit.

(iv) In Area 2C the daily retention limit is 20 fish per vessel.

(3) * * *

(i) * * *

(ii) * * *

(iii) The Anchorage-Matsu-Kenai non-subsistence marine waters area in Commission Regulatory Area 3A (see Figure 4 to subpart E) is defined as: (1) all waters of Cook Inlet north of 59°30.40′ N. lat., except those waters within mean lower low tide from a point one mile south of the southern edge of the Chuitna River (61°05.00′ N.

lat., 151°01.00′ W. long.) south to the easternmost tip of Granite Point (61°01.00′ N. lat., 151°23.00′ W. long.) (Tyonek subdistrict); and (2) all waters of Alaska south of 59°30.40′ N. lat. on the western shore of Cook Inlet to Cape Douglas (58°10′ N. lat.) and in the east to Cape Fairfield (148°50.25′ W. long.), except those waters of Alaska west of a line from the westernmost point of Jakolof Bay (151°31.09′ W. long.) and following the shore to a line extending south from the easternmost point of Rocky Bay (151°18.41′ W. long.);

* * * * *

(i) Community Harvest Permit (CHP). An Area 2C community or Alaska Native tribe listed in paragraph (f)(1) or (f)(2) of this section may apply for a CHP, which allows a community or Alaska Native tribe to appoint one or more individuals from its respective community or Alaska Native tribe to harvest subsistence halibut from a single vessel under reduced gear and harvest restrictions. A CHP is a permit subject to regulation under 50 CFR 679.4(a).

(1) Qualifications. (i) NMFS may issue a CHP to any community or Alaska Native tribe that applies according to paragraph (i)(2) of this section and that is qualified to conduct subsistence fishing for halibut according to paragraph (f) of this section.

(ii) NMFS will issue a CHP to a community in Area 2C only if:

(A) The applying community is listed as eligible in Area 2C according to paragraph (f)(1) of this section.

(B) No Alaska Native tribe listed in paragraph (f)(2) exists in that community.

(iii) NMFS will issue a CHP to an Alaska Native tribe in Area 2C only if the applying tribe is listed as eligible in Area 2C according to paragraph (f)(2) of this section.

(iv) Eligible communities or Alaska Native tribes may appoint only one CHP Coordinator per community or tribe.

(2) Application. A community or Alaska Native tribe may apply for a CHP by submitting an application to the Alaska Region, NMFS. Applications must be mailed to: Restricted Access Management Program, NMFS, Alaska Region, PO Box 21668, Juneau, AK 99802–1668. A complete application must include:

(i) the name of the community or Alaska Native tribe requesting the CHP;

(ii) The full name of the person who is designated as the CHP Coordinator for each community or Alaska Native tribe, the designated CHP Coordinator's mailing address (number and street, city and state, zip code), community of residence (the rural community or residence from 50 CFR 300.65(f)(1)) or the Alaska Native tribe if applicable (as indicated in 50 CFR 300.65(f)(2)), and the daytime telephone number; and

(iii) Any previously issued CHP harvest logs.

(3) Restrictions. Subsistence fishing for halibut under a CHP shall be valid only:

(i) In Area 2C, except that a CHP may not be used:

(A) Within the Sitka LAMP defined in paragraph (d) of this section (see Figure 1 to subpart E)

(B) Within the Juneau and Ketchikan non-rural areas defined in paragraph (g) of this section (see Figures 2 and 3 of subpart E)

(ii) To persons in possession of a valid subsistence halibut registration certificate issued in accordance with paragraph (h) for the same community or Alaska Native tribe listed on the CHP.

(iii) On a single vessel on which the CHP is present.

(4) Expiration of permit. Each CHP will be valid only for the period of time specified on the permit. A CHP will expire one year from the date of issuance to a community or Alaska Native tribe eligible to harvest halibut under paragraph (f) of this section. A community or Alaska Native tribe eligible to harvest subsistence halibut under paragraph (f) of this section may renew its CHP that is expired or will expire within three months by following the procedures described in paragraph (i)(2) of this section.

(5) Duties of the CHP coordinator. Each CHP Coordinator must:

(i) Identify on the Community Harvest Permit harvest log the designated harvesters who may fish under the CHP when the CHP is issued to the designated harvester.

(ii) Maintain possession of the CHP when not in use and issue the CHP to designated harvesters when necessary.

(iii) Perform all required record keeping and data reporting of subsistence harvests under the CHP.

(6) Each Community Harvest Permit harvest log must be submitted to NMFS on or before the date of expiration by facsimile or mail. Harvest logs must be mailed to RAM at the address given in paragraph (i)(2) of this section or faxed to 907–586–7354. The log must provide information on:

(i) The subsistence fisher's identity including his or her full name, subsistence halibut registration certificate number, date of birth, mailing address (number and street, city and state, zip code), community of residence, daytime phone number, and tribal identity (if appropriate);

(ii) The subsistence halibut harvest including whether the participant fished for subsistence halibut during the period specified on the permit, and if so, the date harvest occurred, the number and weight (in pounds) of halibut harvested, the type of gear and number of hooks used, the Commission regulatory area and local water body from which the halibut were harvested, and the number of lingcod and rockfish caught while subsistence fishing for halibut.

(j) Ceremonial Permit or Educational Permit. An Area 2C or Area 3A Alaska Native tribe that is listed in paragraph (f)(2) of this section may apply for a Ceremonial or Educational Permit, allowing the tribe to harvest up to 25 halibut per permit issued. Ceremonial and Educational Permits are permits subject to regulation under 50 CFR 679.4(a).

(1) Qualifications. (i) NMFS may issue a Ceremonial or Educational Permit to any Alaska Native tribe that completes an application according to paragraph (j)(2) of this section and that is qualified to conduct subsistence fishing for halibut according to paragraph (f)(2) of this section.

(ii) Eligible Alaska Native tribes may appoint only one Ceremonial Permit Coordinator per tribe.

(iii) Eligible educational programs may appoint only one authorized Instructor per Educational Permit.

(2) Application. An Alaska Native tribe may apply for a Ceremonial or Educational Permit by submitting an application to the Alaska Region, NMFS. Applications must be mailed to: Restricted Access Management Program, NMFS, Alaska Region, PO Box 21668, Juneau, AK 99802–1668.

(i) A complete application must include:

(A) The name of the Alaska Native tribe requesting the Ceremonial or Educational Permit.

(B) The name of the person designated as the Ceremonial Permit Coordinator for each Alaska Native tribe or the name of the person designated as the Instructor for an Educational Permit, the Ceremonial Permit Coordinator or Instructor's mailing address (number and street, city and state, zip code), and the daytime telephone number.

(C) Any previously issued Ceremonial Permit harvest logs from any expired Ceremonial Permit if applying for a Ceremonial Permit.

(D) Any previously issued Educational Permit harvest logs from any expired Educational Permit if applying for a Educational Permit.

(ii) NMFS will issue a Ceremonial Permit for the harvest of halibut

associated with traditional cultural events only if the application:

(A) Indicates the occasion of cultural or ceremonial significance.

(B) Identifies the person designated by the eligible Alaska Native tribe as the Ceremonial Permit Coordinator.

(iii) NMFS will issue an Educational Permit only if the application:

(A) Includes the name and address of the educational institution or organization.

(B) Includes the instructor's name.

(C) Demonstrates the enrollment of qualified students.

(D) Describes minimum attendance requirements of the educational program.

(E) Describes standards for the successful completion of the educational program.

(3) Restrictions. Subsistence fishing for halibut under Ceremonial or Educational Permits shall be valid only:

(i) In Area 3A, except in the Anchorage-Matsu-Kenai and Valdez non-rural areas defined in paragraph (g) of this section (see Figures 4 and 5 of subpart E)

(ii) In Area 2C, except in the Juneau and Ketchikan non-rural areas defined in paragraph (g) of this section (see Figures 2 and 3 of subpart E) and a Ceremonial Permit may not be used within the Sitka LAMP from June 1 through August 31.

(iii) On a single vessel on which the Ceremonial or Educational Permit is present.

(iv) On the vessel on which the instructor is present for Educational Permits.

(v) To persons in possession of a valid subsistence halibut registration certificate issued in accordance with paragraph (h) for the same Alaska Native tribe listed on the Ceremonial Permit, except that students enrolled in an educational program may fish under an Educational Permit without a subsistence halibut registration certificate.

(4) Expiration of permits. Each Ceremonial or Educational Permit will be valid only for the period of time specified on the permit. Ceremonial and Educational Permits will expire 30 days from the date of issuance to an Alaska Native tribe eligible to harvest halibut under paragraph (f)(2) of this section. A tribe eligible to harvest subsistence halibut under paragraph (f)(2) of this section may apply for additional Ceremonial or Educational Permits at any time.

(5) Duties of Ceremonial Permit Coordinators and Instructors. Each Ceremonial Permit Coordinator or Instructor must:

(i) Identify on the Ceremonial/Educational Permit harvest log the designated harvesters or students who may fish under the Ceremonial or Educational Permit when the permit is used.

(ii) Maintain possession of the Ceremonial Permit when not in use and issue the Ceremonial Permit to designated harvesters when necessary.

(iii) Perform all required recordkeeping and data reporting of subsistence harvests under the Ceremonial or Educational Permit.

(6) Submission of a Ceremonial or Educational Permit log shall be required upon the expiration of each permit and must be received by Restricted Access Management within 15 days of the expiration by facsimile or mail. Harvest logs must be mailed to RAM at the address given in paragraph (j)(2) of this section or faxed to 907–586–7354. The log must provide information on:

(i) The subsistence fisher's identity including his or her full name, subsistence halibut registration certificate number if applicable (students do not need a SHARC), date of birth, mailing address (number and street, city and state, zip code), community of residence, daytime phone number, and tribal identity.

(ii) The subsistence halibut harvest including whether the participant fished for subsistence halibut during the period indicated on the permit, and if so, the date when harvest occurred, the number and weight (in pounds) of halibut harvested, the type of gear and number of hooks used, the Commission regulatory area and local water body from which the halibut were harvested, and the number of lingcod and rockfish caught while subsistence fishing for halibut.

(k) *Appeals.* If Restricted Access Management (RAM) determines that an application is deficient, it will prepare and send an Initial Administrative Determination (IAD) to the applicant. The IAD will indicate the deficiencies in the application or any additional provided information. An applicant who receives an IAD may appeal RAM's findings pursuant to 50 CFR 679.43.

4. In § 300.66, paragraphs (e) and (h) are revised; paragraph (k) is redesignated as paragraph (l), and a new paragraph (k) is added to read as follows:

§ 300.66 Prohibitions.

* * * * *

(e) Fish for subsistence halibut in and off Alaska unless the person is qualified to do so under 50 CFR 300.65(f), possesses a valid subsistence halibut registration certificate pursuant to 50 CFR 300.65(h), and makes this certificate available for inspection by an authorized officer on request, except that students enrolled in a valid educational program and fishing under an Educational Permit issued pursuant to 50 CFR 300.65(j) do not need a subsistence halibut registration certificate.

* * * * *

(h) Retain on board the harvesting vessel halibut harvested while subsistence fishing with halibut harvested while commercial fishing or from sport fishing, as defined at 50 CFR 300.61(b), except that persons authorized to conduct subsistence fishing under 50 CFR 300.65(f), and who land their total annual harvest of halibut:

(1) In Commission regulatory Areas 4D or 4E may retain, with harvests of Community Development Quota (CDQ) halibut, subsistence halibut harvested in Commission regulatory areas 4D or 4E that are smaller than the size limit specified in the annual management measures published pursuant to 50 CFR 300.62; or

(2) In Commission regulatory Areas 4C, 4D or 4E may retain, with harvests of CDQ halibut, subsistence halibut harvested in Commission regulatory areas 4C, 4D or 4E that are equal to or greater than the size limit specified in the annual management measures published pursuant to 50 CFR 300.62.

* * * * *

(k) Retain subsistence halibut harvested under a CHP, Ceremonial Permit, or Educational Permit together in any combination or with halibut harvested under any other license or permit.

(l) Fillet, mutilate, or otherwise disfigure subsistence halibut in any manner that prevents the determination of the number of fish caught, possessed, or landed.

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

1. The authority citation for part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.*; 1801 *et seq.*; and 3631 *et seq.*; Title II of Division C, Pub. L. 105–277; Sec. 3027, Pub. L. 106–31; 113 Stat. 57; 16 U.S.C. 1540(f); and Sec. 209 Pub. L. 106–554.

2. In § 679.4, paragraphs (a)(1) and (a)(2) are revised to read as follows:

§ 679.4 Permits.

(a) * * *

(1) *What permits are available?* Various types of permits are issued for programs codified at 50 CFR parts 300

and 679. These permits are listed in the following table. The date of effectiveness for each permit is given along with certain reference paragraphs for further information.

If program permit or card type is:	*Permit is in effect from issue date through end of:*	*For more information, see...*
* * * * *		
(xi) Special Subsistence Permits		
(A) Community Harvest Permit	1 year	§ 300.65 of this Title
(B) Ceremonial or Educational Permit	30 days	§ 300.65 of this Title

(2) *Permit and logbook required by participant and fishery.* For the various types of permits issued, refer to § 679.5 for recordkeeping and reporting requirements. For subsistence permits, refer to § 300.65 of this chapter for recordkeeping and reporting requirements.

* * * * *

3. In § 679.43, paragraph (a) is revised to read as follows:

§ 679.43 Determinations and appeals.

(a) *General.* This section describes the procedure for appealing initial administrative determinations made under this part 679 and part 300, subpart E of this title.

* * * * *

[FR Doc. 04–15548 Filed 7–8–04; 8:45 am]
BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 69, No. 131
Friday, July 9, 2004

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.

DEPARTMENT OF AGRICULTURE

Forest Service

Public Meetings on the Black Hills National Forest Advisory Board

AGENCY: Forest Service, USDA.

ACTION: Notice of meetings.

SUMMARY: The Black Hills National Forest Advisory Board (NFAB) will hold meetings to become informed about Black Hills National Forest issues and to consider those issues so as to make management recommendations to the forest supervisor. The meetings are open, and the public may attend any part of the meetings.

DATES AND AGENDA ISSUES: Wednesday, July 14, 2004, from 1 to 5 p.m.—Travel Management.

ADDRESSES: Meeting location will be announced in local news media.

FOR FURTHER INFORMATION CONTACT: Frank Carroll, Black Hills National Forest, 25041 North Highway 16, Custer, SD 57730, (605) 673–9200.

Dated: July 2, 2004.

Franklin O. Carroll,

Black Hills National Forest Acting Forest Supervisor.

[FR Doc. 04–15597 Filed 7–8–04; 8:45 am]

BILLING CODE 3410–11–M

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List Proposed Additions

AGENCY: Committee for Purchase from People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to procurement list.

SUMMARY: The Committee is proposing to add to the Procurement List services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

Comments Must be Received on or Before: August 8, 2004.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia, 22202–3259.

FOR FURTHER INFORMATION CONTACT: Sheryl D. Kennerly, (703) 603–7740.

SUPPLEMENTARY INFORMATION:

This notice is published pursuant to 41 U.S.C 47(a) (2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions. If the Committee approves the proposed additions, the entities of the Federal Government identified in the notice for each service will be required to procure the services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the services to the Government.
2. If approved, the action will result in authorizing small entities to furnish the services to the Government.
3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the services proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

End of Certification

The following services are proposed for addition to Procurement List for production by the nonprofit agencies listed:

Services

Service Type/Location: Custodial Services, National Institute of Standards & Technology (NIST), Advanced Measurement Laboratory, Gaithersburg, Maryland.

NPA: Opportunities, Inc., Alexandria, Virginia.

Contract Activity: National Institute of Standards & Technology, Gaithersburg, Maryland.

Service Type/Location: Custodial Services, Quad-Cities Veterans Center, Moline, Illinois.

NPA: Association for Retarded Citizens of Rock Island County, Rock Island, Illinois.

Contract Activity: Veterans Affairs Medical Center, Iowa City, Iowa.

Sheryl D. Kennerly,

Director, Information Management.

[FR Doc. 04–15627 Filed 7–8–04; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List Additions

AGENCY: Committee for Purchase from People Who Are Blind or Severely Disabled.

ACTION: Additions to Procurement List.

SUMMARY: This action adds to the Procurement List products to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

EFFECTIVE DATE: August 8, 2004.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia, 22202–3259.

FOR FURTHER INFORMATION CONTACT: Sheryl D. Kennerly, (703) 603–7740.

SUPPLEMENTARY INFORMATION:

On May 14, 2004, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (69 FR 26805) of proposed additions to the Procurement List. After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the products and impact of the additions on the current or most recent contractors, the Committee has determined that the products listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the products to the Government.

2. The action will result in authorizing small entities to furnish the products to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products proposed for addition to the Procurement List.

End of Certification

Accordingly, the following products are added to the Procurement List:

Products

Product/NSN: Battery Nonrechargeable, Lithium; 6135–01–398–5922; 6135–01–333–6101.
NPA: Eastern Carolina Vocational Center, Inc., Greenville, North Carolina.
Contract Activity: Defense Supply Center Richmond, Richmond, Virginia.
Product/NSN: Glow Plug; 2920–01–188–3863.
NPA: Shares Inc., Shelbyville, Indiana.
Contract Activity: Defense Supply Center Columbus, Columbus, Ohio.

This action does not affect current contracts awarded prior to the effective date of this addition or options that may be exercised under those contracts.

Sheryl D. Kennerly,
Director, Information Management.
[FR Doc. 04–15628 Filed 7–8–04; 8:45 am]
BILLING CODE 6353–01–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Alabama, Arkansas, Louisiana, and Mississippi State Advisory Committees

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a planning and briefing meeting of the Alabama, Arkansas, Louisiana, and Mississippi Advisory Committees will be held at the Radisson Admiral Semmes Hotel, 251 Government Street, Mobile, AL 36602. The planning meeting will convene on Monday, August 23 at 1:30 p.m. and recess at 7 p.m. The public briefing meeting will convene on Tuesday, August 24 at 9 a.m. and adjourn at 12 p.m. The purpose of the meeting is to discuss the briefing transcript from the "Southern Civil Rights Listening Tour and conduct a public briefing meeting on civil rights issues.

Persons desiring additional information, or planning a presentation to the Committees should contact Farella Robinson, Civil Rights Analyst of the Central Regional Office, 913–551–1400 (TDD 913–551–1414). Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Office at least ten (10) working days before the schedule date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, June 23, 2004.

Ivy L. Davis,
Chief, Regional Programs Coordination Unit.
[FR Doc. 04–15629 Filed 7–8–04; 8:45 am]
BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Sunshine Act Notice

AGENCY: U.S. Commission on Civil Rights.

DATE AND TIME: Friday, July 16, 2004, 9:30 a.m.

PLACE: U.S. Commission on Civil Rights, 624 Ninth Street, NW., Rm. 540, Washington, DC 20425.

STATUS:

Agenda

I. Approval of Agenda.
II. Approval of Minutes of April 9, 2004, meeting.
III. Announcements.
IV. Staff Director's Report.
V. "Ten Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations? Volume IV: An Evaluation of the Departments of Education, Health and Human Services, and Housing and Urban Development, and the Equal Employment Opportunity Commission" Report.
VI. "Broken Promises: Evaluating the Native America Health Care System".
VII. "Toward Equal Access: Eliminating Language Barriers from Federal Programs" Report.
VIII. "Funding Federal Civil Rights Enforcement: 2005" Report.
IX. "Closing the Achievement Gap: The Impact of standards-Based Education Reform on Student Performance" Report.
X. State Advisory Committee Report: "City Services and the Justice System: Do Korean American Storeowners in Baltimore, Maryland, Get Equal Treatment?" (Maryland).
XI. Closed Meeting on Personnel Matters.
XII. Future Agenda items.

11 a.m.—Briefing on Voting and Election Reform—Is America Ready to Vote?: Voting Integrity, Accessibility, and Security (Thursday, July 15, 2004).

FOR FURTHER INFORMATION CONTACT: Les Jin, Press and Communications (202) 376–7700.

Debra A. Carr,
Deputy General Counsel.
[FR Doc. 04–15727 Filed 7–7–04; 1:06 pm]
BILLING CODE 6335–01–M

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Sensors and Instrumentation Technical Advisory Committee; Notice of Partially Closed Meeting

The Sensors and Instrumentation Technical Advisory Committee (SITAC) will meet on July 27, 2004, 9:30 a.m., in the Herbert C. Hoover Building, Room 3884, 14th Street between Constitution and Pennsylvania Avenues, NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration on technical questions that affect the level of export controls applicable to sensors and instrumentation equipment and technology.

Agenda

Public Session

1. Opening remarks and introductions.
2. Discussion on distribution licenses.
3. Update on Bureau of Industry and Security initiatives.
4. Update on night vision and thermal imaging industry study.
5. Report on trip to People's Republic of China.
6. Update from laser working group.
7. Discussion on technical parameters and thermal imaging controls.
8. Presentation of papers and comments by the public.

Closed Session

9. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 sections 10(a)(1) and 10(a)(3).

A limited number of seats will be available during the public session of

the meeting. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of public presentation materials to the Committee members, the Committee suggests that the materials be forwarded before the meeting to Ms. Lee Ann Carpenter at *Lcarpent@bis.doc.gov*.

The Assistant Secretary for Administration, with the concurrence of the General Counsel, formally determined on June 15, 2004, pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 section 10(d)), that the portion of this meeting dealing with pre-decisional changes to the Commerce Control List and U.S. export control policies shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 sections 10(a)(1) and 10(a)(3). The remaining portions of the meeting will be open to the public.

For more information contact Lee Ann Carpenter on (202) 482–2583.

Dated: July 6, 2004.

Lee Ann Carpenter,

Committee Liaison Officer.

[FR Doc. 04–15596 Filed 7–8–04; 8:45 am]

BILLING CODE 3510–JT–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–853]

Bulk Aspirin from the People's Republic of China: Notice of Court Decision and Suspension of Liquidation

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On June 29, 2004, the United States Court of International Trade issued a decision invalidating certain sets of liquidation instructions issued by the Department of Commerce in the antidumping proceeding covering entries of bulk aspirin from the People's Republic of China. *Jilin Henghe Pharmaceutical Co. and Jilin Pharmaceutical USA v. United States*, Consol. Court No. 04–00151, Slip. Op. 04–77 (CIT 2004) (''*Jilin Henghe*''). Consistent with the decision of the United States Court of Appeals for the Federal Circuit in *Timken Co. v. United States*, 893 F.2nd 337 (Fed. Cir. 1990) (''*Timken*''), the Department is notifying the public that the *Jilin Henghe* decision was ''not in harmony'' with the Department's amended final determination, or its administrative reviews.

EFFECTIVE DATE: July 9, 2004.

FOR FURTHER INFORMATION CONTACT: Scott Holland or Julie Santoboni, AD/CVD Enforcement Group I, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, DC 20230; telephone: (202) 482–1279 or (202) 482–4194, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 11, 2000, the Department of Commerce (''the Department'') issued an antidumping duty order covering bulk aspirin from the People's Republic of China. *Notice of Antidumping Duty Order: Bulk Aspirin From the People's Republic of China*, 65 FR 42673 (July 11, 2000). Jilin Pharmaceutical Company, now known as Jilin Henghe Pharmaceutical Company (''Jilin'') appealed the final determination and antidumping order, but did not obtain an injunction. *Jilin Pharmaceutical Co., Ltd. v. United States*, No. 00–08–00401, consolidated into *Rhodia, Inc. v. United States*, Consol. No. 00–08–00407, 240 F. Supp. 2d 1247 (CIT 2002).

Jilin requested and received an administrative review of the antidumping order covering its imports that had entered from July 6, 2000 through June 30, 2001. *Bulk Aspirin from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Changed Circumstances Review*, 67 FR 51167 (August 7, 2002); *Notice of Amended Final Results of Antidumping Duty Administrative Review: Bulk Aspirin from the People's Republic of China*, 68 FR 12036 (March 13, 2003) (''*Amended First Review*''). Similarly, for the second period of review, Jilin requested and received an administrative review of the antidumping duty order covering its imports that had entered from July 1, 2001 through June 30, 2002. *Bulk Aspirin from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 68 FR 17343 (April 9, 2003); *Notice of Amended Final Results of Antidumping Duty Administrative Review: Bulk Aspirin from the People's Republic of China*, 68 FR 54890 (September 19, 2003) (''*Amended Second Review*'').

The CIT affirmed the Department's Final Results of Redetermination on September 9, 2002. *See Rhodia Inc. v. United States*, 240 F. Supp. 2d 1247 (CIT 2002) (''*Rhodia II*'').

On September 30, 2002, Commerce published a notice of Court decision. *Bulk Aspirin from the People's Republic of China: Notice of Court Decision and Suspension of Liquidation*, 67 FR. 61315 (September 30, 2002) (''*Aspirin Timken*''); *see also Rhodia, Inc. v. United States*, 185 F. Supp. 2d 1343 (CIT 2001). As a result of the remand redetermination, Jilin Henghe was excluded from the antidumping order. *See Redetermination Pursuant to Court Remand, Rhodia, Inc. v. United States and Jilin Pharmaceutical Co., Ltd.; Shandong Xinhua Pharmaceutical Factory, Ltd*, Consol. Court No. 00–08–00407 (March 29, 2002).

The domestic producer, Rhodia, appealed this Court's decision to the United States Court of Appeals for the Federal Circuit (''Federal Circuit''). On October 14, 2003, the CIT's decision was affirmed by the Federal Circuit. *See Rhodia Inc. v. United States*, 2003 U.S. App. LEXIS 21424 (Fed. Cir. Oct. 14, 2003) (*Rhodia II* aff'd without opinion). At the conclusion of the appeal, the Department published an amended final determination and an amended order which excluded Jilin from the antidumping duty order, effective September 30, 2002. Notice of Amended Final Determination and Amended Order Pursuant to Final Court Decision: Bulk Aspirin from the People's Republic of China, 68 FR 75208 (December 30, 2003) (''Amended Final Determination and Order'').

The domestic producer requested a review of Jilin's entries during the third period of review, but it subsequently withdrew its request for a review of Jilin. The Department rescinded the review with respect to Jilin. *Bulk Aspirin from the People's Republic of China: Notice of Partial Rescission of Antidumping Duty Administrative Review*, 69 FR 5126 (February 3, 2004) (''*Partial Rescission Notice*''). Accordingly, the Department instructed U.S. Customs and Border Protection (''CBP'') to liquidate Jilin's entries from July 1, 2002 through September 29, 2002 (i.e., from the beginning of the third administrative review period through the Department's publication of the *Aspirin Timken*) at the cash deposit rate required at the time of entry. *Partial Rescission Notice* at 5127.

On April 14, 2004, Jilin and Jilin USA filed their complaint, challenging the Department's liquidation instructions to CBP that covered entries produced and exported by Jilin and imported by Jilin USA. On June 29, 2004, the CIT found that the instructions issued pursuant to

the *Amended Final Determination and Order*, the automatic liquidation instructions issued after the rescission of the third period of review with respect to Jilin, and the liquidation instructions issued pursuant to the first and second administrative reviews, were not in accordance with law, and ordered that any Jilin unliquidated entries of bulk aspirin be liquidated without regard to antidumping duties. *See Jilin Henghe*.

Timken Notice

In its decision in *Timken*, the Federal Circuit held that, pursuant to 516a(c)(1) and (e) of the Act, the Department must publish notice of a decision of the CIT which is not in harmony with the Department's determination. The CIT's decision in *Jilin Henghe* was not in harmony with the Department's *Amended Final Determination and Order, Amended First Review*, or *Amended Second Review*. Therefore, publication of this notice fulfills the statutory obligation.

Suspension of Liquidation

This notice will serve to continue the suspension of liquidation pending the expiration of the period to appeal the CIT's June 29, 2004, decision, or, if that decision is appealed, pending a final decision by the Federal Circuit. Because the CIT issued a temporary restraining order on April 27, 2004, which the CIT continued in a preliminary injunction, the Department will continue to suspend entries of bulk aspirin from the People's Republic of China that: (1) were produced and exported by Jilin, and imported by Jilin USA; (2) were entered or withdrawn from warehouse, for consumption, from July 6, 2000 through September 29, 2002; (3) were subject to the determinations in the *Amended First Review*, the *Amended Second Review*, and the *Amended Final Determination and Order*; and (4) remain unliquidated as of April 27, 2004. The Department will issue liquidation instructions covering these entries if the CIT's decision is not appealed, or if it is affirmed on appeal.

Dated: July 2, 2004.

Jeffrey A. May,

Acting Assistant Secretary for Import Administration.

[FR Doc. 04–15636 Filed 7–8–04; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 070204B]

Mid-Atlantic Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meeting.

SUMMARY: The Joint Mid-Atlantic Fishery Management Council (MAFMC) and the AtlanticStates Marine Fisheries Commission's (ASMFC) Summer Flounder, Scup, and Black Sea Bass Industry Advisors will hold a public meeting.

DATES: The meeting will be held on Tuesday, July 27, 2004, from 10 a.m. until 4 p.m.

ADDRESSES: The meeting will be held at the Renaissance Philadelphia Airport, 500 Stevens Drive, Lester, PA 19113; telephone: 610–521–5900.

MAFMC/ASMFC addresses: MAFMC, Room 2115, 300 S. New Street, Dover, DE 19904. ASMFC, 1444 Eye Street, NW, 6th Floor, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Daniel T. Furlong, Executive Director, Mid-Atlantic Fishery Management Council; telephone: 302–674–2331, ext. 19. Vince O'Shea, Executive Director, ASMFC, telephone 202–289–6400.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is to discuss the proposed 2005 commercial management measures for summer flounder, scup, and black sea bass.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Debbie Donnangelo at the Council Office (see **ADDRESSES**) at least five days prior to the meeting date.

Dated: July 6, 2004.

Alan D. Risenhoover,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E4–1511 Filed 7–8–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 070204A]

Mid-Atlantic Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meetings.

SUMMARY: The Mid-Atlantic Fishery Management Council's Summer Flounder Monitoring Committee, Scup Monitoring Committee, Black Sea Bass Monitoring Committee, and Bluefish Monitoring Committee will hold public meetings.

DATES: The meeting will be held on Monday, July 26, 2004, beginning at 10 a.m.

ADDRESSES: The meeting will be held at the Renaissance Philadelphia Airport, 500 Stevens Drive, Lester, PA 19113; telephone: 610–521–5900.

Council address: Mid-Atlantic Fishery Management Council, Room 2115, 300 S. New Street, Dover, DE 19904.

FOR FURTHER INFORMATION CONTACT: Daniel T. Furlong, Executive Director, Mid-Atlantic Fishery Management Council; telephone: 302–674–2331, ext. 19.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is to recommend the 2005 commercial management measures, commercial quotas, and recreational harvest limits for summer flounder, scup, and black sea bass. The Council's Bluefish Monitoring Committee will meet to recommend commercial management measures, recreational management measures, and a commercial quota for bluefish for 2005.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Actions will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management

Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Debbie Donnangelo at the Council Office at least five days prior to the meeting date.

Dated: July 6, 2004.

Alan D. Risenhoover,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E–1512 Filed 7–8–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 062204A]

Endangered Species; File Nos. 1346 and 1368

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Issuance of Permit No. 1346–01 and withdrawal of File No. 1368.

SUMMARY: Notice is hereby given that Thomas B. McCormick, Channel Islands Marine Resource Institute (CIMRI), P.O. Box 1627, Port Hueneme, CA 93044, has been issued a modification to Permit No. 1346 to take white abalone (*Haliotis sorenseni*) for the purposes of scientific research. In addition, the Southwest Fisheries Science Center (SWFSC), National Marine Fisheries Service, 8604 La Jolla Shores Drive, La Jolla, CA 92038 (Principal Investigator: John Butler, Ph.D.) has withdrawn their application (File No. 1368) to take white abalone for the purposes of scientific research.

ADDRESSES: The permit modification and related documents are available for review upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376; and

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562)980–4001; fax (562)980–4018.

FOR FURTHER INFORMATION CONTACT: Jennifer Skidmore or Ruth Johnson, (301)713–2289.

SUPPLEMENTARY INFORMATION: Notices of receipt were previously published regarding requests for one scientific research permit and one permit modification to take white abalone that were submitted by the SWFSC (March 15, 2002; 67 FR 11676) and Mr. McCormick (October 21, 2002; 67 FR 64603) respectively. The requested permit modification has been issued under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an environmental assessment was prepared analyzing the effects of the permitted activities. After a Finding of No Significant Impact, the determination was made that it was not necessary to prepare an environmental impact statement.

Issuance of this permit, as required by the ESA, was based on a finding that such permit (1) was applied for in good faith, (2) will not operate to the disadvantage of the endangered species which is the subject of this permit, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: July 2, 2004.

Tammy C. Adams,

Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 04–15613 Filed 7–8–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF DEFENSE

Department of the Navy

Meetings of the Naval Research Advisory Committee

AGENCY: Department of the Navy, DOD.

ACTION: Notice of closed meetings.

SUMMARY: The Naval Research Advisory Committee (NRAC) Panel on Science and Technology for Modular Systems will meet to hold classified Government briefs and receive proprietary information from individuals and government concerns that the Department of the Navy should incorporate in its recommendations for near and far term technologies or equipment to be developed.

DATES: The meetings will be held on Wednesday, July 14, 2004, from 12 p.m. to 5 p.m.; Thursday, July 15, 2004, from 8 a.m. to 5 p.m.; and Friday, July 16, 2004, from 8 a.m. to 12 p.m.

ADDRESSES: The meetings will be held at Jorge Scientific, 2900 South Quincy Street, Arlington, VA 22206 on July 14, 2004, and at the Office of Naval Research, 800 North Quincy Street, Arlington, VA 22217–5660 on July 15 and 16, 2004.

FOR FURTHER INFORMATION CONTACT: Dennis Ryan, Program Director, Naval Research Advisory Committee, 800 North Quincy Street, Arlington, VA 22217–5660, (703) 696–6769.

SUPPLEMENTARY INFORMATION: This notice is provided in accordance with the provisions of the Federal Advisory Committee Act (5 U.S.C. App. 2). All sessions of the meetings will be devoted to executive sessions that will include discussions and technical examination of information related to venture capital technologies. These briefings and discussions will contain proprietary information and classified information that is specifically authorized under criteria established by Executive Order to be kept secret in the interest of national defense and are in fact properly classified pursuant to such Executive Order. The proprietary, classified, and non-classified matters to be discussed are so inextricably intertwined as to preclude opening any portion of the meetings. In accordance with 5 U.S.C. App. 2, section 10(d), the Secretary of the Navy has determined in writing that all sessions of the meetings must be closed to the public because they were concerned with matters listed in 5 U.S.C. section 552b(c)(1) and (4). Due to unavoidable delay in administrative processing, the 15 days advance notice could not be provided.

Dated: July 6, 2004.

J.T. Baltimore,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Alternate Federal Register Liaison Officer.

[FR Doc. 04–15688 Filed 7–8–04; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF ENERGY

Office of Arms Control and Nonproliferation; Proposed Subsequent Arrangement

AGENCY: Department of Energy.

ACTION: Notice of proposed subsequent arrangement.

SUMMARY: This notice is being issued under the authority of Section 131 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2160). The Department is providing notice of a proposed "subsequent arrangement" under Article 6 paragraph 2 of the Agreement

for Cooperation Between the Government of the United States of America and the Government of the Argentine Republic Concerning Peaceful Uses of Nuclear Energy.

This subsequent arrangement concerns the recovery and blend down of 8,330 grams of U.S.-obligated uranium, of which 7,480 g is in the isotope uranium-235 (U–235), for fabrication into low-enriched uranium (LEU) MTR type fuel elements. The LEU fuel elements will replace the high-enriched core in the Comision Nacional de Energia Atomica (CNEA) RA–6 and for the CNEA RA–3 Molybdenum-99 research and production reactor. 1,930 g of the total uranium amount (1,730 g U–235) is irradiated and will be dissolved in order to recover the resulting strontium-90 and cesium-137. The strontium-90 will be used in the production of generators for nuclear medicine and the cesium-137 will be used in the fabrication of sealed sources for medical and industrial purposes. Both the strontium-90 and cesium-137 will be controlled under the International Atomic Energy Agency's Code of Conduct on the Safety and Security of Radioactive Sources. The remaining amount of uranium is unirradiated and will be blended down in order to reduce its enrichment to less than 20 percent U–235. CNEA personnel will perform the blend down operations in specified hot cells and laboratory facilities under IAEA safeguards at CNEA's Ezeiza Atomic Center near Buenos Aires.

In accordance with Section 131 of the Atomic Energy Act of 1954, as amended, we have determined that this subsequent arrangement will not be inimical to the common defense and security.

This subsequent arrangement will take effect no sooner than fifteen days after the date of publication of this notice.

Dated: July 1, 2004.

For the Department of Energy.

Kurt Siemon,

Acting Director, Office of Nonproliferation Policy.

[FR Doc. 04–15624 Filed 7–8–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Science; Basic Energy Sciences Advisory Committee

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Basic Energy Sciences Advisory Committee (BESAC). Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Thursday, August 5, 2004, 8:30 a.m. to 5 p.m., and Friday, August 6, 2004, 8:30 a.m. to 12 p.m.

ADDRESSES: The Doubletree Rockville Hotel & Executive Meeting Center, 1750 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Karen Talamini; Office of Basic Energy Sciences; U. S. Department of Energy; Germantown Building, Independence Avenue, Washington, DC 20585; telephone: (301) 903–4563.

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting: The purpose of this meeting is to provide advice and guidance with respect to the basic energy sciences research program.

Tentative Agenda: Agenda will include discussions of the following:

- News from the Office of Science
- News from the Office of Basic Energy Sciences
- Report on BESAC Committee of Visitors for the Scientific User Facilities Division
- Report of BESAC Subcommittee on Theory and Computation in Basic Energy Sciences
- Highlights of the Nanoscale Research Centers (NSRC) Directors' Meeting
- BESAC Discussion

Public Participation: The meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact Karen Talamini at 301–903–6594 (fax) or *karen.talamini@science.doe.gov* (e-mail). You must make your request for an oral statement at least 5 business days prior to the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The minutes of this meeting will be available for public review and copying within 30 days at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585; between 9 a.m. and 4 p.m., Monday through Friday, except holidays.

Issued in Washington, DC, on July 6, 2004.

Rachel M. Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. 04–15625 Filed 7–8–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Energy Information Administration

Notice of Energy Information Administration Policy for Disseminating Revisions to Petroleum Supply Reporting System Data

AGENCY: Energy Information Administration (EIA), Department of Energy (DOE).

ACTION: Notice of Energy Information Administration Policy for Disseminating Revisions to Petroleum Supply Reporting System Data.

SUMMARY: The EIA is formalizing its existing policy for disseminating revisions to Petroleum Supply Reporting System (PSRS) data. PSRS information products include data on production, receipts, inputs, movements, and stocks of crude oil, petroleum products, and natural gas liquids in the United States.

DATES: Comments must be filed by August 9, 2004. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Comments on this policy should be directed to Stefanie Palumbo of EIA's Petroleum Division. To ensure receipt of the comments by the due date, submission by Fax (202–586–5846) or e-mail (*stefanie.palumbo@eia.doe.gov*) is recommended. The mailing address is Petroleum Division, EI–42, Forrestal Building, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585. Alternatively, Stefanie Palumbo may be contacted by telephone at (202) 586–6866.

FOR FURTHER INFORMATION CONTACT: Requests for additional information about this policy should be directed to Ms. Palumbo at the address listed above. Additional information on EIA's petroleum supply program is available on EIA's Internet site at *http://www.eia.doe.gov/oil_gas/petroleum/info_glance/petroleum.html.*

SUPPLEMENTARY INFORMATION:

I. Background
II. Current Actions
III. Request for Comments

I. Background

The Federal Energy Administration Act of 1974 (Pub. L. No. 93–275, 15

U.S.C. 761 *et seq.*) and the DOE Organization Act (Pub. L. No. 95–91, 42 U.S.C. 7101 *et seq.*) require the EIA to carry out a centralized, comprehensive, and unified energy information program. This program collects, evaluates, assembles, analyzes, and disseminates information on energy resource reserves, production, demand, technology, and related economic and statistical information. This information is used to assess the adequacy of energy resources to meet near and longer term domestic demands.

The EIA provides the public and other Federal agencies with opportunities to comment on collections of energy information conducted by EIA. As appropriate, EIA also requests comments on important issues relevant to EIA dissemination of energy information. Comments received help the EIA when preparing information collections and information products necessary to EIA's mission.

The purpose of EIA's Petroleum Supply Reporting System (PSRS) is to collect and disseminate basic and detailed data to meet EIA's mandates and energy data users' needs for credible, reliable, and timely information on U.S. petroleum supply. Adequate understanding of the U.S. petroleum industry requires data on production, receipts, inputs, movements, and stocks of crude oil, petroleum products, and natural gas liquids.

The PSRS is comprised of 16 surveys (*i.e.*, six weekly surveys, nine monthly surveys, and one annual survey). The surveys are:

- EIA–800, Weekly Refinery and Fractionator Report,
- EIA–801, Weekly Bulk Terminal Report,
- EIA–802, Weekly Product Pipeline Report,
- EIA–803, Weekly Crude Oil Stocks Report,
- EIA–804, Weekly Imports Report,
- EIA–805, Weekly Terminal Blenders Report,
- EIA–810, Monthly Refinery Report,
- EIA–811, Monthly Bulk Terminal Report,
- EIA–812, Monthly Product Pipeline Report,
- EIA–813, Monthly Crude Oil Report,
- EIA–814, Monthly Imports Report,
- EIA–815, Monthly Terminal Blenders Report,
- EIA–816, Monthly Natural Gas Liquids Report,
- EIA–817, Monthly Tanker and Barge Movement Report,
- EIA–819, Monthly Oxygenate Report, and
- EIA–820 Annual Refinery Report.

Both weekly and monthly surveys are administered at five key points along the petroleum production and supply path: (1) Refineries, (2) bulk terminals, (3) product pipelines, (4) crude oil stock holders, and (5) importers of crude oil and products. Data collected weekly using weekly Forms EIA–800 through EIA–805 are similar, although less detailed and accurate, than data collected monthly using Forms EIA–810 through EIA–815.

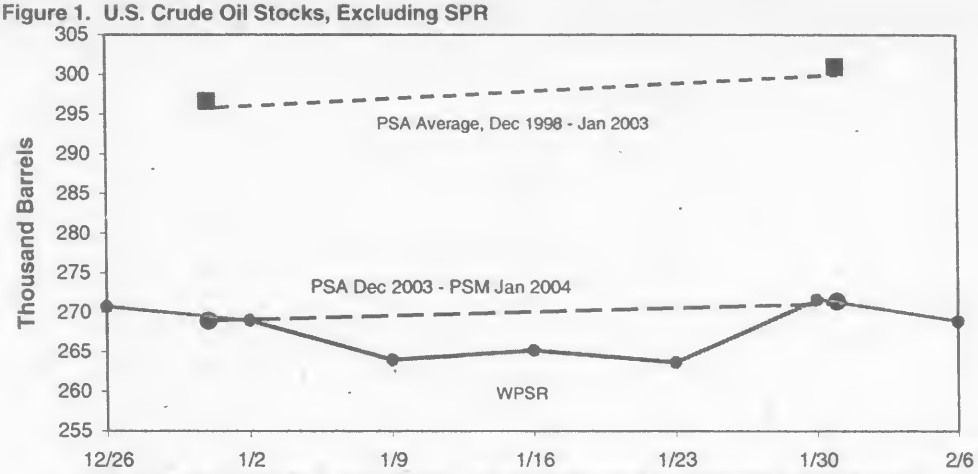
The data are disseminated in EIA's petroleum supply information products—the *Weekly Petroleum Status Report (WPSR), This Week in Petroleum (TWIP), the Petroleum Supply Monthly (PSM), and the Petroleum Supply Annual Volumes 1 and 2 (PSA).* Within five days of the close of the reference week (excluding holiday weeks), weekly PSRS data are disseminated in the WPSR and TWIP to provide timely, relevant snapshots of the U.S. petroleum industry. Within two months of the close of a reference month, data based on the monthly surveys is disseminated in the PSM. About five months after the end of the reference year, final monthly data as well as annual data are published in the PSA.

Accuracy of the survey data is measured as the closeness of the disseminated values to the true values (*i.e.*, those values that would be obtained if the entire target population had been surveyed and all the data had been precisely recorded). To help users of PSRS data, EIA addresses data accuracy in two publicly available documents: (1) The feature article "*Accuracy of Petroleum Supply Data*" published annually in one issue of the PSM, and (2) Table C1, "*Impact of Resubmissions on Major Series,*" published in each issue of the PSM.

The weekly PSRS data are expected to be less accurate than the PSM data because the data are collected from a sample of companies rather than from all companies. Estimates are made for the nonsampled companies. Additionally, companies must frequently estimate data they submit weekly, but can base monthly data on accounting records. Finally, the WPSR is on a tight time schedule for publication, and the weekly surveys have a somewhat lower response rate (but still greater than 95%) than the corresponding monthly surveys. Estimates are made for companies whose data are not available at time of publication. The annual PSA data are most accurate. Companies file resubmissions and EIA has time to carefully edit the data and resolve any ambiguities with the respondent. EIA has received data from almost 100% of respondents by the time the PSA is published.

While the major weekly petroleum supply data series tend to track quite well with corresponding monthly data, certain series demonstrate more variation in trend relative to monthly patterns, even though the end of month comparisons may track favorably. Imports of crude oil and petroleum products and crude oil stocks have historically exhibited the most variation from week to week. For example, the graph in Figure 1 shows crude oil inventories from the end of December 2003 to the end of January 2004. Included is a 5-year crude stock trend line that shows the expected crude oil stock pattern for this period is a slight build in stocks. This graph illustrates that, while the weekly and monthly stock numbers for the end of the month did track quite closely, the weekly data over most of the month exhibited the opposite behavior. The trend for the first three weeks was a declining stock pattern, altered only in the last week of the month with a nearly 8 million barrel stock increase that ultimately brought it close to what the monthly data showed. This also illustrates another advantage of weekly data (in addition to timeliness) in that you see detail that you do not see in the monthly data. Of course, this also shows that the weekly data can vary from week to week in ways that are difficult to predict.

Figure 1. U.S. Crude Oil Stocks, Excluding SPR



Sources: Energy Information Administration, Petroleum Supply Annual (PSA), Petroleum Supply Monthly (PSM) and Weekly Petroleum Status Report (WPSR).
SPR = Strategic Petroleum Reserve.

To help ensure accuracy, a PSRS survey respondent is instructed to submit revisions to previously reported data if the respondent discovers an error greater than five percent of a previously reported value or if EIA requests a resubmission. Revision(s) to survey data may be based on a number of factors including:

(1) More accurate information becomes available to a respondent after a survey form is filed and the respondent resubmits corrected information.

(2) After submitting a survey form, a respondent determines that information submitted was incorrect (*e.g.*, numbers were transposed, numbers were entered in the wrong item on the form, other reporting errors) and then resubmits corrected information.

(3) Based on its review and editing of the data, EIA may identify inconsistencies or anomalies in the data and request the respondent to recheck the data.

(4) A survey form is submitted too late for including its data in an information product.

All reported revisions to the data are entered into EIA's PSRS database for editing, imputation, and other analytic purposes. In nearly all cases the impact of resubmissions would be insignificant to the published data. EIA has published a revision to weekly data on average only once every 5 years, while revisions to the monthly data prior to release of the final PSA data are even less frequent. Consistent with the policy outlined in this notice, EIA has disseminated revised data only if the revision was expected to substantively affect understanding of the U.S. petroleum supply.

II. Current Actions

EIA is soliciting public comments on the following policy for disseminating revisions to PSRS data. This is a formal statement of the existing policy for PSRS data that has been in effect for over ten years.

With respect to the weekly PSRS data, EIA will only disseminate revised data if the revision is expected to substantively affect understanding of the U.S. petroleum supply. Whether to disseminate a revision to weekly data will be based on EIA's judgment of the revision's expected effect. A revision will be disseminated in the next regularly scheduled release of the weekly products. Weekly PSRS data have been revised on average only once every five years.

The monthly PSRS data reflect EIA's official data on petroleum supply and are considered to be more accurate than the weekly data because they are generally based upon company accounting records instead of company estimates and EIA has more time to edit and correct anomalous data. With respect to the monthly PSRS data, EIA will only disseminate revised data during the year if the revision is expected to substantively affect understanding of the U.S. petroleum supply. Whether to disseminate a revision during the year will be based on EIA's judgment of the revision's expected effect. At the end of year, the monthly data are revised to reflect all resubmitted data received during the year. These official final monthly petroleum supply data are included in the PSA. To assist users in understanding the expected effect of revisions to monthly data during the year, EIA publishes a separate monthly table, Impact of Resubmissions on Major Series, in each release of the PSM. During the last 10 years, EIA has not published revised PSM data outside this scheduled policy.

The PSA reflects EIA's final data on petroleum supply and will only be revised if, in EIA's judgment, a revision is expected to substantively affect understanding of the U.S. petroleum supply. EIA has not revised PSA data during the last 10 years.

When EIA disseminates any revised PSRS data, it will alert users to the affected data value(s) that are revised.

III. Request for Comments

The public should comment on the actions discussed in item II as well as the questions below.

General Issues

A. Is the proposed policy for disseminating revisions to PSRS data appropriate?

B. What additional actions could EIA take to help ensure and maximize the quality, objectivity, utility, and integrity of the PSRS data?

Comments submitted in response to this notice will be considered during development of EIA's policy for disseminating revisions to the PSRS data. The comments will also become a matter of public record.

After EIA has completed development of this policy, a **Federal Register** notice will be issued announcing the policy.

Statutory Authority: Section 52 of the Federal Energy Administration Act (Pub. L. 93–275, 15 U.S.C. 790a).

Issued in Washington, DC July 2, 2004.

Jay H. Casselberry,

Agency Clearance Officer, Statistics and Methods Group, Energy Information Administration.

[FR Doc. 04–15623 Filed 7–8–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–347–000]

CenterPoint Energy—Mississippi River Transmission Corporation; Notice of Proposed Changes in FERC Gas Tariff

July 1, 2004.

Take notice that on June 28, 2004, CenterPoint Energy—Mississippi River Transmission Corporation (MRT) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, the following tariff sheets to be effective August 1, 2004:

Fifty-First Revised Sheet No. 5
Fifty-First Revised Sheet No. 6
Forty-Eighth Revised Sheet No. 7

MRT states that these tariff sheets reflect changing the Gas Research Institute Adjustment Charge in the applicable MRT rate schedules to zero.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1509 Filed 7–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–348–000]

Dauphin Island Gathering Partners; Notice of Refund Report

July 1, 2004.

Take notice that on June 25, 2004, Dauphin Island Gathering Partners (Dauphin Island) tendered for filing its report of net revenue received from cash outs. Dauphin Island has made this refund to its customers based upon its calculation method as set out in this report.

Dauphin Island states that copies of the filing are being served contemporaneously on all participants listed on the service list in this proceeding and on all persons who are required by the Commission's regulations to be served with the application initiating these proceedings.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with § 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance on or before the date as indicated below. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See,* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Comment Date: July 8, 2004.

Magalie R. Salas,

Secretary.

FR Doc. E4–1502 Filed 7–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–346–000]

Gas Transmission Northwest Corporation; Notice of Proposed Change in FERC Gas Tariff

July 1, 2004.

Take notice that on June 28, 2004, Gas Transmission Northwest Corporation (GTN) tendered for filing to be part of its FERC Gas Tariff, Third Revised Volume

No. 1–A, the tariff sheets listed in Appendix A to the filing, with an effective date of August 1, 2004.

GTN states that it is submitting these revised tariff sheets to remove references to the GRI surcharge which will be discontinued effective August 1, 2004.

GTN further states that a copy of this filing has been served on GTN's jurisdictional customers and interested state regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. See, 18 CFR 385.2001(a)(1)(iii) and the

instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,
Secretary.
[FR Doc. E4–1508 Filed 7–8–04; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application for Non-Project Use of Project Lands and Waters and Soliciting Comments, Motions To Intervene, and Protests

July 1, 2004.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-Project Use Of Project Lands And Waters.

b. *Project No.:* 2413–062.

c. *Date Filed:* June 14, 2004.

d. *Applicant:* Georgia Power.

e. *Name of Project:* Wallace Dam Project.

f. *Location:* This project is located on the Oconee River in Putnam, Hancock, Greene, Morgan, Oconee, and Oglethorpe Counties, Georgia, and occupies lands of the Oconee National Forest. This project does not occupy any tribal lands.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r), 799 and 801.

h. *Applicant Contact:* Mr. Lee B. Glenn; Lake Resources Manager for Georgia Power; 125 Wallace Dam Road, NE; Eatonton, Georgia, 31024; 706–485–8704.

i. *FERC Contact:* Any questions on this notice should be addressed to Kate DeBragga at (202) 502–8961, or by e-mail: *Kate.DeBragga@ferc.gov.*

j. *Deadline for filing comments and or motions:* August 2, 2004.

All documents (original and eight copies) should be filed with: Ms. Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington DC 20426. Please include the project number (P–2413–062) on any comments or motions filed. Comments, protests, and interventions may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages e-filings.

k. *Description of Request:* Georgia Power is seeking Commission approval to construct 3 docks with 10 slips each at Lake Oconee. A permit would be issued by Georgia Power to Pinnacle Point Condominiums for the construction and operation of the docks. The proposed site is located in Putnam County, along Georgia State Route 44 near its intersection with Harmony Road.

l. *Location of the Application:* This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. Agency Comments—Federal, state, and local agencies are invited to file comments on the described applications. A copy of the applications may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Magalie R. Salas,
Secretary.
[FR Doc. E4–1505 Filed 7–8–04; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

July 1, 2004.

Take notice that the following application has been filed with the Commission and is available for public inspection.

a. *Type of Filing:* Application for Amendment of License to find that a certain transmission line is no longer jurisdictional and no longer requires licensing.

b. *Project No.:* P–1971–084.

c. *Date Filed:* February 23, 2004.

d. *Applicant:* Idaho Power Company.

e. *Name of Project:* Hells Canyon.

f. *Location:* The project is located on the Snake River in Ada, Adam, Boise, Gem and Washington Counties, Idaho.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contacts:* Mr. Robert W. Stahman, Vice President, Secretary and General Counsel, Idaho Power Company, 1221 West Idaho Street, P.O. Box 70, Boise, Idaho 83707. Nathan F. Gardiner, Attorney, Idaho Power Company, 1221 West Idaho Street, P.O. Box 70, Boise, Idaho 83707.

i. *FERC Contact:* Etta Foster, (202) 502–8769, or e-mail address: *etta.foster@ferc.gov.*

j. *Deadline for filing comments, motions to intervene or protests:* August 2, 2004.

All documents (original and eight copies) should be filed with Ms. Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See 18 CFR 385.2001 (a)(1)(iii) and the instructions on the Commission's Web site under the "e-filing" link.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files Comments or documents with the Commission

relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Request:* The applicant requests that its license for this project be amended by deleting the Boise-Brady No. 2 Line and the Boise Bench-Midpoint Line from the license.

l. *Location of Filing:* A copy of the filing is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE, Room 2A, Washington, DC 20426, or by calling (202) 208–1371. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the Web site at *http://www.ferc.gov* using the "elibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov*, or call 1–866–208–3676 for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. Comments, Protests, or Motions to Intervene—comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS", "PROTEST", or "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1503 Filed 7–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EG04–78–000, et al.]

Boeve Windfarm LLC, et al.; Electric Rate and Corporate Filings

June 30, 2004.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Boeve Windfarm LLC

[Docket No. EG04–78–000]

Take notice that on June 28, 2004, Boeve Windfarm, LLC (Boeve) filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to part 365 of the Commission's regulations.

Boeve states that it owns and operates a 1.9 MW wind energy conversion facility in Woodstock, Minnesota, which sells its entire output to Northern States Power Company exclusively at wholesale pursuant to a long-term power purchase agreement. Boeve further states that the facility interconnects with NSP on an NSP 34.5 kV subtransmission line in Minnesota and the Boeve facility includes only those interconnection facilities needed to deliver energy from the facility to NSP for its wholesale sale and purchase.

Comment Date: July 19, 2004.

2. Fey Windfarm, LLC

[Docket No. EG04–79–000]

Take notice that on June 28, 2004, Fey Windfarm, LLC (Fey) filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to part 365 of the Commission's regulations.

Fey states that it owns and operates a 1.9 MW wind energy conversion facility in Woodstock, Minnesota, which sells its entire output to Northern States Power Company exclusively at wholesale pursuant to a long-term power purchase agreement. Fey further states that the facility interconnects with NSP on an NSP 34.5 kV subtransmission line in Minnesota and the Fey facility includes only those interconnection facilities needed to deliver energy from the facility to NSP for its wholesale sale and purchase.

Comment Date: July 19, 2004.

3. Windcurrent Farms, LLC

[Docket No. EG04–80–000]

Take notice that on June 28, 2004, Windcurrent Farms, LLC (Windcurrent) filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to part 365 of the Commission's regulations.

Windcurrent states that it owns and operates a 1.9 MW wind energy conversion facility in Woodstock, Minnesota, which sells its entire output to Northern States Power Company exclusively at wholesale pursuant to a long-term power purchase agreement. Windcurrent further states that the facility interconnects with NSP on an NSP 34.5 kV subtransmission line in Minnesota and the Windcurrent facility includes only those interconnection facilities needed to deliver energy from the facility to NSP for its wholesale sale and purchase.

Comment Date: July 19, 2004.

4. Tofteland Windfarm, LLC

[Docket No. EG04–81–000]

Take notice that on June 28, 2004, Tofteland Windfarm, LLC (Tofteland) filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to part 365 of the Commission's regulations.

Tofteland states that it owns and operates a 1.9 MW wind energy conversion facility in Woodstock, Minnesota, which sells its entire output to Northern States Power Company exclusively at wholesale pursuant to a long-term power purchase agreement. Tofteland further states that the facility interconnects with NSP on an NSP 69 kV transmission line in Minnesota and the Tofteland facility includes only those interconnection facilities needed to deliver energy from the facility to NSP for its wholesale sale and purchase.

Comment Date: July 19, 2004.

5. CG Windfarm, LLC

[Docket No. EG04–82–000]

Take notice that on June 28, 2004, CG Windfarm, LLC (CG) filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to part 365 of the Commission's regulations.

CG states that it owns and operates a 1.9 MW wind energy conversion facility in Woodstock, Minnesota, which sells its entire output to Northern States Power Company exclusively at wholesale pursuant to a long-term power purchase agreement. CG further states that the facility interconnects with NSP on an NSP 69 kV transmission line in Minnesota and the CG facility includes only those interconnection facilities needed to deliver energy from the facility to NSP for its wholesale sale and purchase.

Comment Date: July 19, 2004.

6. The Governors of: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont

[Docket No. EL04–112–000]

Take notice that on June 25, 2004, the Governors of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont (collective, the Petitioners) filed a Joint Petition for Declaratory Order to Form a New England Regional State Committee. The Petitioners informed the Commission of their collective intention to form a non-profit corporation, the New England States Committee on Electricity (NESCOE), that will serve as the New England region's regional state committee. Petitioners state that NESCO will focus on developing and making policy recommendations related to resource adequacy and system planning, and will affirmatively investigate and report to the New England Governors on policy questions concerning the possibility of a regional authority for siting of interstate transmission facilities.

The Petitioners request the Commission's declaratory order to require RTO New England (RTO–NE) and the New England participating transmission owners (TOs) provide NESCOE, absent exigent circumstances, with written notice of any proposed additions or changes to market rules or tariffs within a reasonable time before filing the proposed additions or changes to market rules or tariffs within a reasonable time before filing the proposal; require that RTO–NE and the TOs give NESCOE a reasonable opportunity to make determinations regarding any proposed additions or changes to market rules and tariffs that affect matters within the scope of NESCOE's responsibility; require RTO–NE and the TOs to file with the Commission any determinations made by NESCOE, along with an explanation of how the determination was incorporated into RTO–NE's or the TOs' proposal or why it was not followed; require that RTO–NE or the TOs file NESCOE's determinations with the Commission pursuant to their respective authorities under Section 205 of the Federal Power Act; require NESCOE to be funded by a regional tariff administered by the RTO–NE and ultimately collected from all New England retail electricity customers; and, require that RTO–NE, the New England Power Pool, and the TOs file amendments to their respective jurisdictional tariffs and agreements to reflect the Commission's intention in the declaratory order resulting from this Petition.

Comment Date: July 16, 2004.

7. Tenaska Virginia Partners, L.P.

[Docket No. ER04–680–002]

Take notice that on June 25, 2004, Tenaska Virginia Partners, L.P., (Tenaska Virginia) submitted a compliance filing modifying its rate schedule under which Tenaska Virginia provides Reactive Support and Voltage Control from Generation Sources Service pursuant to the Commission's order issued May 28, 2004 in Docket No. ER04–680–000, *Tenaska Virginia Partners,* 107 FERC ¶ 61,207 (2004). Tenaska Virginia requests an effective date of May 1, 2004.

Comment Date: July 16, 2004.

8. Pacific Gas and Electric Company

[Docket No. ER03–708–001]

Take notice that on June 25, 2004, Pacific Gas and Electric Company (PG&E) tendered for filing a refund report in connection with the Commission's order issued April 16, 2004 in Docket No. ER03–708–000.

PG&E states that copies of PG&E's filing have been served upon each person designated on the official service list in this proceeding.

Comment Date: July 16, 2004.

9. Entergy Services, Inc.

[Docket No. ER04–795–001]

Take notice that on June 25, 2004, Entergy Services, Inc. (Entergy Services), on behalf of Entergy Arkansas, Inc. (Entergy Arkansas), tendered for filing an amendment to Entergy Services' April 29, 2004, filing of an unexecuted amended Interconnection and Operating Agreement between Entergy Arkansas and Plum Point Energy Associates, LLC (Plum Point) in response to the Commission's deficiency letter issued June 4, 2004.

Comment Date: July 16, 2004.

10. PJM Interconnection, L.L.C.

[Docket No. ER04–955–000]

Take notice that on June 25, 2004, PJM Interconnection, L.L.C. (PJM), submitted for filing an executed interconnection service agreement among PJM, Calpine Newark, LLC, and Public Service Electric & Gas Company (ISA). PJM requests an effective date of May 27, 2004.

PJM states that copies of this filing were served upon the parties to the agreement and the state regulatory commissions within the PJM region.

Comment Date: July 16, 2004.

11. PJM Interconnection, L.L.C.

[Docket No. ER04–956–000]

Take notice that on June 25, 2004, PJM Interconnection, L.L.C. (PJM), submitted for filing an executed interconnection service agreement among PJM, Calpine Parlin, LLC, and Jersey Central Power & Light Company (ISA). PJM requests a waiver of the Commission's 60-day notice requirement to permit a May 27, 2004 effective date for the ISA.

PJM states that copies of this filing were served upon the parties to the agreement and the state regulatory commissions within the PJM region.

Comment Date: July 16, 2004.

12. TXU Electric Delivery Company

[Docket No. ER04–957–000]

Take notice that on June 25, 2004, TXU Electric Delivery Company (TXU Electric Delivery), tendered for filing a Notice of Succession pursuant to section 35.16 of the Commission's Regulations, 18 CFR 35.16. TXU Electric Delivery states that as a result of a name change, TXU Electric Delivery is succeeding to the tariffs and related service agreements of Oncor Electric Delivery Company, effective May 31, 2004.

TXU Electric Delivery states that copies of this filing have been served upon each customer taking service under tariffs subject to the Notice of Succession, and the Public Utility Commission of Texas.

Comment Date: July 16, 2004.

13. New York Independent System Operator, Inc.

[Docket No. ER04–958–000]

Take notice that on June 25, 2004, the New York Independent System Operator, Inc. (NYISO) on behalf of the

Long Island Power Authority (LIPA), filed proposed revisions to the NYISO's Open Access Transmission Tariff (OATT). NYISO states that the proposed filing would revise LIPA's wholesale transmission service charge. The NYISO has requested an effective on August 1, 2004.

NYISO states that a copy of this filing was served upon all signatories of the NYISO OATT.

Comment Date: July 16, 2004.

14. Reliant Energy Etiwanda, Inc.

[Docket No. ER04–959–000]

Take notice that on June 25, 2004, Reliant Energy Etiwanda. Inc. (Etiwanda) tendered for filing its Rate Schedule FERC No. 2, Must-Run Service Agreement (RMR Agreement) and a related letter agreement between Etiwanda and the California Independent System Operator Corporation (CAISO). Etiwanda requests waiver of the notice requirement of section 35.3 of the Commission's regulations, 18 CFR 35.3 (2003), in order to allow the Must-Run Service Agreement and the Letter Agreement to be effective as of July 1, 2004.

Etiwanda states that this filing has been served upon the CAISO, the California Public Utilities Commission, the California Electricity Oversight Board and Southern California Edison Company.

Comment Date: July 16, 2004.

15. Mid-Continent Area Power Pool

[Docket No. ER04–960–000]

Take notice that on June 25, 2004, Mid-Continent Area Power Pool (MAPP) tendered for filing amendments to Schedule F, FERC Electric Tariff, First Revised Volume No. 1 (Schedule F), pursuant to section 205 of the Federal Power Act.

MAPP states that a copy of this filing has been served on all MAPP members, customers under Schedule F, and the state commissions in the MAPP region. MAPP also states that the filing has been posted on the MAPP Web site at *www.mapp.org.*

Comment Date: July 16, 2005.

16. Midwest Independent Transmission

[Docket No. ER04–961–000]

Take notice that on June 25, 2004, Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted for filing a proposed Schedule 21—Reactive Supply and Voltage Control from Independent Generation Resources Service, which is intended to supplement Schedule 2 of the Midwest ISO Open Access Transmission Tariff concerning the provision of reactive supply and voltage control from generation resource service. Midwest ISO requests an effective date of October 1, 2004.

The Midwest ISO has also requested waiver of the service requirements set forth in 18 CFR 385.2010. Midwest ISO states that it has electronically served a copy of this filing, with attachments, upon all Midwest ISO Members, Member representatives of Transmission Owners and Non-Transmission Owners, the Midwest ISO Advisory Committee participants, as well as all state commissions within the region. In addition, Midwest ISO states that the filing has been electronically posted on the Midwest ISO's Web site at *www.midwestiso.org* under the heading "Filings to FERC" for other interested parties in this matter. Midwest ISO indicates that it will provide hard copies to any interested parties upon request.

Comment Date: July 16, 2004.

Standard Paragraph

Any person desiring to intervene or to protest this filing should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the "FERRIS" link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, call (202) 502–8222 or TTY, (202) 502–8659. Protests and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1501 Filed 7–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application Accepted for Filing and Soliciting Motions To Intervene and Protests

July 1, 2004.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 2150–033.

c. *Date Filed:* April 30, 2004.

d. *Applicant:* Puget Sound Energy.

e. *Name of Project:* Baker River Hydroelectric Project.

f. *Location:* On the Baker River, near the Town of Concrete, in Whatcom and Skagit Counties, Washington. The project occupies about 5,207 acres of lands within the Mt. Baker-Snoqualmie National Forest managed by the U.S. Forest Service.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Connie Freeland, Puget Sound Energy, P.O. Box 97034 PSE–09S Bellevue, WA 98009–9734; (425) 462–3556 or *connie.freeland@pse.com.*

i. *FERC Contact:* Steve Hocking, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426; (202) 502–8753 or *steve.hocking@ferc.gov.*

j. *Deadline for filing motions to intervene and protests:* September 30, 2004.

All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Motions to intervene and protests may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *www.ferc.gov* under the "e-Filing" link.

k. This application has been accepted, but is not ready for environmental analysis at this time.

l. The Baker River Project has two developments. The Upper Baker development consists of the following existing facilities: (1) A 312-foot-high by 1,200-foot-long concrete gravity dam impounding Baker Lake with a surface area of about 4,980 acres at a normal full pool elevation of 727.77 feet mean sea level (msl); (2) a 122-foot-long, 59-foot-wide concrete and steel powerhouse at the base of the dam containing two turbine-generator units, Unit No. 1 with an authorized capacity of 52,400 kilowatts (kW) and Unit No. 2 with an authorized capacity of 38,300 kW; (3) a 115-foot-high by 1,200-foot-long earth and rock-fill dam, known as West Pass dike, located in a depression about 1,500 feet north of Upper Baker dam; (4) a 22-foot-high by 3,000-foot-long earth-filled dike, known as Pumping Pond dike, which impounds Depression Lake with a surface area of 44 acres at a normal full pool elevation of 699 feet msl; (5) a water recovery pumping station adjacent to Pumping Pond dike; (6) fish passage facilities and fish spawning facilities; and (7) appurtenant facilities.

The Lower Baker development consists of the following existing facilities: (1) A 285-foot-high by 550-foot-long concrete arch dam impounding Lake Shannon with a surface area of about 2,278 acres at a normal full pool elevation of 442.35 feet msl; (2) a concrete intake equipped with trashracks and gatehouse located at the dam's left abutment; (3) a 1,410-foot-long concrete and steel-lined pressure tunnel; (4) a concrete surge tank near the downstream end of the pressure tunnel; (5) a 90-foot-long, 66-foot-wide concrete and steel powerhouse containing one turbine-generator unit, Unit No. 3, with an authorized capacity of 79,330 kW; (6) a 750-foot-long, 115-kilovolt transmission line; (7) fish passage facilities including a 150-foot-long by 12-foot-high barrier dam; and (8) appurtenant facilities.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at *www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular application.

All filings must (1) bear in all capital letters the title "PROTEST" or "MOTION TO INTERVENE;" (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application.

Magalie R. Salas,

Secretary.

FR Doc. E4–1504 Filed 7–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 6514–009]

City of Marshall, Michigan; Notice of Application Ready for Environmental Analysis and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions

July 1, 2004.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Subsequent Minor License.

b. *Project No.:* 6514–009.

c. *Date Filed:* May 2, 2003.

d. *Applicant:* City of Marshall, Michigan.

e. *Name of Project:* City of Marshall Hydroelectric Project.

f. *Location:* On the Kalamazoo River near the City of Marshall, in Calhoun County, Michigan. The project does not affect federal lands.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Keith Zienert, Power Plant Superintendent, City of Marshall, 906 S. Marshall, Marshall, MI 49068, (269) 781–8631; or John Fisher, Chairman, Lawson-Fisher Associates P.C., 525 West Washington Avenue, South Bend, IN 46601, (574) 234–3167.

i. *FERC Contact:* Peter Leitzke, (202) 502–6059 or *peter.leitzke@ferc.gov.*

j. Deadline for filing comments, recommendations, terms and conditions, and prescriptions is 60 days from the issuance date of this notice. Reply comments are due 105 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Please include the project number (P–6514–009) on any comments or documents filed.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Comments, recommendations, terms and conditions, and prescriptions may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the "e-Filing" link.

k. This application has been accepted for filing, and is ready for environmental analysis at this time.

l. The existing City of Marshall Hydroelectric Project (Project) consists of: (1) The 12-foot-high, 215-foot-long Perrin No. 1 Dam; (2) the 12-foot-high, 90-foot-long Perrin No. 2 Dam; (3) a 130-acre reservoir with a normal pool elevation of 899 feet msl; (4) a 140-foot-long canal-type forebay; (5) a powerhouse containing three generating units with a total installed capacity of 463 kW; and (6) other appurtenances.

m. A copy of the application is on file with the Commission and is available for public inspection. This filing is available for review at the Commission in the Public Reference Room or may be

viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits (P–6514) in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676 or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

All filings must (1) bear in all capital letters the title "COMMENTS", "REPLY COMMENTS", "RECOMMENDATIONS," "TERMS AND CONDITIONS," or "PRESCRIPTIONS:" (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Each filing must be accompanied by proof of service on all persons listed on the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b), and 385.2010.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Procedural schedule and final amendments: The application will be processed according to the following Hydro Licensing Schedule. Revisions to the schedule will be made as appropriate.

Notice of the availability of the EA: November 2004

Ready for Commission decision on the application: February 2005

Unless substantial comments are received in response to the EA, staff intends to prepare a single EA in this case. If substantial comments are received in response to the EA, a final EA will be prepared with the following modifications to the schedule.

Notice of the availability of the final EA: February 2005

Ready for Commission's decision on the application: February 2005

Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1506 Filed 7–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

July 1, 2004.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Amendment of License to raise the normal maximum surface elevations of Jeffrey Reservoir and Johnson Lake of the Kingsley Dam Project

b. *Project No.:* 1417–147.

c. *Date Filed:* June 9, 2004.

d. *Applicant:* Central Nebraska Public Power and Irrigation District.

e. *Name of Project:* Kingsley Dam Project.

f. *Location:* The project is located on the North Platte and Platte Rivers in Garden, Keith, Lincoln, Dawson and Gosper Counties in south-central Nebraska.

g. *Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Don Kraus, P.E., General Manager, Central Nebraska Public Power and Irrigation District, 415 Lincoln Street, P.O. Box 740, Holdrege, NE., 68949; (308) 995–3801.

i. *FERC Contact:* Any questions on this notice should be addressed to Mr. Vedula Sarma at (202) 502–6190, or e-mail address: *vedula.sarma@ferc.gov.*

j. *Deadline for filing comments and or motions:* August 2, 2004.

Description of Request: Central Nebraska Public Power and Irrigation District (District) proposes to raise the "normal maximum surface elevation" at Jeffery Reservoir from 2,758.0 to 2,760 feet m.s.l. and at Johnson Lake from 2,619.0 to 2,621.0 feet m.s.l. The proposed changes would permit the District to operate the reservoirs as it has operated historically, and to implement certain recreational and other environmental measures such as the approved Flow Attenuation Plan for endangered species under the license.

k. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's website at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov*, or call 1–866–208–3676 for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

l. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

m. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

n. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

o. Agency Comments—Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an

agency's comments must also be sent to the Applicant's representatives.

p. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the "e-Filing" link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1510 Filed 7–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RP04–251–000; RP04–248–000 (not consolidated)]

El Paso Natural Gas Company; Notice of Technical Conference

July 1, 2004.

Take notice that a technical conference will be held on Tuesday July 27, 2004 at 9:30 a.m. (e.s.t.), in a room to be designated at the offices of the Federal Energy Regulatory Commission, 888 First Street, NE., Washington DC 20426. A room has also been reserved for Wednesday, July 28, 2004, if there is a need to continue the conference.

The conference will be held to discuss El Paso Natural Gas Company's filing in Docket No. RP04–251–000 to comply with Order No. 637 and the related filing in Docket No. RP04–248–000 regarding imbalance management services.

All interested parties and Staff are permitted to attend.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1507 Filed 7–8–04; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[OECA–2003–0142; FRL–7785–3]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; Air Emission Standards for Tanks, Surface Impoundments and Containers (40 CFR Part 264, Subpart CC and 40 CFR Part 265, Subpart CC) (Renewal), ICR Number 1593.06, OMB Number 2060–0318

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act, this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. This ICR is scheduled to expire on 7/31/04. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. This ICR describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before August 9, 2004.

ADDRESSES: Submit your comments, referencing docket ID number OECA–2003–0142, to (1) EPA online using EDOCKET (our preferred method), by e-mail to *docket.oeca@epa.gov*, or by mail to: Environmental Protection Agency, EPA Docket Center (EPA/DC), Enforcement and Compliance Docket and Information Center, EPA West, Mail Code 2201T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Dan Chadwick, Compliance Assessment and Media Programs Division, Office of Enforcement and Compliance Assurance, Mail Code 2223A, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; (202) 564–7054; fax number (202) 564–0050; e-mail address: *chadwick.dan@epa.gov*.

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On November 3, 2003 (68 FR 62289) EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments.

EPA has established a public docket for this ICR under Docket ID Number OECA–2003–0142, which is available for public viewing at the Enforcement and Compliance Docket and Information Center in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center 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 Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket and Information Center Docket is: (202) 566–1752. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket*. Use EDOCKET to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. When in the system, select "search," then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA and OMB within 30 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, *see* EPA's **Federal Register** notice describing the electronic docket at 67 FR 38102 (May 31, 2002), or go to *http://www.epa.gov/edocket*.

Title: Air Emission Standards for Tanks, Surface Impoundments and Containers (40 CFR Part 264, Subpart CC and 40 CFR Part 265, Subpart CC) (Renewal).

Abstract: This ICR contains recordkeeping and reporting requirements that are mandatory for compliance with 40 CFR part 264, subpart CC and 40 CFR part 265, subpart CC. RCRA subpart CC requires controls for minimizing release of volatile organic air emissions from tanks, surface impoundments and containers holding hazardous waste. Records and reports are necessary in order for the EPA to determine that the standards are implemented and maintained to protect human health and the environment.

Organic air emissions from hazardous waste Treatment, Storage and Disposal Facilities (TSDFs) can contain toxic chemical compounds. Cancer and other adverse noncancerous human health

effects can result from exposure to these emissions. Organic emissions from TSDFs react photochemically with other compounds in the atmosphere to form ground level ozone. Excessive ambient ozone concentrations are a major air quality problem in many cities throughout the United States. Nationwide organic emissions from TSDFs are estimated to be approximately one million megagrams per year. These organic emissions are estimated to result in 48 excess incidences of cancer per year nationwide and a 3×10^{-2} maximum individual risk (MIR). The experience of the EPA in implementing and enforcing New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) promulgated under authority of the Clean Air Act has demonstrated that certain information must be collected to ensure compliance with air emission standards. Information collection is needed by the EPA to determine: (a) Whether a hazardous waste contains sufficiently low concentrations of volatile organics to allow the waste to be managed in a tank, surface impoundment, or container without the use of emission controls, and (b) for units requiring emission controls, whether the controls are being properly operated and maintained. The collected information will be used by the EPA enforcement personnel to ensure that the requirements of the recommended rules are being properly applied and that emission control devices are being properly operated and maintained on a continuous basis.

In addition, records and reports are necessary to enable the EPA to identify TSDF owners or operators that may not be operating in compliance with the standards. The reported information is used by the EPA to target TSDFs for inspection and identify what records or waste management units should be inspected at the TSDF. The information that TSDF owners or operators are required to maintain is recorded in sufficient detail to enable owners or operators to demonstrate their means of complying with the applicable standards. The data collected by the affected facility is retained at the facility for a minimum of three years.

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 OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15, and are identified on the form and/or instrument, if applicable.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 114 hours per response. 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.

Respondents/Affected Entities: Hazardous waste treatment, storage and disposal facilities and large quantity generators.

Estimated Number of Respondents: 6,209.

Frequency of Response: On occasion, semiannually.

Estimated Total Annual Hour Burden: 711,477 hours.

Estimated Total Annual Costs: $57,432,910 which includes $0 annualized capital/startup costs, $12,418,000 annual (O&M) costs, and $45,014,910 annual labor costs.

Changes on Estimates: There is an increase of 38,837 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This increase is due to an adjustment of the burden based on including some recordkeeping and reporting requirements that have never been included in this ICR before. The estimated total capital and operations and maintenance costs have increased because operations and maintenance costs were not previously reported for this ICR.

Dated: June 26, 2004.

Oscar Morales,

Director, Collection Strategies Division.

[FR Doc. 04–15617 Filed 7–8–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[SFUND–2000–0008, FRL–7785–2]

Agency Information Collection Activities: Proposed Collection; Comment Request; Continuous Release Reporting Regulations (CRRR) Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), EPA ICR Number 1445.06, OMB Control Number 2050–0086

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a continuing Information Collection Request (ICR) to the Office of Management and Budget (OMB). This is a request to renew an existing approved collection. This ICR is scheduled to expire on November 30, 2004. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before September 7, 2004.

ADDRESSES: Submit your comments, referencing docket ID number SFUND–2000–0008, to EPA online using EDOCKET (our preferred method), by e-mail to *superfund.docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Superfund Docket Office, Mail Code 5202T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Lynn M. Beasley, Office of Solid Waste and Emergency Response, Office of Emergency Prevention, Preparedness, and Response, Emergency Response Staff, 5204G, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 603–9086; fax number: (703) 603–9104; e-mail address: *beasley.lynn@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has established a public docket for this ICR under Docket ID number SFUND–2000–0008, which is available for public viewing at the Superfund Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center 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 Reading Room is (202) 566–1744, and the telephone number for the Superfund Docket is (202) 566–0276. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket.* Use EDOCKET to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA within 60 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, *see* EPA's **Federal Register** notice describing the electronic docket at 67 FR 38102 (May 31, 2002), or go to *http://www.epa.gov./edocket.*

Affected entities: Entities potentially affected by this action are vessels or facilities that manufacture, process, transport, or otherwise use certain specified hazardous substances.

Title: Continuous Release Reporting Regulations (CRRR) under the Comprehensive, Environmental Response, Compensation, and Liability Act of 1980.

Abstract: Section 103(a) of CERCLA, as amended, requires the person in charge of a vessel or facility to immediately notify the National Response Center (NRC) of a hazardous substance release into the environment if the amount of the release equals or exceeds the substance's reportable quantity (RQ). The RQ of every hazardous substance can be found in Table 302.4 of 40 CFR 302.4.

Section 103(f)(2) of CERCLA provides facilities relief from this per-occurrence notification requirement if the hazardous substance release at or above the RQ is continuous and stable in quantity and rate. Under the Continuous Release Reporting Requirements (CRRR), to report such a release as a continuous release you must make an initial telephone call to the NRC, an initial written report to the EPA Region, and, if the source and chemical composition of the continuous release does not change and the level of the continuous release does not significantly increase, a follow-up written report to the EPA Region one year after submission of the initial written report. If the source or chemical composition of the previously reported continuous release changes, notifying the NRC and EPA Region of a change in the source or composition of the release is required. Further, a significant increase in the level of the previously reported continuous release must be reported immediately to the NRC according to section 103(a) of CERCLA. Finally, any change in information submitted in support of a continuous release notification must be reported to the EPA Region.

The reporting of a hazardous substance release that is equal to or above the substance's RQ allows the Federal government to determine whether a Federal response action is required to control or mitigate any potential adverse effects to public health or welfare or the environment.

The continuous release of hazardous substance information collected under CERCLA section 103(f)(2) is also available to EPA program offices and other Federal agencies who use the information to evaluate the potential need for additional regulations, new permitting requirements for specific substances or sources, or improved emergency response planning. State and local government authorities and facilities subject to the CRRR use release information for purposes of local emergency response planning. Members of the public, who have access to release information through the Freedom of Information Act, may request release information for purposes of maintaining an awareness of what types of releases are occurring in different localities and what actions, if any, are being taken to protect public health and welfare and the environment. 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 OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

The EPA would like to solicit comments to:

(i) 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;

(ii) Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) 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.

Burden Statement:

Estimated total number of facilities that will have to report continuous hazardous substance releases per year: 2,712.

Frequency of response: After reporting the continuous release to the NRC and EPA Region initially, only a one-year follow-up report to the EPA Region is necessary unless there is a change in the source of the continuous release, a change in the chemical composition of the continuous release, or a significant increase in the level of the continuous release. In these cases the person in charge of the facility has to notify the NRC and the appropriate EPA Regional Office of the change in the continuous release.

Estimated total annual burden hours: 249,451 hours.

Estimated total annual burden costs: $11,277,827.

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.

Dated: June 29, 2004.

Deborah Y. Dietrich,

Director, Office of Emergency Prevention, Preparedness, and Response.

[FR Doc. 04–15618 Filed 7–8–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7785–5]

Science Advisory Board Staff Office

Request for Nominations for the Science Advisory Board Second Generation Model Advisory Panel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA Science Advisory Board (SAB) Staff Office announces the formation of a new advisory panel known as the SAB Second Generation Model (SGM) Advisory Panel, and is soliciting nominations for members of the Panel.

DATES: Nominations should be submitted by July 30, 2004, per the instructions below.

ADDRESSES: Any member of the public wishing further information regarding this Request for Nominations may contact Dr. Holly Stallworth, Designated Federal Officer (DFO), via telephone/voice mail at (202) 343–9867; via e-mail at *stallworth.holly@epa.gov* or at the U.S. EPA Science Advisory Board (1400F), 1200 Pennsylvania Ave., NW., Washington, DC 20460. General information about the SAB can be found on the SAB Web site at: *http://www.epa.gov/sab.*

FOR FURTHER INFORMATION CONTACT: Contact Dr. Holly Stallworth at (202) 343–9867.

SUPPLEMENTARY INFORMATION:

Background: EPA's Office of Atmospheric Programs (OAP) requested that the SAB provide advice on a computable general equilibrium (CGE) model known as the Second Generation Model (SGM). This regionally disaggregated model of the global economy is a computer program that uses input-output relationships and simultaneous equations to simulate activities in multiple markets (*e.g.*, labor markets, energy fuels markets, and final goods markets) in the economy. These models consider major economic actors (households, government, and firms) as well as other important aspects of the economy, including demographics, resources, energy supply, and capital flows. The SGM is a 14 region, 22 sector CGE model that can be used to project greenhouse gas emissions and determine the costs of various options for reducing greenhouse gas emissions (*e.g.* carbon fees or charges, allowance trading, accelerated energy conservation).

The SAB is a chartered Federal Advisory Committee, established by 42 U.S.C. 4365, to provide independent scientific and technical advice, consultation, and recommendations to the EPA Administrator on the technical bases for EPA policies and actions. The SAB SGM Advisory Panel will provide advice through the chartered SAB and will comply with the openness provisions of the Federal Advisory Committee Act (FACA) and all appropriate SAB procedural policies. The work of this panel includes reviewing background material, participating in a few public teleconferences, and attending one or more public face-to-face meetings, until the advisory is complete.

Tentative Charge to the SAB Panel: EPA's OAP requested that the SAB provide comments on the appropriateness and usefulness of the SGM model for estimating the economic effects of climate policies. Proposed specific charge questions to the SAB SGM Advisory Panel are as follows.

1. Are the model's structure and fundamental assumptions consistent with economic theory?

2. Are the parameter values employed in the model (*e.g.*, elasticities of substitution and of demand, price and income) within the range of values in the literature?

3. Are the model's parameterizations of physical phenomena logical, and are its projections of future energy use and efficiency reasonable, given fundamental physical constraints and rates of technological change?

4. Are the model's outputs and projections for short-, medium-, and long-term analyses reasonable and within the range of expert opinion?

5. In what areas is the model most in need of further development and refinement?

EPA Technical Contact: An extensive and detailed documentation of SGM's structure, parameters and assumptions, as well as a shorter overview paper, will be available on EPA's OAP's Web site. Mr. Michael Leifman of OAP is the EPA technical contact and may be contacted at (202) 343–9380 or at *leifman.michael@epa.gov.*

Request for Nominations: The SAB Staff Office is requesting nominations of recognized experts with one or more of the following expertise to serve on the SAB SGM Advisory Panel: (a) Energy economics; (b) environmental economics; (c) economic modeling of climate options; (d) computable general equilibrium modeling; (e) technological change and diffusion; and (f) climate science.

Process and Deadline for Submitting Nominations: Any interested person or organization may nominate individuals qualified in the areas of expertise described above to serve on the SAB SGM Advisory Panel. Nominations should be submitted in electronic format through the Form for Nominating Individuals to Panels of the EPA Science Advisory Board which can be accessed through a link on the blue navigational bar on the SAB Web site at: *http://www.epa.gov/sab.* To be considered, all nominations must include the information requested on that form.

Anyone who is unable to submit nominations using this form, and any questions concerning any aspects of the nomination process may contact the DFO, as indicated above in this notice. Nominations should be submitted in time to arrive no later than July 30, 2004. Any questions concerning either this process or any other aspects of this notice should be directed to the DFO. The process for forming a SAB panel is described in the Overview of the Panel Formation Process at the Environmental Protection Agency, Science Advisory Board (EPA–SAB–EC–COM–02–010), on the SAB Web site at: *http://www.epa.gov/sab/pdf/ecm02010.pdf.*

The SAB Staff Office will acknowledge receipt of the nomination and inform nominators of the panel selected. From the nominees identified by respondents to this **Federal Register** notice (termed the "Widecast"), the SAB Staff Office will develop a smaller subset (known as the "Short List") for more detailed consideration. The Short List will be posted on the SAB Web Site at: *http://www.epa.gov/sab,* and will include, for each candidate, the nominee's name and biosketch. Public comments on the Short List will be accepted for 21 calendar days. During this comment period, the public will be requested to provide information, analysis or other documentation on nominees that the SAB Staff Office should consider in evaluating candidates for the Panel.

For the SAB, a balanced panel (*i.e.*, committee, subcommittee, or panel) is characterized by inclusion of candidates who possess the necessary domains of knowledge, the relevant scientific perspectives (which, among other factors, can be influenced by work history and affiliation), and the collective breadth of experience to

adequately address the charge. Public responses to the Short List candidates will be considered in the selection of the panel, along with information provided by candidates and information gathered by SAB Staff independently of the background of each candidate (*e.g.*, financial disclosure information and computer searches to evaluate a nominee's prior involvement with the topic under review). Specific criteria to be used in evaluation of an individual Panel member include: (a) Scientific and/or technical expertise, knowledge, and experience (primary factors); (b) absence of financial conflicts of interest; (c) scientific credibility and impartiality; (d) availability and willingness to serve; and (e) ability to work constructively and effectively in committees.

Short List candidates will be required to fill-out the "Confidential Financial Disclosure Form for Special Government Employees Serving on Federal Advisory Committees at the U.S. Environmental Protection Agency" (EPA Form 3110–48). This confidential form allows Government officials to determine whether there is a statutory conflict between that person's public responsibilities (which includes membership on an EPA Federal advisory committee) and private interests and activities, or the appearance of a lack of impartiality, as defined by Federal regulation. The form may be viewed and downloaded from the following URL address: *http://www.epa.gov/sab/pdf/epaform3110-48.pdf.*

Dated: June 29, 2004.

Vanessa T. Vu,

Director, EPA Science Advisory Board Staff Office.

[FR Doc. 04–15615 Filed 7–8–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6653–5]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 564–7167. An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in the **Federal Register** dated April 2, 2004 (69 FR 17403).

Draft EISs

ERP No. D–AFS–L65455–ID Rating EC2, Clearwater National Forest, Proposes to Approve Plans-of-Operation for Small-Scale Suction Dredging in Lolo Creek and Moose Creek, Clearwater National Forest, North Fork Ranger District, Clearwater and Idaho Counties, ID.

Summary: EPA expressed concern due to water quality impacts related to suction dredge operations. EPA recommends that the final EIS discuss the proposed 303(d) listing of Lolo Creek and how this will affect management of the project area.

ERP No. D–FTA–K53010–CA Rating EC2, Gold Line Phase II—Pasadena to Montclair—Foothill Extension, To Address Transportation Problems and Deficiencies, Cities of Pasadena, Arcadia, Monrovia, Durate, Irwindale, Azusa, Glendora, San Dimas, La Verne, Pomona and Claremont in Los Angeles County and Cities of Montclair and Upland in San Bernardino County, CA.

Summary: EPA expressed environmental concerns regarding impacts to air quality, waters of the U.S., biological resources, and hazardous materials management. EPA recommends additional information in the FEIS regarding these resources.

ERP No. D–NPS–K61159–CA Rating LO, Sequoia and Kings Canyon National Parks, Middle and South Forks of the Kings River and North Fork of the Kern River, General Management Plan, Tulare and Fresno Counties, CA.

Summary: EPA expressed a lack of objections to the project, but suggested additional information in the FEIS regarding expansion of the parks' shuttle system, air quality standards, and stock use mitigation measures.

Final EISs

ERP No. F–AFS–F65040–WI, Programmatic EIS—Cheguamegon-Nicolet National Forests Revised Land and Resource Management Plan, Implementation, Ashland, Bayfield, Florence, Forest, Langlade, Oconto, Oneida, Price, Sawyer, Taylor and Vilas Counties, CA.

Summary: EPA's previous comments were addressed in the Final EIS. Therefore, EPA has no objection to the proposed action.

ERP No. F–AFS–H65015–NB, Pine Ridge Geographic Area Rangeland Allotment Management Planning, To Permit Livestock Grazing on 34 Allotments, Nebraska National Forest, Pine Ridge Ranger District, Dawes and Sioux Counties, NB.

Summary: EPA's concerns identified in the Draft EIS were addressed in the Final EIS. Therefore, EPA was no objection to the proposed action.

ERP No. F–AFS–J65394–MT, Basin Creek and Blacktail Hazardous Watershed Fuels Reduction Project, Implementation, Highland Mountains, Butte Ranger District, Beaverhead-Deerlodge National Forest, Butte-Silver Bow County, MT.

Summary: EPA supports the need to protect the Basin Creek municipal watershed for the City of Butte, and to reduce hazardous fuels and fire risk. However, given concerns with the potential impacts to water quality EPA stressed the need to avoid impacts to water quality in the municipal watershed during hazardous fuel reduction treatments.

ERP No. F–IBR–L39059–WA, Banks Lake Drawdown Project, Proposal to Lower the Water Surface Elevation from 1565 feet to 1560 feet in August of each year, Columbia River, Douglas and Grant Counties, WA.

Summary: No formal comment letter was sent to the preparing agency.

ERP No. F–NPS–K65244–CA, Yosemite Fire Management Plan, Alternative for Carrying out the Fire Management Program, Implementation, Yosemite National Park, Sierra Nevada, Mariposa, Tuolumne, Madera and Mono Counties, CA.

Summary: EPA expressed a lack of objections to the project. However, as the project area was recently redesignated as nonattainment for the new eight-hour ozone national ambient air quality standard, EPA recommends that the ROD reflect the need to meet conformity requirements at 40 CFR 93.150–93.160 after June 15, 2005.

ERP No. FR–BLM–G70005–NM, Sierra and Otero Counties Resource Management Plan Amendment and Federal Fluid Minerals Leasing and Development, Additional Information to Improve the Public Understanding of the Proposed Plan, Implementation, Sierra and Otero Counties, NM.

Summary: No formal comment letter was sent to the preparing agency.

Dated: July 6, 2004.

Ken Mittelholtz,

Environmental Protection Agency, Office of Federal Activities.

[FR Doc. 04–15620 Filed 7–8–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6653–4]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7167 or *http://www.epa.gov/compliance/nepa/.*

Weekly receipt of Environmental Impact Statements

Filed June 28, 2004, Through July 2, 2004

Pursuant to 40 CFR 1506.9.

EIS No. 040302, Final Supplement, AFS, OR, Rimrock Ecosystem Restoration Projects, New Information on the Commercial and Non-commercial Thinning Treatments in the C3 Management Area, Umatilla National Forest, Heppner Ranger District, Grant, Morrow and Wheeler Counties, OR, Wait Period Ends: August 9, 2004, Contact: David S. Herr (541) 278–3869.

EIS No. 040303, Final EIS, NPS, MT, Glacier National Park Commercial Services Plan, General Management Plan, Implementation, Glacier National Park, a Portion of Waterton-Glacier International Peace Park, Flathead and Glacier Counties, MT, Wait Period Ends: August 9, 2004, Contact: Mary Riddle (406) 888–7898.

EIS No. 040304, Final EIS, FHW, NE, SD, U.S. 81 Highway, Yankton Bridge Replacement, Missouri River Crossing between the City of Yankton, Yankton County, South Dakota and Cedar County, Nebraska, Funding and Permit Issuance, SD and NE, Wait Period Ends: August 9, 2004, Contact: Edward Kosola (402) 437–5521.

EIS No. 040305, Final EIS, FRC, AK, Glacier Bay National Park and Preserve, Falls Creek Hydroelectric Project (FERC. NO. 11659) and Land Exchange Project, Issuance of License and Land Exchange, Kahtaheena River (Falls Creek) near Gustavus in Southeastern, AK, Wait Period Ends: August 9, 2004, Contact: Robert Easton (202) 502–6045.

EIS No. 040306, Final EIS, IBW, TX, NM, Rio Grande Canalization Project (RGCP), Long-Term River Management Alternatives Practices, Implementation, from below Percha Dam in Sierra County, NM to American Dam in El Paso, TX, Wait Period Ends: August 9, 2004, Contact: Douglas Echlin (915) 832–4741.

EIS No. 040307, Final EIS, DOE, OR, COB Energy Facility, Proposes to Construct a 1,160-megawatt (MW) Natural Gas-Fired and Combined-Cycle Electric Generating Plant, Right-of-Way Permit cross Federal Land under the Jurisdiction of BLM, Klamath Basin, Klamath County, OR, Wait Period Ends: August 9, 2004, Contact: Thomas C. McKinney (503) 230–4749.

EIS No. 040308, Final EIS, AFS, AK, Threemile Timber Sale, Implementation, Petersburg Ranger District, Tongass National Forest, AK, Wait Period Ends: August 9, 2004, Contact: Jim Brainard (907) 772–3871.

EIS No. 040309, Final EIS, NRC, IL, Dresden Nuclear Power Station, Units 2 and 3, Supplement 17, NUREG 1437, Renewal of a Nuclear Power Plant Operating License, Grundy County, IL, Wait Period Ends: August 9, 2004, Contact: James Wilson (301) 415–1108.

EIS No. 040310, Final EIS, AFS, KY, Gray Mountain Coal Lease Land Use Analysis, Application for Leasing Tracts 3094Bb, 3049Be and 3049Az, Daniel Boone National Forest, Leslie County, KY, Wait Period Ends: August 9, 2004, Contact: Corey Miller (859) 745–3149.

EIS No. 040311, Final EIS, AFS, MT, Pipestone Timber Sale and Restoration Project, Timber Harvest, Prescribed Fire Burning, Watershed Restoration and Associated Activities, Kootenai National Forest, Libby Ranger District, Lincoln County, MT, Wait Period Ends: August 9, 2004, Contact: Leslie Ferguson (406) 283–7568.

EIS No. 040312, Final EIS, NRC, IL, Quad Cities Nuclear Power Station Units 1 and 2, Supplement 16 to NUREG–1437, License Renewal, IL, Wait Period Ends: August 9, 2004, Contact: Louis L. Wheeler (301) 415–1444.

EIS No. 040313, Draft EIS, COE, LA, Programmatic—EIS Louisiana Coastal Area (LCA) Ecosystem Restoration Study, Implementation, Tentatively Selected Plan, Mississippi River, LA, Comment Period Ends: August 23, 2004, Contact: William P. Klein (504) 862–2540.

EIS No. 040314, Final EIS, COE, PR, Port of The Americas Project, Development of a Deep-Draft Terminal at the Port of Ponce to Receive Post-Panamax Ships, COE Section 10 and 404 Permits, Municipalities of Guayanilla-Penuelas and Ponce, Puerto Rico, Wait Period Ends: August 9, 2004, Contact: Jose E. Rosario (787) 729–6905.

EIS No. 040315, Final EIS, AFS, ID, South Fork Wildfire Salvage Project, Harvesting Fire-Killed and Imminently Dead Trees, Cascade Ranger District, Boise National Forest, Valley County, ID, Wait Period Ends: August 9, 2004, Contact: Keith Dimmett (208) 382–7430.

Dated: July 6, 2004.

Ken Mittelholtz,

Environmental Protection Specialist, Office of Federal Activities.

[FR Doc. 04–15621 Filed 7–8–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7785–7]

Environmental Laboratory Advisory Board (ELAB) Meeting Dates, and Agenda

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of teleconference and face-to-face meetings.

SUMMARY: The Environmental Protection Agency's Environmental Laboratory Advisory Board (ELAB) will have teleconference meetings on August 18, 2004, at 1 p.m. e.d.t.; September 15, 2004, at 1 p.m. e.d.t.; October 20, 2004, at 1 p.m. e.d.t.; November 17, 2004, at 1 p.m. e.d.t.; and December 15, 2004, at 1 p.m. e.d.t. in addition to a face-to-face meeting on July 19, 2004, at 9 a.m. e.d.t. at the Wyndham Washington, DC, on 1400 M Street, NW., to discuss the ideas and views presented at the previous ELAB meetings, as well as new business. Items to be discussed include: Laboratory participation; environmental monitoring issues; homeland security; follow-up on draft language on ELAB's past recommendations on EPA reference methods; performance based measurement systems; and outreach. Written comments on NELAP laboratory accreditation and the NELAC standards are encouraged and should be sent to Ms. Lara P. Autry, DFO, US EPA (E243–05), 4930 Old Page Road, Research Triangle Park, NC 27709, faxed to (919) 541–4261, or e-mailed to *autry.lara@epa.gov.* Members of the public are invited to listen to the teleconference calls or attend the face-to-face meeting, and time permitting, will be allowed to comment on issues discussed during this and previous ELAB meetings. Those persons interested in attending should call Lara P. Autry at (919) 541–5544 to obtain teleconference information or logistics regarding the hotel for the face-to-face meeting. The number of lines for the teleconferences, however, are limited and will be distributed on a first come, first serve basis. Preference will be given

to a group wishing to attend over a request from an individual.

Paul Gilman,

Assistant Administrator, Office of Research and Development.

[FR Doc. 04–15619 Filed 7–8–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7785–4]

Notification of an Upcoming Closed Meeting of the Science Advisory Board's Scientific and Technology Achievement of Awards Subcommittee—Closed Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA), Science Advisory Board (SAB) Staff Office announces a closed meeting of the Scientific and Technological Achievement Awards Subcommittee to recommend to the Assistant Administrator of the Office of Research and Development (ORD) the recipients of the Agency's 2004 Scientific and Technological Achievement Cash Awards.

DATES: August 10–12, 2004.

ADDRESSES: This closed meeting will take place at the U.S. Environmental Protection Agency, Science Advisory Board Conference Center, 1025 F Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Members of the public who wish to obtain further information regarding this announcement may contact Ms. Kathleen White, Designated Federal Officer, by telephone: (202) 343–9878 or e-mail at: *white.kathleen@epa.gov.*

The SAB Mailing address is: US EPA Science Advisory Board (1400F), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave, NW., Washington, DC 20460. General information about the SAB as well as any updates concerning the meeting announced in this notice, may be found in the SAB Web site at: *http://www.epa.gov/sab.*

SUPPLEMENTARY INFORMATION:

Summary: Pursuant to Section 10(d) of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, and section (c)(6) of the Government in the Sunshine Act, 5 U.S.C. 552b(c)(6), EPA has determined that the meeting will be closed to the public. The purpose of the meeting is to recommend to the Assistant Administrator of ORD the recipients of the Agency's 2004 Scientific and Technological Achievement Cash Awards. These awards are established to honor and recognize EPA employees who have made outstanding contributions in the advancement of science and technology through their research and development activities, as exhibited by publication of their results in peer reviewed journals. In making these recommendations, including the actual cash amount of each award, the Agency requires full and frank advice from the SAB. This advice will involve professional judgments on the relative merits of various employees and their respective work. Such personnel issues, where disclosure of information of a personal nature would constitute an unwarranted invasion of personal privacy, are protected from disclosure by section (c)(6) of the Government in the Sunshine Act, 5 U.S.C. 552b(c)(6). In accordance with the provisions of the Federal Advisory Committee Act, minutes of the meeting will be kept for Agency and Congressional review.

Dated: June 25, 2004.

Michael O. Leavitt,

Administrator.

[FR Doc. 04–15616 Filed 7–8–04; 8:45 am]

BILLING CODE 6560–50–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7778–3]

Casmalia Disposal Site; Notice of Proposed CERCLA Administrative De Minimis Settlement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comment.

SUMMARY: In accordance with section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), 42 U.S.C. 9622(i), the EPA is hereby providing notice of a proposed administrative *de minimis* settlement concerning the Casmalia Disposal Site in Santa Barbara County, California ("the Casmalia Disposal Site"). Section 122(g) of CERCLA, 42 U.S.C. 9622(g), provides EPA with the authority to enter into administrative *de minimis* settlements. This settlement is intended to resolve the liabilities of 192 settling parties for the Casmalia Disposal Site under CERCLA and section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6973. For most of the parties, the settlement will also resolve the Casmalia Disposal Site-related liability for response costs incurred or to be incurred, and potential natural resource damage claims, by the United States Fish and Wildlife Service, the National Oceanic and Atmospheric Administration, and the United States Air Force. The settling parties will pay a total of $11.9 million to EPA.

DATES: EPA will receive written comments relating to the settlement until August 13, 2004. The EPA will consider all comments it receives during this period, and may modify or withdraw its consent to the settlement if any comments disclose facts or considerations indicating that the settlement is inappropriate, improper, or inadequate.

In accordance with section 7003(d) of RCRA, 42 U.S.C. 6973(d), commenters may request an opportunity for a public meeting in the affected area. The deadline for requesting a public meeting is July 19, 2004. Requests for a public meeting may be made by calling Karen Goldberg at (415) 972–3951, or e-mailing her at *goldberg.karen@epa.gov,* or by facsimile at (415) 947–3570.

ADDRESSES: Written comments should be addressed to Casmalia Case Team, U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street (mail code SFD–7–1), San Francisco, California 94105–3901.

FOR FURTHER INFORMATION CONTACT: Additional information about the Casmalia Disposal Site and about the proposed settlement may be obtained on the Casmalia Web site at: *http://yosemite.epa.gov/r9/sfund/overview.nsf* or by calling Karen Goldberg at (415) 972–3951.

Dated: June 21, 2004.

Keith Takata,

Director, Superfund Division, Region IX.

[FR Doc. 04–14606 Filed 7–8–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7784–4]

Program Requirement Revisions Related to the Public Water System Supervision Programs for the Commonwealth of Massachusetts and the State of Rhode Island

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Notice is hereby given that the Commonwealth of Massachusetts and the State of Rhode Island are in the process of revising their approved

Public Water System Supervision Programs to meet the requirements of the Safe Drinking Water Act (SDWA).

The Commonwealth of Massachusetts has adopted drinking water regulations for the Stage 1 Disinfectants/Disinfection Byproducts Rule (63 FR 69390–69476), and the Interim Enhanced Surface Water Treatment Rule (63 FR 69478–69521), promulgated on December 16, 1998, that correspond to the National Primary Drinking Water Regulations. After review of the submitted documentation, EPA has determined that the Stage 1 Disinfectants/Disinfection Byproducts Rule and the Interim Enhanced Surface Water Treatment Rule currently in effect in Massachusetts are no less stringent than the corresponding Federal regulations. Therefore, EPA intends to approve these Public Water Supply Supervision Program requirements for the Commonwealth of Massachusetts.

The State of Rhode Island and the Commonwealth of Massachusetts have adopted drinking water regulations for the Filter Backwash Recycling Rule (66 FR 31086) promulgated on June 8, 2001. After review of the submitted documentation, EPA has determined that the Filter Backwash Recycling Rules for these states are no less stringent than Federal regulations. Therefore, EPA intends to approve these Public Water Supervision Program requirements for Rhode Island and Massachusetts.

DATES: All interested parties may request a public hearing for any of the above EPA determinations. A request for a public hearing must be submitted within thirty (30) days of this **Federal Register** publication date to the Regional Administrator at the address shown below. Frivolous or insubstantial requests for a hearing may be denied by the Regional Administrator. However, if a substantial request for a public hearing is made by this date, a public hearing will be held. If no timely and appropriate request for a hearing is received, and the Regional Administrator does not elect to hold a hearing on his/her own motion, this determination shall become final and effective 30 days after the publication of this **Federal Register** notice. Any request for a public hearing shall include the following information: (1) The name, address, and telephone number of the individual organization, or other entity requesting a hearing; (2) a brief statement of the requesting person's interest in the Regional Administrator's determination; (3) information that the requesting person intends to submit at such hearing; and (4) the signature of the individual making the request, or if the request is made on behalf of an organization or other entity, the signature of a responsible official of the organization or other entity.

ADDRESSES: All documents relating to this determination are available for inspection between the hours of 8:30 a.m. and 4 p.m., Monday through Friday, at the following office(s): U.S. Environmental Protection Agency, Office of Ecosystem Protection, One Congress Street, 11th floor, Boston, MA 02114.

For documents specific to that State/Commonwealth:

Massachusetts Department of Environmental Protection, Drinking Water Program, One Winter Street, Boston, MA 02108.

Rhode Island Department of Health, Office of Drinking Water Quality, 3 Capitol Hill, Cannon Building, Room 209, Providence, RI 02908–5097.

FOR FURTHER INFORMATION CONTACT: Barbara McGonagle, Office of Ecosystem Protection (telephone 617–918–1608).

Authority: Section 1401 and section 1413 (42 U.S.C. 300g–2) of the Safe Drinking Water Act, as amended (1996), and 40 CFR part 142.10 of the National Primary Drinking Water Regulations.

Dated: June 24, 2004.

Ira Leighton,

Acting Regional Administrator, EPA—New England.

[FR Doc. 04–15536 Filed 7–8–04; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK OF THE UNITED STATES

Notice of Open Special Meeting of the Advisory Committee of the Export-Import Bank of the United States (Ex-Im Bank)

SUMMARY: The Advisory Committee was established by Pub. L. 98–181, November 30, 1983, to advise the Export-Import Bank on its programs and to provide comments for inclusion in the reports of the Export-Import Bank of the United States to Congress.

Time and Place: Wednesday, July 21, 2004, from 9:30 a.m. to 12:30 p.m. The meeting will be held at Ex-Im Bank in the Main Conference Room 1143, 811 Vermont Avenue, NW., Washington, DC 20571.

Agenda: Agenda items include a presentation of the recently approved Environmental Procedures and Guidelines, suggested recommendations for middle-market SMEs, and an update on Ex-Im Bank related legislative issues.

Public Participation: The meeting will be open to public participation, and the last 10 minutes will be set aside for oral questions or comments. Members of the public may also file written statement(s) before or after the meeting. If any person wishes auxiliary aids (such as a sign language interpreter) or other special accommodations, please contact, prior to July 14, 2004, Teri Stumpf, Room 1203, 811 Vermont Avenue, NW., Washington, DC 20571, Voice: (202) 565–3502 or TDD (202) 565–3377.

FOR FURTHER INFORMATION CONTACT: For further information, contact Teri Stumpf, Room 1203, 811 Vermont Ave., NW., Washington, DC 20571, (202) 565–3502.

Peter Saba,

General Counsel.

[FR Doc. 04–15573 Filed 7–8–04; 8:45 am]

BILLING CODE 6690–01–M

FEDERAL COMMUNICATIONS COMMISSION

[DA 04–1738]

FCC Reminds Public of Requirements Regarding Internet Relay Service and Issues Alert

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Commission provides guidance to consumers, TRS providers, and merchants that conduct business via telephone. In addition, this document is intended to alert the public regarding the fraudulent use of IP Relay Service, and to suggest steps they can take to avoid becoming victims.

DATES: Effective June 18, 2004.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Dana Jackson, (202) 418–2247 (voice), (202) 418–7898 (TTY), or e-mail *dana.jackson@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Public Notice,* DA 04–1738 released June 18, 2004.

The full text of this document is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room

CY–B402, Washington, DC 20554. Customers may contact BCPI, Inc. at their Web site: *http://www.bcpiweb.com* or call 1–800–378–3160.

To request this document in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This *Public Notice* can also be downloaded in Word and Portable Formats at *http://www.fcc.gov/cgb/dro*.

Synopsis: TRS enables an individual with a hearing or speech disability to communicate by telephone with a person without such a disability. This is accomplished through TRS facilities that are staffed by specially trained communications assistants (CAs) using special technology. The CA relays conversations between persons using various types of assistive communication devices and persons who do not require such assistive devices. In a traditional text-based TRS call, the caller types the number of the TRS facility and, after reaching the facility, types the number of the party he or she desires to call. The CA, in turn, places an outbound voice call to the called party. The CA serves as the "link" in the conversation, converting all TTY messages from the caller into voice messages, and all voice messages from the called party into typed messages for the TTY user. The process is performed in reverse when a voice telephone user initiates a traditional TRS call to a TTY user. TRS also includes Video Relay Services (VRS), Internet Protocol (IP) Relay, and Speech-to-Speech (STS). IP Relay is a form of TRS that uses the Internet, rather than the Public Switched Telephone Network, to place the leg of the call from the person with a hearing or speech disability to the TRS CA. The IP Relay user establishes a local connection to an Internet service provider (ISP) using a computer, web phone, personal digital assistant (PDA) or any other IP-capable device. The IP Relay user then reaches a CA by directing the web browser to one of the IP Relay providers' Web sites. When the IP Relay user is connected to the IP Relay service provider, the user is immediately routed to a CA, who then makes the outbound call to the hearing person and relays the call between the parties. The Commission has received complaints from vendors, consumers, and TRS providers that people are using the IP Relay to make telephone purchases using stolen or fake credit cards. Although such purchases are illegal, and the Department of Justice and the FBI can investigate, due to the transparent nature of the CA's role in a TRS call the CA may not interfere with the conversation. The TRS statutory and regulatory scheme do not contemplate that the CA should have a law enforcement role by monitoring the conversations they are relaying.

The Federal Trade Commission is aware of this problem and has instructed that persons who have been defrauded should contact the FTC directly at *http://www.ftc.gov* or 877–FTC–HELP. The FBI also has a Web site for complaints and information regarding Internet crimes: *http://www.ic3.gov*. Since this type of fraud first became apparent, the TRS Providers have worked to develop methods to determine which IP Relay calls are fraudulent, and therefore have been able to prevent many of these calls from reaching the intended victims. This has been achieved without negatively impacting legitimate users of the service, according to the IP Relay providers. However, this is still a concern and merchants should report any fraudulent activity to the FTC, FBI, or their state authorities. We encourage vendors that accept orders for their goods and services by telephone to take steps to ensure that, when they receive a TRS call, the credit card is valid and the purchaser is authorized to use the particular credit card, just as they would do with any other telephone order. We also remind vendors that Title III of the Americans with Disabilities Act of 1990 (ADA) does not permit merchants to treat persons with a hearing or speech disability differently than they treat others. Therefore, if they accept telephone orders from the general public, they cannot refuse to accept them from persons with hearing or speech disabilities using TRS.

For more information on the applicability of the ADA in this context, see generally the United States Department of Justice's ADA home page, at *http://www.usdoj.gov/crt/ada/adahom1.htm* or contact the DOJ ADA Information Line at 800–514–0301 (voice) or 800–514–0663 (TTY).

Federal Communications Commission.

Thomas D. Wyatt,

Deputy Chief, Consumer & Governmental Affairs Bureau.

[FR Doc. 04–15639 Filed 7–8–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Intra-Agency Appeal Process: Guidelines for Appeals of Material Supervisory Determinations and Guidelines for Appeals of Deposit Insurance Assessment Determinations

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of guidelines.

SUMMARY: On June 28, 2004, the Federal Deposit Insurance Corporation ("FDIC") Board of Directors ("Board") adopted revised Guidelines for Appeals of Material Supervisory Determinations ("guidelines"). The Guidelines for Appeals of Material Supervisory Determinations govern the Supervision Appeals Review Committee ("SARC") process and supersede the FDIC's prior Guidelines for Appeals of Material Supervisory Determinations, which were adopted by the FDIC's Board of Directors on March 21, 1995. The guidelines reconstitute the SARC and modify the procedures for appeals to the SARC. On that same date, the Board also adopted Guidelines for Appeals of Deposit Insurance Assessment Determinations. The Guidelines for Appeals of Deposit Insurance Assessment Determinations govern the Assessment Appeals Committee ("AAC") process. The guidelines reconstitute the AAC and set out procedures for appeals to the AAC. Both sets of guidelines are effective upon adoption.

DATES: The SARC Guidelines and the AAC Guidelines became effective on June 28, 2004.

FOR FURTHER INFORMATION CONCERNING THE SARC GUIDELINES CONTACT: Lisa K. Roy, Associate Director, Division of Supervision and Consumer Protection, (202) 898–3764; Christopher Bellotto, Counsel, Legal Division, (202) 898–3801, Federal Deposit Insurance Corporation, 550 17th St., NW., Washington, DC 20429.

FOR FURTHER INFORMATION CONCERNING THE AAC GUIDELINES CONTACT: William V. Farrell, Chief, Assessment Management Section, Division of Finance, (202) 416–7156; Diane Ellis, Associate Director, Division of Insurance and Research, (202) 898–8978; Lisa K. Roy, Associate Director, Division of Supervision and Consumer Protection, (202) 898–3764; Christopher Bellotto, Counsel, (202) 898–3801, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

The revised Guidelines for Appeals of Material Supervisory Determinations

change the composition of the SARC, reducing it from five to three voting members, and incorporate changes to the procedures governing SARC appeals. Included are new rules under which the FDIC's Division of Supervision and Consumer Protection ("DSC") issues written decisions if it denies requests for review of material supervisory determinations; if dissatisfied with the division's determination, institutions decide for themselves whether to appeal to the SARC; and SARC decisions will be published, with exempt material redacted. The types of determinations eligible for review by the SARC and the standards by which such appeals are decided remain unchanged.

The Guidelines for Appeals of Deposit Insurance Assessment Determinations change the composition of the AAC, reducing it from seven to five voting members, and set forth procedures to be followed by insured depository institutions that choose to appeal adverse assessment determinations they have received from the appropriate FDIC division. As with the SARC, AAC decisions will be published, with exempt material redacted. The types of determinations eligible for review by the AAC and the standards by which such appeals are decided remain unchanged.

On March 18, 2004, the FDIC published in the **Federal Register**, for a 30-day comment period, a notice of and request for comments the proposed revisions to the Guidelines for Appeals of Material Supervisory Determinations and the proposed Guidelines for Appeals of Deposit Insurance Assessment Determinations. (69 FR 12855). The comment period closed on April 19, 2004. The FDIC considered it desirable in this instance to garner comments regarding these guidelines, although notice and comment rulemaking was not required and need not be employed should the FDIC make future amendments.

The FDIC received three comment letters, two from trade organizations (America's Community Bankers and the American Bankers Association) and one from a depository institution (The Bank of Easton). The comments generally supported the proposed guidelines, although a few objections were raised and several recommendations were made to somewhat revise specific parts of the proposal. The following is a discussion of the revised guidelines for the SARC and for the AAC and the comments received.

I. Guidelines for Appeals of Material Supervisory Determinations

Background

Section 309(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (Public Law 103–325, 108 Stat. 2160) ("Riegle Act") required the FDIC (as well as the other Federal banking agencies and the National Credit Union Administration Board) to establish an independent intra-agency appellate process to review material supervisory determinations.

The Riegle Act defines the term "independent appellate process" to mean a review by an agency official who does not directly or indirectly report to the agency official who made the material supervisory determination under review. In the appeals process, the FDIC is required to ensure that (1) an appeal of a material supervisory determination by an insured depository institution is heard and decided expeditiously; and (2) appropriate safeguards exist for protecting appellants from retaliation by agency examiners.

On March 21, 1995, the FDIC's Board of Directors adopted the original Guidelines for Appeals of Material Supervisory Determinations, which established and set forth procedures governing the SARC, whose purpose was to consider and decide appeals of material supervisory determinations as required by the Riegle Act.

A. Membership

As originally constituted, the SARC consisted of the FDIC Vice Chairperson (as chair of the SARC), the Director of the Division of Supervision ("DOS"), the Director of the Division of Compliance and Consumer Affairs ("DCA"), the Ombudsman, and the General Counsel (or their designees).

The 1995 SARC guidelines were amended in 1999 to add the Director of the Division of Insurance (now the Director of the Division of Insurance and Research ("DIR")) as a voting SARC member, to provide formally that the Directors of DOS and DCA (now the DSC Director) would not vote on cases brought before the SARC involving their respective (now consolidated) divisions, to provide that designees would be limited to the most senior members of a SARC member's staff, and to include Truth-in-Lending (Regulation Z) restitution. In addition, the SARC was expressly authorized to consider appeals of denied filings as set forth in 12 CFR 303.11(f) for which a Request for Reconsideration has been granted, other than denials of a change in bank control, change in senior executive officer or board of directors, or denial of an application pursuant to section 19 of the Federal Deposit Insurance Act ("FDI Act") (which are contained in 12 CFR 308, subparts D, L, and M, respectively), if the filing was originally denied by the Director, Deputy Director or Associate Director of DSC.

While the prior guidelines satisfied the Riegle Act's requirement to establish an independent appellate process for the review of material supervisory determinations, the revised guidelines will facilitate the disposition of SARC appeals and further underscore the perception of the SARC as a fair and independent high-level body for review of material supervisory determinations within the FDIC.

In the Notice and Request for Comment published on March 18, 2004, the FDIC proposed to change the composition of the SARC so that the Director of DSC, the Director of DIR, and the Ombudsman would no longer serve on the SARC, and new SARC members would be drawn from the most senior levels of the Corporation.

Under the revised guidelines, SARC membership would consist of three (3) voting members: (1) One of the inside FDIC Board members, either the Chairperson, the Vice Chairperson, or the Director (Appointive), as designated by the FDIC Chairperson (this person would serve as the Chairperson of the SARC); and (2) one deputy or special assistant to each inside FDIC Board member not designated as the SARC Chairperson.

The General Counsel would be the fourth, and non-voting, member of the SARC. The FDIC Chairperson can designate alternate member(s) to the SARC if vacancies occur so long as the alternate member was not directly or indirectly involved in making or affirming the material supervisory determination under review. In addition, a member of the SARC can designate and authorize the most senior member of his or her staff—within the substantive area—to act on his or her behalf in SARC matters.

One commenter noted that the designation "inside directors" would make the procedures more "reader-friendly." The FDIC has two "outside directors"—the Director from the Office of the Comptroller of the Currency and the Director from the Office of Thrift Supervision. The FDIC has three "inside directors"—the FDIC Chairperson, the FDIC Vice-Chairperson and the appointive FDIC Director. By using the designation suggested by the commenter, the procedures more clearly describe the membership of the SARC

and AAC. The FDIC has adopted this suggestion in the revised guidelines. In addition, the term "special assistant" has been added to clarify that directors may have both deputies and special assistants who may serve on the SARC (or AAC).

The three commenters expressed concern over the removal of the FDIC's Ombudsman from the SARC. One commenter indicated a preference that the Ombudsman be the sole decision maker for appeals of material supervisory determinations, but, if not that, at least be retained as a voting member; one commenter acknowledged the potential for perceived conflicts that arise because the Ombudsman serves a dual role as SARC member as well as liaison to insured institutions; the third commenter saw the Ombudsman as playing a valuable role in facilitating discussions between institutions and examiners. The latter two commenters suggested that the Ombudsman be retained as a non-voting SARC member. The former commenter also objected to the FDIC's proposal on the grounds that it did not conform with the statutory requirement for the Ombudsman. No commenter opposed the elimination of division directors and one expressly supported that change.

After considering the comments on the composition of the SARC, the FDIC continues to believe that the revised composition and structure of the SARC satisfies the requirements of the Riegle Act to establish an independent intra-agency appellate process and represents an improvement on SARC membership. A tension and a potential for conflict exist between the Ombudsman's statutory role and its role as a member of the SARC. The statute provides that the Ombudsman is a liaison between the agency and any affected person with respect to any problem resulting from the agency's regulatory activities. On the SARC, the Ombudsman is an agency deciding official. These two roles are fundamentally different and to a degree inconsistent. As liaison, the Ombudsman is required to be neutral, independent, and confidential. In fulfilling its statutory role, the Ombudsman collects information from the institution and the FDIC and attempts to promote communication between the institution and the FDIC. As a member of the SARC, the Ombudsman loses its liaison role and may be presented with actual, potential or perceived conflicts to its neutrality, independence and confidentiality. For example, the Ombudsman may receive confidential information from an institution before the matter is appealed to the SARC. If the Ombudsman is also a SARC member, he or she is placed in the difficult position of either (1) using that confidential information in the FDIC's decision-making process, even though the information was obtained under a promise of confidentiality, or (2) attempting to ignore information acquired in his or her Ombudsman role no matter how important he or she may think the information is.

Making the Ombudsman a non-voting SARC member, as two commenters suggested, does not solve this dilemma. The FDIC believes that underlying tension between the two roles of the Ombudsman—as SARC member and as liaison between the agency and any affected person—places the Ombudsman in a potentially conflicted position best resolved if the Ombudsman does not serve as a SARC member.[1]

The commenter's objection that the FDIC's proposal "does not conform with the statutory requirement" for the Ombudsman is not supported by the Riegle Act. The statute sets forth two duties for the Ombudsman: To act as liaison between the agency and any affected person and to assure that safeguards exist to encourage complainants to come forward and preserve confidentiality. 12 U.S.C. 4806(d). "Independent appellate process" is defined as review by an agency official who does not report to the official who made the determination under review. 12 U.S.C. 4806(f)(2). No role for the Ombudsman as agency decision maker regarding material supervisory determinations is articulated. The FDIC believes that the proposed structure of the SARC fully complies with the Riegle Act. Consistent with this view, neither the Federal Reserve Board Ombudsman nor the Office of Thrift Supervision Ombudsman participates in deciding material supervisory determinations within those agencies.[2] Under the prior guidelines, the Ombudsman could consider the merits of matters under review by the DSC Director or on appeal to the SARC only in its role as a SARC member. Under the revised guidelines the subject matter of a material supervisory determination that has been appealed to the SARC or that has been resolved in a final SARC decision is ineligible for consideration by the Ombudsman. Thus, unlike the prior guidelines, under the revised guidelines the Ombudsman may consider the merits of a material supervisory determination for which review has been requested from the DSC Director before the institution has made an appeal to the SARC. In addition, the Ombudsman may consider any other problem that an institution may have in dealing with the FDIC.

B. Procedures

Institutions that wish to obtain SARC review of material supervisory determinations must file an appeal to the SARC within 30 calendar days from the date of the division director's written determination. Unlike the prior process, institutions receive a written determination issued by DSC within 30 days, setting forth the reasons for the division's denial. Based on DSC's determination, institutions decide for themselves whether to appeal to the SARC. If the issue presented is not one that merits expending the time or effort of seeking a SARC determination, the institution may decide not to appeal. Under the new guidelines, that decision rests with the institution.

The depository institution, which had recently completed a SARC appeal, complained that it was never informed of DSC's denial of its request for review or that the request had been passed to the SARC. The revised guidelines remedy this anomaly by providing that institutions receive a DSC determination and then have the opportunity to decide for themselves whether to file a SARC appeal. Another commenter expressly supported this provision, saying that a written decision from the DSC Director would "add certainty" to the status of a request.

[1] An express basis for one of the comments favoring keeping the Ombudsman on the SARC is an expectation that the sort of conflict discussed above will occur, *i.e.*, the commenter stated that the Ombudsman should remain on the SARC because the Ombudsman facilitated discussions between the institution and examiners. Such communications, however, were impermissible under the prior SARC guidelines if they addressed the merits of an appeal; "The merits of any material supervisory determination for which an appeal has been initiated or a final decision made will not be eligible for consideration by the Ombudsman (except in his or her capacity as a member of the Supervision Appeals Review Committee)." The substance of that limitation on the Ombudsman's role, once the matter has been appealed to the SARC, is retained in the revised guidelines.

[2] The Office of the Comptroller of the Currency's (OCC) Ombudsman, in contrast, acts as both fact gatherer and sole deciding official in material supervisory appeals, and did so prior to passage of the Riegle Act. The Act's legislative history indicates that pre-existing programs could continue: "Some of the Federal banking agencies have in place procedures to settle disputes between the agency and a financial institution that may satisfy the requirements of this [regulatory appeals process] provision. In addition, some agencies, for example, the Comptroller of the Currency, may already have appointed an Ombudsman to hear appeals. Nothing in this section is intended to interfere with such existing programs." H.R. Conf. Rep. No. 103–652 (Aug. 2, 1994), 1994 U.S.C.C.A.N. 1977, 2001, 1994 WL 405912.

An appeal to the SARC is considered filed if received by the FDIC within 30 calendar days from the date of the determination being appealed or if placed in the United States mail within 30 calendar days from the date of that determination. Institutions must include their name and address, the name and address of any representative, a copy of the determination being appealed, and all of the reasons, factual or legal, why the institution disagrees with the DSC Director's determination. FDIC staff analyzes the filing for the SARC, but that analysis is part of the intra-agency deliberative process and is not disclosable to insured institutions. The SARC's written decision, setting forth the SARC's rationale, is provided to the institution within 60 days from the date the appeal is filed.

One commenter suggested that the SARC, in its written decision, and the DSC Director, in its written determination of a request for review, be required to respond separately to each argument advanced by an institution in support of its request or appeal. A letter "generally denying" a request, the commenter stated, does not demonstrate an open commitment to communication, does not help an institution to understand the basis for a denial, does not help an institution determine whether to file an appeal with the SARC, leaves the impression that the request was not given sufficient consideration, and is not useful as precedent. While the FDIC understands these concerns in the comment and will work to see that decisions issued in the SARC and AAC processes inform institutions of the reasons(s) for the decision rendered, the requirement that every issue raised be separately addressed in every case would impose burdens that do not benefit the industry or the FDIC. For example, in some cases issues may be raised that are insubstantial or frivolous or that miss the point of the matter. In addition, issues may be raised that have been presented and addressed in SARC or AAC precedent that may be cited without reiteration. Accordingly, while the FDIC will consider every issue raised in every case, every issue raised need not be specifically addressed in a written opinion. *See United States* v. *Garza,* 165 F.3d 312, 314 (5th Cir. 1999) (litigant's right to have all issues fully considered and ruled on by the appellate court does not equate to a right to a full written opinion on every issue raised). For these reasons, the FDIC has decided not to adopt the commenter's suggestion.

The SARC has the discretion, whether or not a request is made, to determine to allow an oral presentation. If an institution wishes to make an oral presentation, it should include in its appeal a statement to that effect. Oral presentations, however, are granted only if the SARC determines in its discretion that the oral presentation is likely to prove helpful or is otherwise in the public interest. At the oral presentation, the institution will present its position and respond to any questions the SARC might have. The SARC, in its discretion, may also require that FDIC staff participate in the oral presentation to the extent the SARC deems appropriate.

One commenter proposed that the section governing "Contents of Appeal" be amended to advise institutions to include a request for oral presentation, if they so desire. The FDIC agrees with this suggestion and the guidelines for both the SARC and the AAC have been amended accordingly. The depository institution commented that denial of oral presentation, where requested, should be separately noticed. This comment too has been adopted and a provision has been added mandating separate notice to the requesting institution of the SARC (or AAC) determination regarding any request for oral presentation. Separate notice will also be provided if a case is transferred by a division director directly to the SARC (or AAC).

Only matters previously reviewed at the division level, resulting either in a written determination or direct referral to the SARC, are appealable to the SARC. Evidence not presented for review to the DSC Director may be submitted to the SARC only if authorized by the SARC Chairperson. No discovery or other such rights are created in the SARC process.

The types of determinations eligible for review by the SARC and the standards by which SARC appeals are decided remain unchanged from the previous guidelines.

The provision for publication of SARC and AAC decisions, with appropriate redactions to protect confidential information, was expressly endorsed by one commenter.

The FDIC proposed to eliminate the provision in the original guidelines that allowed for reconsideration of SARC decisions if new information were submitted and good cause shown why that information was material to the dispute. No institution ever invoked this provision, and, in any event, the discretion to revise decisions is implicit. One commenter, however, felt that retaining a reconsideration provision would be helpful to institutions that may not understand that such an avenue is available. The FDIC agrees with the commenter and the revised SARC and AAC procedures provide for reconsideration of SARC and AAC decisions if the institution can show an intervening change in the controlling law or the availability of material evidence that was not reasonably available when the decision was issued.

II. Guidelines for Appeals of Deposit Insurance Assessment Determinations

The FDIC Board of Directors created the AAC in 1999 to provide a high-level process for considering all deposit insurance assessment appeals brought from determinations made by the appropriate FDIC Divisions. Responsibility for deposit insurance assessments is shared by the Division of Finance ("DOF"), DIR and, in some respects, DSC. DOF is responsible for calculating the assessments owed by individual insured institutions based on assessment risk classifications assigned by DIR, which in turn uses supervisory information provided by DSC. To calculate an institution's assessment, DOF applies the assessment rate that corresponds to the institution's assessment risk classification to that institution's assessment base. DOF determines the assessment base from deposit and other data submitted in the institution's Report of Condition or Thrift Financial Report. An insured institution may request revision of its quarterly assessment payment by following the procedures set forth at 12 CFR 327.3(h); similarly, an insured institution may request review of its assessment risk classification by following the procedures set forth at 12 CFR 327.4(d). Having complied with those procedures and received a determination from the appropriate division, an institution dissatisfied with that division's determination may file an appeal with the AAC. After reviewing the determination made at the division level, the AAC will issue a final decision.

A. Membership

Since its creation in 1999, the AAC membership has included individuals who are knowledgeable and experienced in matters related to the FDIC's assessment activities, bringing to the AAC the necessary experience and judgment to make well-informed decisions concerning determinations on appeal. As originally constituted, the AAC membership consisted of the Vice Chairperson of the Board (as Chairperson of the AAC), the Deputy to the Office of the Comptroller of the Currency's ("OCC") member of the FDIC's Board of Directors, the Deputy to the Office of Thrift Supervision's

("OTS") member on the FDIC's Board of Directors; the General Counsel, the Director of the Division of Supervision and Consumer Protection; the Deputy to the Chairperson and Chief Financial Officer or the DOF Director; and the DIR Director.

Under the guidelines, AAC membership now consists of five (5) voting members: (1) One inside FDIC Board member, either the Vice Chairperson or the Director (Appointive), as designated by the FDIC Chairperson (this person would serve as Chairperson of the AAC); (2) a deputy or special assistant to the FDIC Chairperson, to be designated by the FDIC Chairperson; (3) a deputy or special assistant to the OCC member on the FDIC's Board of Directors; (4) a deputy or special assistant to the OTS member on the FDIC's Board of Directors; and (5) a deputy or special assistant to either the Vice Chairperson or the inside FDIC Director (Appointive), whoever is not the AAC Chairperson. The General Counsel is the sixth, and non-voting, member of the AAC. The FDIC Chairperson may designate alternate member(s) to the AAC if vacancies occur so long as the alternate member is not directly or indirectly involved in making or affirming the determination under review. A member of the AAC may designate and authorize the most senior member of his or her staff within the substantive area to act on his or her behalf in AAC matters.

Like the SARC guidelines, the AAC guidelines use the designation "inside" FDIC directors to distinguish them from the OTS and OCC Directors, as suggested by a commenter. In addition, the term "special assistant" has been added to clarify that directors may have both deputies and special assistants who may serve on the AAC.

B. Procedures

Under the FDIC's assessment regulations, institutions that dispute the computation of their quarterly assessment payments must comply with the filing requirements set forth at 12 CFR 327.3(h) and institutions that dispute their risk classification must comply with the filing requirements set forth at 12 CFR 327.4(d).

Section 327.3(h) provides that an institution may request revision of the computation of its quarterly assessment payment and sets out the procedures for doing so. Any such request must be made within 60 days of the quarterly assessment invoice for which a revision is requested, or within 60 days of detection of an error in the institution's quarterly Call Report and must include any supporting documentation. Assessment audit and assessment refund determinations are also subject to review under section 327.3(h), although not expressly mentioned in the rule. Additional information requested by the FDIC must be provided within 21 days. Section 327.3(h) mandates that the FDIC respond within 60 days and provides that the response should include the FDIC's determination wherever feasible; otherwise, the FDIC's determination—rendered by the Chief Financial Officer or designee (usually DOF)—is to be made as promptly as possible.

Under section 327.4(d), an institution may request review of its assessment risk classification within 90 days from the date it receives notice of that classification by the FDIC. Supporting documentation must be included with the request. Any additional information requested by the FDIC must be provided within 21 days. The FDIC—through the appropriate division—either DIR or DSC—must promptly notify the institution of its determination.

An insured depository institution dissatisfied with the determination made by the appropriate division pursuant to 12 CFR 327.3(h) or 327.4(d) may appeal that determination to the AAC. The AAC reviews the determination being appealed and, unless the AAC determines to refer the matter to the FDIC Board of Directors for consideration, renders a final determination which constitutes final agency action. FDIC staff analyzes the filing for the AAC, but that analysis is part of the intra-agency deliberative process and is not disclosable to insured institutions. The AAC's written decision, setting forth its rationale, is provided to the institution.

As with the SARC, the AAC has the discretion, whether or not a request is made, to allow an oral presentation. The institution's appeal may contain a statement regarding whether it wishes to make an oral presentation. Oral presentations are granted only if the AAC determines in its discretion that oral presentation would be helpful or would otherwise be in the public interest. At the oral presentation, the institution presents its position and responds to any questions the AAC might have. The AAC, in its discretion, may also require that FDIC staff participate in the oral presentation to the extent the AAC deems appropriate.

As stated in the SARC discussion, the suggestion of one commenter that the section governing "Contents of Appeal" be amended to advise institutions to include a request for oral presentation, if they so desire, has been adopted. In addition, a provision mandating separate notice to the requesting institution of the AAC's determination regarding any request for oral presentation has been added as well. Separate notice will also be provided if a case is transferred by a division director directly to the AAC.

Only matters previously reviewed at the division level are subject to AAC review. Evidence not presented for review to at the division level may be submitted to the AAC only if authorized by the AAC Chairperson. No discovery or other such rights are created in the AAC process.

A reconsideration provision has been added to the AAC guidelines as suggested by a commenter. Reconsideration of AAC decisions may be granted if the institution can show an intervening change in the controlling law or the availability of material evidence that was not reasonably available when the decision was issued.

For the reasons stated in the SARC discussion, the FDIC has decided not to add a provision requiring that AAC decisions address every issue raised.

The Guidelines for Appeals of Material Supervisory Determinations are set forth below. The Guidelines for Appeals of Deposit Insurance Assessment Determinations immediately follow.

* * * * *

For the reasons stated in the Preamble, the Board has adopted the Guidelines for Appeals of Material Supervisory Determinations as set forth below.

Guidelines for Appeals of Material Supervisory Determinations

A. Introduction

Section 309(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (Public Law 103–325, 108 Stat. 2160) ("Riegle Act") required the Federal Deposit Insurance Corporation ("FDIC") to establish an independent intra-agency appellate process to review material supervisory determinations made at insured depository institutions that it supervises. The Guidelines for Appeals of Material Supervisory Determinations ("guidelines") describe the types of determinations that are eligible for review and the process by which appeals will be considered and decided. The procedures set forth in these guidelines establish an appeals process for the review of material supervisory determinations by the Supervision Appeals Review Committee ("SARC").

B. SARC Membership

The following individuals comprise the three (3) voting members of the SARC: (1) One inside FDIC Board member, either the Chairperson, the Vice Chairperson, or the FDIC Director (Appointive), as designated by the FDIC Chairperson (this person would serve as the Chairperson of the SARC); and (2) one deputy or special assistant to each of the inside FDIC Board members who are not designated as the SARC Chairperson. The General Counsel is a non-voting member of the SARC. The FDIC Chairperson may designate alternate member(s) to the SARC if there are vacancies so long as the alternate member was not involved in making or affirming the material supervisory determination under review. A member of the SARC may designate and authorize the most senior member of his or her staff within the substantive area of responsibility related to cases before the SARC to act on his or her behalf.

C. Institutions Eligible To Appeal

The guidelines apply to the insured depository institutions that the FDIC supervises (*i.e.*, insured State nonmember banks (except District banks) and insured branches of foreign banks) and also to other insured depository institutions with respect to which the FDIC makes material supervisory determinations.

D. Determinations Subject To Appeal

An institution may appeal any material supervisory determination pursuant to the procedures set forth in these guidelines. Material supervisory determinations include:

(a) CAMELS ratings under the Uniform Financial Institutions Rating System;

(b) EDP ratings under the Uniform Interagency Rating System for Data Processing Operations;

(c) Trust ratings under the Uniform Interagency Trust Rating System;

(d) CRA ratings under the Revised Uniform Interagency Community Reinvestment Act Assessment Rating System;

(e) Consumer compliance ratings under the Uniform Interagency Consumer Compliance Rating System;

(f) Registered transfer agent examination ratings;

(g) Government securities dealer examination ratings;

(h) Municipal securities dealer examination ratings;

(i) Determinations relating to the adequacy of loan loss reserve provisions;

(j) Classifications of loans and other assets in dispute the amount of which, individually or in the aggregate, exceed 10 percent of an institution's total capital;

(k) Determinations relating to violations of a statute or regulation that may impact the capital, earnings, or operating flexibility of an institution, or otherwise affect the nature and level of supervisory oversight accorded an institution;

(l) Truth in Lending (Regulation Z) restitution;

(m) Filings made pursuant to 12 CFR 303.11(f), for which a Request for Reconsideration has been granted, other than denials of a change in bank control, change in senior executive officer or board of directors, or denial of an application pursuant to section 19 of the FDI Act (which are contained in 12 CFR 308, subparts D, L, and M, respectively), if the filing was originally denied by the DSC Director, Deputy Director or Associate Director; and

(n) Any other supervisory determination (unless otherwise not eligible for appeal) that may impact the capital, earnings, operating flexibility, or capital category for prompt corrective action purposes of an institution, or otherwise affect the nature and level of supervisory oversight accorded an institution.

Material supervisory determinations do not include:

(a) Decisions to appoint a conservator or receiver for an insured depository institution;

(b) Decisions to take prompt corrective action pursuant to section 38 of the Federal Deposit Insurance Act, 12 U.S.C. 1831o;

(c) Determinations for which other appeals procedures exist (such as determinations of deposit insurance assessment risk classifications and payment calculations);

(d) Decisions to initiate formal enforcement actions under section 8 of the Federal Deposit Insurance Act, 12 U.S.C. 1818 (including assessment of civil money penalties) or under any other provisions of law or regulation; and

(e) Decisions to initiate informal enforcement actions (such as memoranda of understanding).

The FDIC recognizes that, although determinations to take prompt corrective action or initiate formal or informal enforcement actions are not appealable, the determinations upon which such actions may be based (*e.g.*, loan classifications) are appealable provided they otherwise qualify.

E. Good Faith Resolution

An institution should make a good faith effort to resolve any dispute concerning a material supervisory determination with the on-site examiner and/or the appropriate Regional Office. The on-site examiner and the Regional Office will promptly respond to any concerns raised by an institution regarding a material supervisory determination. Informal resolution of disputes with the on-site examiner and/or the appropriate Regional Office is encouraged, but seeking such a resolution is not a condition to filing a request for review with the Division of Supervision and Consumer Protection or an appeal to the SARC under these guidelines.

F. Filing a Request for Review With the FDIC Division of Supervision and Consumer Protection

An institution may file a request for review of a material supervisory determination with the Director, Division of Supervision and Consumer Protection, 550 17th Street, NW., Room F–4076, Washington, DC 20429, within 60 calendar days following the institution's receipt of a report of examination containing a material supervisory determination or other written communication of a material supervisory determination. A request for review must be in writing and must include:

(a) A detailed description of the issues in dispute, the surrounding circumstances, the institution's position regarding the dispute and any arguments to support that position (including citation of any relevant statute, regulation, policy statement or other authority), how resolution of the dispute would materially affect the institution, and whether a good faith effort was made to resolve the dispute with the on-site examiner and the Regional Office; and

(b) A statement that the institution's board of directors has considered the merits of the request and authorized that it be filed.

The Director, Division of Supervision and Consumer Protection, will issue a written determination of the request for review, setting forth the grounds for that determination, within 30 days of receipt of the request. No appeal to the SARC will be allowed unless an institution has first filed a timely request for review with the Division of Supervision and Consumer Protection.

G. Appeal to the SARC

An institution that does not agree with the written determination rendered by the Director of the Division of Supervision and Consumer Protection must appeal that determination to the SARC within 30 calendar days from the

date of that determination. The Director's determination will inform the institution of the 30-day time period for filing with the SARC and will provide the mailing address for any appeal the institution may wish to file. Failure to file within the 30-day time limit may result in denial of the appeal by the SARC. If the Director of the Division of Supervision and Consumer Protection determines that an institution is entitled to relief that the Director lacks delegated authority to grant, the Director may, with the approval of the Chairperson of the SARC, transfer the matter directly to the SARC without issuing a determination. Notice of such a transfer will be provided to the institution.

H. Filing With the SARC

An appeal to the SARC will be considered filed if the written appeal is received by the FDIC within 30 calendar days from the date of the division director's written determination or if the written appeal is placed in the U.S. mail within that 30-day period. If the 30th day after the date of the division director's written determination is a Saturday, Sunday or Federal holiday, filing may be made on the next business day. The appeal should be sent to the address indicated on the determination being appealed.

I. Contents of Appeal

The appeal should be labeled to indicate that it is an appeal to the SARC and should contain the name, address, and telephone number of the institution and any representative, as well as a copy of the determination being appealed. If oral presentation is sought, that request should be included in the appeal. Only matters previously reviewed at the division level, resulting in a written determination or direct referral to the SARC, may be appealed to the SARC. Evidence not presented for review to the DSC Director may be submitted to the SARC only if authorized by the SARC Chairperson. The institution should set forth all of the reasons, legal and factual, why it disagrees with the determination. Nothing in the SARC administrative process shall create any discovery or other such rights.

J. Burden of Proof

The burden of proof as to all matters at issue in the appeal, including timeliness of the appeal if timeliness is at issue, rests with the institution.

K. Oral Presentation

The SARC may, in its discretion, whether or not a request is made, determine to allow an oral presentation. The SARC generally grants a request for oral presentation only if it determines that oral presentation is likely to be helpful or would otherwise be in the public interest. Notice of the SARC's determination to grant or deny a request for oral presentation will be provided to the institution. If oral presentation is held, the institution will be allowed to present its positions on the issues raised in the appeal and to respond to any questions from the SARC. The SARC may also require that FDIC staff participate as the SARC deems appropriate.

L. Dismissal and Withdrawal

An appeal may be dismissed by the SARC if it is not timely filed, if the basis for the appeal is not discernable from the appeal, or if the institution moves to withdraw the appeal.

M. Scope of Review and Decision

The SARC will review the appeal for consistency with the policies, practices and mission of the FDIC and the overall reasonableness of and the support offered for the positions advanced, and notify the institution, in writing, of its decision concerning the disputed material supervisory determination(s) within 60 days from the date the appeal is filed, or within 60 days from oral presentation, if held. SARC review will be limited to the facts and circumstances as they existed prior to or at the time the material supervisory determination was made, even if later discovered, and no consideration will be given to any facts or circumstances that occur or corrective action taken after the determination was made. The SARC may reconsider its decision only on a showing of an intervening change in the controlling law or the availability of material evidence not reasonably available when the decision was issued.

N. Publication of Decisions

SARC decisions will be published. Published SARC decisions will be redacted to avoid disclosure of exempt information. Published SARC decisions may be cited as precedent in appeals to the SARC.

O. SARC Guidelines Generally

Appeals to the SARC will be governed by these guidelines. The SARC will retain the discretion to waive any provision of the guidelines for good cause; the SARC may adopt supplemental rules governing SARC operations; the SARC may order that material be kept confidential; and the SARC may consolidate similar appeals.

P. Limitation on Agency Ombudsman

The subject matter of a material supervisory determination for which either an appeal to the SARC has been filed or a final SARC decision issued is not eligible for consideration by the Ombudsman.

Q. Coordination With State Regulatory Authorities

In the event that a material supervisory determination subject to a request for review is the joint product of the FDIC and a State regulatory authority, the Director, Division of Supervision and Consumer Protection, will promptly notify the appropriate State regulatory authority of the request, provide the regulatory authority with a copy of the institution's request for review and any other related materials, and solicit the regulatory authority's views regarding the merits of the request before making a determination. In the event that an appeal is subsequently filed with the SARC, the SARC will notify the institution and the State regulatory authority of its decision. Once the SARC has issued its determination, any other issues that may remain between the institution and the State authority will be left to those parties to resolve.

R. Effect on Supervisory or Enforcement Actions

The use of the procedures set forth in these guidelines by any institution will not affect, delay, or impede any formal or informal supervisory or enforcement action in progress or affect the FDIC's authority to take any supervisory or enforcement action against that institution.

S. Effect on Applications or Requests for Approval

Any application or request for approval made to the FDIC by an institution that has appealed a material supervisory determination which relates to or could affect the approval of the application or request will not be considered until a final decision concerning the appeal is made unless otherwise requested by the institution.

T. Prohibition on Examiner Retaliation

The FDIC has an experienced examination workforce and is proud of its professionalism and dedication. FDIC policy prohibits any retaliation, abuse, or retribution by an agency examiner or any FDIC personnel against an institution. Such behavior against an institution that appeals a material supervisory determination constitutes unprofessional conduct and will subject the examiner or other personnel to

appropriate disciplinary or remedial action. Institutions that believe they have been retaliated against are encouraged to contact the Regional Director for the appropriate FDIC region. Any institution that believes or has any evidence that it has been subject to retaliation may file a complaint with the Director, Office of the Ombudsman, Federal Deposit Insurance Corporation, 550 17th Street, Washington, DC 20429, explaining the circumstances and the basis for such belief or evidence and requesting that the complaint be investigated and appropriate disciplinary or remedial action taken. The Office of the Ombudsman will work with the Division of Supervision and Consumer Protection to resolve the allegation of retaliation. For the reasons stated in the Preamble, the Board has adopted the Guidelines for Appeals of Deposit Insurance Assessment Determinations as set forth below.

Guidelines for Appeals of Deposit Insurance Assessment Determinations

A. Introduction

The Assessment Appeals Committee ("AAC") was formed in 1999 and, pursuant to the direction of the FDIC Board of Directors, has been functioning as the appellate entity responsible for making final determinations pursuant to Part 327 of the FDIC's regulations regarding the assessment risk classification and the assessment payment calculation of insured depository institutions. Institutions that dispute the computation of their quarterly assessment payments must comply with the time limits and other filing requirements set forth at 12 CFR 327.3(h). Generally, any such request may be made within 60 days of the quarterly assessment invoice for which a revision is requested, or within 60 days of the filing of an amendment to the institution's quarterly report of condition. Institutions that dispute their risk classification must comply with the time limits and other filing requirements set forth at 12 CFR 327.4(d). Generally, an institution may request review of its assessment risk classification within 90 days from the date it receives notice of that classification by the FDIC. The AAC provides a process for considering all deposit insurance assessment appeals brought from determinations made by the appropriate FDIC divisions pursuant to those regulations. The procedures set forth in these guidelines apply to all appeals to the AAC.

B. AAC Membership

The following individuals comprise the five (5) voting members of the AAC, representing each member of the FDIC Board of Directors: (1) One inside FDIC Board member, either the Vice Chairperson or the Director (Appointive), as designated by the FDIC Chairperson (this person would serve as Chairperson of the AAC); (2) one of the deputies or special assistants to the FDIC Chairperson, to be designated by the FDIC Chairperson; (3) a deputy or special assistant to the Office of the Comptroller of the Currency's member on the FDIC's Board of Directors; (4) a deputy or special assistant to the Office of Thrift Supervision's member on the FDIC's Board of Directors; and (5) a deputy or special assistant to either the Vice Chairperson or the inside Director (Appointive), whoever is not the AAC Chairperson. The General Counsel is a non-voting member of the AAC. The FDIC Chairperson may designate alternative member(s) for the AAC if vacancies occur. A member of the AAC may designate and authorize the most senior member of his or her staff within the substantive area of responsibility related to cases before the AAC to act on his or her behalf.

C. Institutions Eligible to Appeal

These guidelines apply to all depository institutions insured by the FDIC.

D. Determinations Subject to Appeal

The AAC, upon appeal by an insured depository institution, reviews determinations of the Director of the Division of Insurance and Research or the Director of the Division of Supervision and Consumer Protection made pursuant to the procedures set forth at 12 CFR 327.4(d) regarding the assessment risk classification assigned by the FDIC to the institution and renders a final determination. The AAC also, upon appeal by an insured depository institution, reviews determinations made pursuant to 12 CFR 327.3(h) by the Chief Financial Officer (or the Director of the Division of Finance, as designee) regarding the computation of the institution's assessment payment and renders a final determination.

E. Appeal to the AAC

An institution that does not agree with the written determination rendered by the appropriate division director pursuant to 12 CFR 327.4(d) and 12 CFR 327.3(h) must appeal that determination to the AAC within 30 calendar days from the date of the determination. The division director's determination will inform the institution of the 30-day time limit for filing with the AAC and will provide the mailing address for any appeal the institution may wish to file. Failure to file within the 30-day time period may result in denial of the appeal by the AAC.

If a division director determines that an institution is entitled to relief that the director lacks delegated authority to grant, the director may, with the approval of the Chairperson of the AAC, transfer the matter directly to the AAC without issuing a determination. Notice of such a transfer will be provided to the institution.

F. Filing With the AAC

An appeal to the AAC will be considered filed if the written appeal is received by the FDIC within 30 calendar days from the date of the division director's written determination or if the written appeal is placed in the U.S. mail within that 30-day period. If the 30th day after the date of the division director's written determination is a Saturday, Sunday or Federal holiday, filing may be made on the next business day. The appeal should be sent to the address indicated on the determination being appealed.

G. Contents of Appeal

The appeal should be labeled to indicate that it is an appeal to the AAC and should contain the name, address, and telephone number of the institution and any representative, as well as a copy of the determination being appealed. If oral presentation is sought, that request should be included in the appeal. Only matters previously reviewed at the division level, resulting in either a written determination or a direct referral to the AAC, may be appealed to the AAC. Evidence not presented for review at the division level may be submitted to the AAC only if authorized by the AAC Chairperson. The institution should set forth all of the reasons, legal and factual, why it disagrees with the determination. Nothing in the AAC administrative process shall create any discovery or other such rights.

H. Burden of Proof

The burden of proof as to all matters at issue in the appeal, including timeliness of the appeal if timeliness is at issue, rests with the institution.

I. Oral Presentation

The AAC may, in its discretion, whether or not a request is made, determine to allow an oral presentation. The AAC generally grants a request for oral presentation only if it determines

that oral presentation is likely to be helpful or would otherwise be in the public interest. Notice of the AAC's determination to grant or deny a request for oral presentation will be provided to the institution. If oral presentation is held, the institution will be allowed to present its position on the issues raised in the appeal and to respond to any questions from the AAC. The AAC may also require that FDIC staff participate as the AAC deems appropriate.

J. Dismissal and Withdrawal

An appeal may be dismissed by the AAC if it is not timely filed, if the legal or factual basis for the appeal is not discernable from the appeal, or if the institution moves to withdraw the appeal.

K. Scope of Review and Decision

The AAC will review all submissions concerning an appeal, review the final determination being appealed, consider any other matters it deems in its discretion to be appropriate, and issue a written decision within 60 days from the date the appeal is filed, or within 60 days from oral presentation, if held. The AAC may reconsider its decision only on a showing of an intervening change in the controlling law or the availability of material evidence not reasonably available when the decision was issued.

L. Publication of Decisions

AAC decisions will be published. Published AAC decisions will be redacted to avoid disclosure of exempt information. Published decisions of the AAC may be cited as precedent in appeals to the AAC.

M. AAC Guidelines Generally

Appeals to the AAC will be governed by these guidelines. The AAC will retain the discretion to waive any provision of the guidelines for good cause; the AAC may adopt supplemental rules governing AAC operations; the AAC may order that material be kept confidential; and the AAC may consolidate similar appeals.

N. Effect on Deposit Insurance Assessment Payments

The use of the procedures set forth in these guidelines by an insured institution will not affect, delay, or impede the obligation of that institution to make timely payment of any deposit insurance assessment.

By order of the Board of Directors.

Dated at Washington, DC this 28th day of June, 2004.

Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

[FR Doc. 04–15635 Filed 7–8–04; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties can review or obtain copies of agreements at the Washington, DC offices of the Commission, 800 North Capitol Street, NW., Room 940. Interested parties may submit comments on an agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days of the date this notice appears in the **Federal Register**.

Agreement No.: 011626–010.

Title: Alianca/HSDG/P&O Nedlloyd Agreement.

Parties: Alianca Navegacao e Logistica Ltda.; Hamburg Süd; P&O Nedlloyd Limited; P&O Nedlloyd B.V.; and Mercosul Line Navegacao e Logistica Ltda.

Filing Party: Neal M. Mayer, Esq.; Hoppel, Mayer & Coleman; 1000 Connecticut Avenue, NW., Washington, DC 20036.

Synopsis: The proposed modification reduces the number of vessels utilized and makes resulting changes to the parties' space allocation. It also provides for specific transshipment services. The parties request expedited review.

Agreement No.: 011638–002.

Title: Sea Girt Chassis Cooperative, L.L.C. Limited Liability Company Agreement.

Parties: Atlantic Container Lines, China Ocean Shipping Container Lines Co., Ltd., and Mediterranean Shipping Company.

Filing Party: Jeffrey F. Lawrence, Esq.; Sher & Blackwell; 1850 M Street, NW., Suite 900, Washington, DC 20036.

Synopsis: The amendment deletes Atlantic Container Lines and adds CMA CGM, S.A. and Compania Sudamericana de Vapores, S.A. It also deletes obsolete references to Agreement counsel.

Agreement No.: 011733–011.

Title: Common Ocean Carrier Platform Agreement.

Parties: A.P. Moller-Maersk A/S, P&O Nedlloyd Limited, Hamburg-Süd, Mediterranean Shipping Company S.A., CMA CGM S.A., Hapag Lloyd Container Linie GmbH, and United Arab Shipping Company (SAG), as shareholder parties, and Alianca Navegacao e Logistica Ltda., Safmarine Container Lines N.V., Nippon Yusen Kaisha, CP Ship Limited, Tasman Orient Line C.V., Mitsui O.S.K. lines, Ltd., Lykes Lines Limited, LLC, and Kawasaki Kisen Kaisha, Ltd. as non-shareholder parties.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell; 1850 M Street, NW., Suite 900, Washington, DC 20036.

Synopsis: The amendment adds Kawasaki Kisen Kaisha, Ltd. as a non-shareholder party to the agreement.

By Order of the Federal Maritime Commission.

Dated: July 2, 2004.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 04–15578 Filed 7–8–04; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than July 23, 2004.

A. Federal Reserve Bank of Atlanta (Sue Costello, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30303:

1. Clarita Kassin, North Beach Miami, Florida; Kassin Family Partnership, Ltd., North Miami, Florida; and its general partner, Foreign Financial Investments, North Miami, Florida; Delta Holding Corporation, North Miami, Florida; Samuel Papu, Miami, Florida; Dorita Ojalvo, North Miami, Florida; Moris Ruben, Bogota, Colombia; and Salomon Kassin, Aventura, Florida, to collectively retain voting shares of Pointe Financial Corporation, and thereby indirectly retain voting shares of Pointe Bank, both of Boca Raton, Florida.

Board of Governors of the Federal Reserve System, July 2, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–15581 Filed 7–8–04; 8:45 am]

BILLING CODE 6210–01–S

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 website at *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 August 2, 2004.

A. Federal Reserve Bank of Philadelphia (Michael E. Collins, Senior Vice President) 100 North 6th Street, Philadelphia, Pennsylvania 19105–1521:

1. Penn Liberty Financial Corp., Wayne, Pennsylvania; to become a bank holding company by acquiring 100 percent of the voting shares of Penn Liberty Bank, Wayne, Pennsylvania.

Board of Governors of the Federal Reserve System, July 2, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–15582 Filed 7–8–04; 8:45 am]

BILLING CODE 6210–01–S

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 website at *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 August 5, 2004.

A. Federal Reserve Bank of Philadelphia (Michael E. Collins, Senior Vice President) 100 North 6th Street, Philadelphia, Pennsylvania 19105–1521:

1. Yardville National Bancorp, Hamilton, New Jersey; to acquire up to 19.9 percent of the voting shares of Bucks County Bank, Warminster, Pennsylvania.

B. Federal Reserve Bank of Cleveland (Cindy C. West, Banking Supervisor) 1455 East Sixth Street, Cleveland, Ohio 44101–2566:

1. Morgan Bancorp, Inc., Hudson, Ohio; to become a bank holding company by acquiring 100 percent of the voting shares of Morgan Bank, N.A., Hudson, Ohio.

C. Federal Reserve Bank of Kansas City (Donna J. Ward, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198–0001:

1. Astra Financial Corporation, Prairie Village, Kansas; to acquire up to 16.73 percent of the voting shares of First Missouri Bancshares, Inc., Brookfield, Missouri, and thereby indirectly acquire voting shares of First Missouri National Bank, Brookfield, Missouri.

Board of Governors of the Federal Reserve System, July 6, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–15655 Filed 7–8–04; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Sunshine Act Notice

TIME AND DATE: 9 a.m. (e.d.t.) July 19, 2004.

PLACE: 4th Floor Conference Room, 1250 H Street, NW., Washington, DC.

STATUS: Parts will be open to the public and parts closed to the public.

MATTERS TO BE CONSIDERED:

Parts Open to the Public

1. Approval of the minutes of the June 7, 2004, Board member meeting.

2. Annual financial audit presentation (by Deloitte & Touche).

3. Investment policy quarterly review.

4. Thrift Savings Plan activity report by the Executive Director.

Parts Closed to the Public

5. Personnel matters.

6. Litigation.

FOR FURTHER INFORMATION CONTACT: Thomas J. Trabucco, Director, Office of External Affairs, (202) 942–1640.

Dated: July 7, 2004.

Elizabeth S. Woodruff,

Secretary to the Board, Federal Retirement Thrift Investment Board.

[FR Doc. 04–15769 Filed 7–7–04; 3:39 pm]

BILLING CODE 6760–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

[ATSDR–201]

Public Health Assessments Completed

AGENCY: Agency for Toxic Substances and Disease Registry (ATSDR), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: This notice announces those sites for which ATSDR has completed public health assessments during January–March 2004. This notice also includes sites for which ATSDR has completed public health assessments during August 2002 through September 2003, that were erroneously omitted from previously submitted notices. This list includes sites that are on or proposed for inclusion on the National Priorities List (NPL), and includes sites for which assessments were prepared in response to requests from the public.

FOR FURTHER INFORMATION CONTACT: William Cibulas, Jr., Ph.D., Acting Director, Division of Health Assessment and Consultation, Agency for Toxic Substances and Disease Registry, 1600 Clifton Road, NE., Mailstop E–32, Atlanta, Georgia 30333, telephone (404) 498–0140.

SUPPLEMENTARY INFORMATION: The most recent list of completed public health assessments was published in the **Federal Register** on August 28, 2003 (68 FR 51785). This announcement is the responsibility of ATSDR under the regulation, Public Health Assessments and Health Effects Studies of Hazardous Substances Releases and Facilities [42 CFR Part 90]. This rule sets forth ATSDR's procedures for the conduct of public health assessments under section 104(i) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended by the Superfund Amendments and Reauthorization Act (SARA) [42 U.S.C. 9604(i)].

Availability

The completed public health assessments are available for public inspection at the Division of Health Assessment and Consultation, Agency for Toxic Substances and Disease Registry, Century Center, 1825 Century Boulevard, Atlanta, Georgia (not a mailing address), between 8 a.m. and 4:30 p.m., Monday through Friday except legal holidays. The completed public health assessments are also available by mail through the U.S. Department of Commerce, National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161, or by telephone at (800) 553–6847. NTIS charges for copies of public health assessments. The NTIS order numbers are listed in parentheses after the site names.

Public Health Assessments Completed or Issued

During January 1–March 31, 2004, public health assessments were issued for the sites listed below. This list also includes public health assessments issued from August 1, 2002, through September 30, 2003, that were previously omitted.

NPL Sites

Alabama

American Brass, Incorporated—(PB2004–100029).

Arizona

Rodeo-Chediski Fire—(PB2004–100088).

California

Pemaco Maywood—(PB2003–103833).

Lawrence Livermore National Laboratory, Main Site (U.S. Department of Energy (DOE))—(PB2004–100023).

Lawrence Livermore National Laboratory, Main Site (U.S. DOE) (PB2003–106511).

Alark Hard Chrome—(PB2004–100086).

Colorado

Vasquez Boulevard and I70—(PB2003–107173).

Florida

Kerr-McGee, Incorporated (a/k/a Kerr-McGee Chemical Corporation)—(PB2004–100021).

Georgia

Terry Creek Dredge Spoil Areas/Hercules Outfall Site—(PB2003–100173).

Idaho

Stibnite/Yellow Pine Mining Area—(PB2004–100032).

Illinois

Old American Zinc Plant—(PB2003–105756).

Louisiana

Louisiana Army Ammunition Plant—(PB2003–105780).

Maine

Eastern Surplus Company Site—(PB2003–103829).

Massachusetts

Sutton Brook Disposal Area—(PB2003–104569).

General Electric Site-Newell Street Area I (a/k/a GE—Housatonic River)—(PB2004–100028).

General Electric Site-East Street Area I (a/k/a GE—Housatonic River)—(PB2004–100059).

General Electric Site-Newell Street Area II (a/k/a GE—Housatonic River)—(PB2004–100027).

Mississippi

Davis Timber Company—(PB2003–102198).

Montana

Lockwood Solvent Groundwater Plume (a/k/a Lockwood Solvent Ground Water Plume)—(PB2003–106078).

Libby Asbestos NPL Site—(PB2003–104518).

Nevada

Naval Air Station Fallon (a/k/a Fallon Naval Air Station)—(PB2003–106448).

New Hampshire

Electrosonics/Spofford Place (Former)—(PB2003–101567).

New Jersey

Quanta Resources Corporation—(PB2003–100507).

Naval Air Engineering Center, Lakehurst (a/k/a Naval Air Engineering Station, Lakehurst)—(PB2003–106077).

Dismal Swamp Site (a/k/a Woodbrook Road Dump)—(PB2003–105781).

Atlantic Resources Corporation—(PB2003–103830).

New Mexico

North Railroad Avenue Plume—(PB2004–100030).

New York

Shenandoah Road Groundwater Contamination—(PB2004–100033).

Texas

Brine Service Company—(PB2003–103831).

Patrick Bayou—(PB2003–103832).

Utah

Tooele Army Depot (North Area)—(PB2004–100031).

Hill Air Force Base—(PB2003–104652).

Virginia

Norfolk Naval Base (a/k/a Sewells Point Naval Complex)—(PB2003–100521).

Wisconsin

Ackerville Area Groundwater (a/k/a Town of Polk Landfill (Former))—(PB2003–106552).

Non-NPL Petitioned Sites

Puerto Rico

Isla de Vieques Bombing Range (Soil Pathway Evaluation)—(PB2003–104184).

Isla de Vieques Bombing Range (Fish & Shellfish Evaluation)—(PB2003–106449).

Isla de Vieques Bombing Range (Air Pathway Evaluation)—(PB2004–100087).

Dated: June 30, 2004.

Georgi Jones,

Director, Office of Policy, Planning, and Evaluation, National Center for Environmental Health/Agency for Toxic Substances and Disease Registry.

[FR Doc. 04–15566 Filed 7–8–04; 8:45 am]

BILLING CODE 4163–70–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

[ATSDR–200]

Development of Set 18 Toxicological Profiles for Public Comment

AGENCY: Agency for Toxic Substances and Disease Registry (ATSDR), Department of Health and Human Services (HHS).

ACTION: Notice of the selection of substances for profile development.

SUMMARY: This notice announces the 18th set of toxicological profiles prepared by ATSDR, comprising the development of one new and five updated priority hazardous substances.

FOR FURTHER INFORMATION CONTACT: Ms. Jessilynn B. Taylor, Agency for Toxic Substances and Disease Registry (ATSDR), Division of Toxicology, 1600 Clifton Road, NE., Mailstop F–32, Atlanta, Georgia 30333, telephone (770) 488–3313.

SUPPLEMENTARY INFORMATION: The Superfund Amendments and Reauthorization Act (SARA) (Pub. L. 99–499) amends the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) (42 U.S.C. 9601 *et seq.*) by establishing certain requirements for ATSDR and the U.S. Environmental Protection Agency (EPA) concerning hazardous substances that are most commonly found at facilities on the CERCLA National Priorities List (NPL). Among these statutory requirements is a mandate for the Administrator of ATSDR to prepare toxicological profiles for each substance included on the priority lists of hazardous substances. ATSDR and EPA identified 275 hazardous substances that pose the most significant potential threat to human health. The availability of the revised list of the 275 priority substances was announced in the **Federal Register** on November 7, 2003 (68 FR 63098). For prior versions of the list of substances, see **Federal Register** notices dated April 17, 1987 (52 FR 12866); October 20, 1988 (53 FR 41280); October 26, 1989 (54 FR 43619); October 17, 1990 (55 FR 42067); October 17, 1991 (56 FR 52166); October 28, 1992 (57 FR 48801); February 28, 1994 (59 FR 9486); April 29, 1996 (61 FR 18744); November 17, 1997 (62 FR 61332); October 21, 1999 (64 FR 56792); and October 25, 2001 (66 FR 54014).

Availability

This notice announces the 18th set of toxicological profiles prepared by ATSDR, comprising the development of one new and five updated toxicological profiles. The following toxicological profiles will be developed and available for a 90-day public comment period on or about October 17, 2004.

18TH SET

Toxicological profile	CAS. No.
1. Vinyl Chloride (update)	000075–01–4
2. Dichlorobenzenes (update)	
1,2 Dichlorobenzene	000095–50–1
1,3-Dichlorobenzene	00541–73–1
1,4-Dichlorobenzene	00106–46–7
3. 1,1,1-Trichloroethane (update)	000071–55–6
4. Cyanide (update)	000057–12–5
Hydrogen Cyanide	000074–90–8
Sodium Cyanide	000143–33–9
Potassium Cyanide	000151–50–8
5. Hydrogen Sulfide (update)	007783–065–4
6. 1,4-Dioxane	000123–91–3

Dated: June 30, 2004.

Georgi Jones,

Director, Office of Policy, Planning, and Evaluation, National Center for Environmental Health/Agency for Toxic Substances and Disease Registry.

[FR Doc. 04–15567 Filed 7–8–04; 8:45 am]

BILLING CODE 4163–70–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 04266]

Comprehensive Care for HIV-Infected Residents of the Kibera Slum, Nairobi, Kenya; Notice of Intent To Fund Single Eligibility Award

A. Purpose

The Centers for Disease Control and Prevention (CDC) announces the intent to fund fiscal year (FY) 2004 funds for a cooperative agreement program to provide a model program for comprehensive AIDS care in Kenya. This program should specifically facilitate the feasibility and acceptability of providing antiretroviral (ARV) treatment, using locally appropriate approaches, and should operate in close collaboration with the Kenyan Ministry of Health. The Catalog of Federal Domestic Assistance number for this program is 93.941.

B. Eligible Applicant

Assistance will be provided only to the African Medical and Research Foundation (AMREF). In 2002, AMREF was selected from among several

potential collaborators as the implementing partner for a pilot program of antiretroviral treatment in Kibera slum. The organization was chosen based on technical capacity, the fact that the organization was already operating a community-based clinic in an appropriate area (safe, accessible, serving extremely poor clientele) of Kibera slum, and the willingness of this partner to work in very close collaboration with the Ministry of Health, in line with CDC goals. The program implementation has been successful, and AMREF is the only organization appropriately situated to continue to operate the program. In addition to the characteristics that resulted in the initial selection, AMREF has now acquired critical additional technical expertise related to provision of clinic based services for people with HIV including ARV therapy, as well as with implementation of community-based services related to this care.

C. Funding

Approximately $500,000 is available in FY 2004 to fund this award. It is expected that the award will begin on or before August 15, 2004, and will be made for a 12-month budget period within a project period of up to five years. Funding estimates may change.

D. Where To Obtain Additional Information

For general comments or questions about this announcement, contact: Technical Information Management, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341–4146, telephone: 770–488–2700.

For technical questions about this program, contact: Barbara Marston, M.D., Project Officer, Global Aids Program (GAP), Kenya Country Team, National Center for HIV, STD and TB Prevention, Centers for Disease Control and Prevention (CDC), PO Box 606 Village Market, Nairobi, Kenya, telephone: 256–20–271–3008, e-mail: *bmarston@kisian.mimcom.net.*

Dated: July 2, 2004.

William P. Nichols,

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 04–15601 Filed 7–8–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 04125]

The Association of State and Territorial Chronic Disease Program Directors; Notice of Intent To Fund Single Eligibility Award

A. Purpose

The Centers for Disease Control and Prevention (CDC) announces the intent to fund fiscal year (FY) 2004 funds for a cooperative agreement program to support the establishment of a national initiative to develop and implement systems and procedures that result in the inclusion of comprehensive chronic disease prevention and control concepts in the planning and delivery of health promotion and health care services at the state level. The Catalog of Federal Domestic Assistance number for this program is 93.945.

B. Eligible Applicant

Assistance will be provided only to the Association of State and Territorial Chronic Disease Program Directors (CDD). No other applications are solicited.

The CDD is the officially designated organization to advise and represent the interest of state health officials in comprehensive chronic disease prevention and control and health promotion activities. Because of its relationship with ASTHO and all State and Territorial chronic disease prevention and health promotion programs, the CDD can provide state and national leadership for developing programs to prevent and control chronic disease, including behaviors and conditions that contribute to the development of chronic disease conditions. The CDD is uniquely capable of analyzing, advising, and fulfilling liaison responsibilities for comprehensive chronic disease prevention and control activities in such broad-based specialties as aging, arthritis, cancer, cardiovascular disease, diabetes, diabetes health education, managed care, nutrition, osteoporosis, physical activity, risk reduction, and tobacco use. The CDD membership is multidisciplinary, including physicians, nurses, health educators, social workers, nutritionists, epidemiologists, administrators, and others. CDD has served as a policy development and capacity-building organization for state chronic disease matters since 1988 and has as one of its major objectives, the sharing of information within and between State health departments.

The CDD is responsible for developing, implementing and evaluating state-based chronic disease prevention and health promotion programs, therefore they are uniquely qualified to conduct and fulfill the national requirements and focus of this program announcement. The CDD accomplishes its mission by disseminating information on chronic disease program needs and services, as well as recommending and promoting improved policies and programs. The CDD also provides consultation and guidance to states in the establishment of statewide systems of coordinated population-based preventions. All of these activities are accomplished through cooperation and collaboration with national, state, and local partners in the public and private sectors.

Through the work conducted under this Program Announcement, CDC will be in a position to promote and foster an even greater collaboration with public and private health care providers and state prevention programs.

C. Funding

Approximately $2,200,000 is available in FY 2004 to fund this award. It is expected that the award will begin on or before September 1, 2004, and will be made for a 12-month budget period within a project period of up to 5 years. Funding estimates may change.

D. Where To Obtain Additional Information

For general comments or questions about this announcement, contact: Technical Information Management, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341–4146, telephone: 770–488–2700.

For technical questions about this program, contact: John M. Korn, Project Officer, Division of Adult and Community Health, National Center for Chronic Disease Prevention and Health Promotion, 4770 Buford Highway, NE., MS K30, Atlanta, GA 30341, telephone: 770–488–5427, e-mail: *JMK3@cdc.gov.*

Dated: July 2, 2004.

Alan Kotch,

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 04–15598 Filed 7–8–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 04268]

HIV and TB Prevention and Care in Eastlands, Nairobi, Kenya; Notice of Intent To Fund Single Eligibility Award

A. Purpose

The Centers for Disease Control and Prevention (CDC) announces the intent to fund fiscal year (FY) 2004 funds for a cooperative agreement program to provide a comprehensive AIDS prevention and care program in and around Eastlands, Nairobi, Kenya. The Catalog of Federal Domestic Assistance number for this program is 93.941.

B. Eligible Applicant

Assistance will be provided only to the Eastern Deanery AIDS Relief Program (EDARP).

Because of its long history and experience in providing TB and AIDS care in Eastlands, the EDARP is currently the only appropriate and qualified organization to conduct the specific activities needed to achieve the goals of this program. The EDARP has been serving the people of Eastlands and surrounding slums for more than 10 years through provision of TB and AIDS prevention and care. As a faith-based organization building on local church structures and involving volunteers from the church, EDARP has a unique and committed pool of staff, volunteers, and community leaders who can contribute to the success of this project. EDARP has demonstrated an ability to introduce new services when appropriate, including the introduction of VCT in 2001, TB preventive therapy in 2002, PMTCT in 2003, and on a very limited scale, ART in 2004. Because of EDARP's long tradition of serving members of all faiths in this disadvantaged community, EDARP enjoys the trust and confidence not only of the local community but also the local and national government. Thus, no other organization is capable of delivering the described services to this large, resource poor community.

C. Funding

Approximately $5,000,000 is available in FY 2004 to fund this award. It is expected that the award will begin on or before August 15, 2004 and will be made for a 12-month budget period within a project period of up to five years. Funding estimates may change.

D. Where To Obtain Additional Information

For general comments or questions about this announcement, contact: Technical Information Management, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341–4146, telephone: 770–488–2700.

For technical questions about this program, contact: Barbara Marston, MD, Project Officer, Global Aids Program (GAP), Kenya Country Team, National Center for HIV, STD and TB Prevention, Centers for Disease Control and Prevention (CDC), PO Box 606 Village Market, Nairobi, Kenya, telephone: 256–20–271–3008, e-mail: *emarum@cdcnairobi.mimcom.net.*

Dated: July 2, 2004.

Alan A. Kotch,

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 04–15603 Filed 7–8–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Capacity Building To Support Local and Indigenous Organizations Providing HIV Prevention and Care In Kenya

Announcement Type: New.

Funding Opportunity Number: PA 04261.

Catalog of Federal Domestic Assistance Number: 93.941.

Key Dates: Application Deadline: August 9, 2004.

I. Funding Opportunity Description

Authority: This program is authorized under sections 307 and 317(k)(2) of the Public Health Service Act, (42 U.S.C. Sections 242l and 247b(k)(2)), as amended, and under Public Law 108–25 (United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003) (22 U.S.C. 7601).

Purpose: The Centers for Disease Control and Prevention (CDC) announces the availability for Fiscal Year (FY) 2004 funds for a cooperative agreement program to improve the capacity of, and provide support to, local and indigenous organizations in Kenya to enable them to provide a range of services, including: Voluntary counseling and testing (VCT); prevention of mother-to-child transmission (PMTCT); on-going treatment of HIV+ mothers (PMTCT+); prevention education and outreach, including abstinence and faithfulness education; anti-retroviral treatment (ART); and palliative care.

The Global AIDS Program (GAP) has established field operations to support national HIV/AIDS control programs in 25 countries. The CDC's GAP exists to help prevent HIV infection, improve care and support, and build capacity to address the global AIDS pandemic. GAP provides financial and technical assistance through partnerships with governments, community- and faith-based organizations, the private sector, and national and international entities working in the 25 resource-constrained countries. CDC/GAP works with the Health Resources and Services Administration (HRSA), the National Institutes of Health (NIH), the U.S. Agency for International Development (USAID), the Peace Corps, the Departments of State, Labor and Defense, and other agencies and organizations. These efforts complement multilateral efforts, including UNAIDS, the Global Fund to Combat HIV, TB and Malaria, World Bank funding, and other private sector donation programs.

The U.S. Government seeks to reduce the impact of HIV/AIDS in specific countries within sub-Saharan Africa, Asia, and the Americas through the Presidential Emergency Plan for AIDS Relief (PEPFAR). Through this new initiative, CDC's GAP will continue to work with host countries to strengthen capacity and expand activities in the areas of: (1) Primary HIV prevention; (2) HIV care, support, and treatment; and (3) capacity and infrastructure development, especially for surveillance and training. Targeted countries represent those with the most severe epidemics where the potential for impact is greatest and where U.S. government agencies are already active. Kenya is one of these targeted countries.

To carry out its activities in these countries, CDC is working in a collaborative manner with national governments and other agencies to develop programs of assistance to address the HIV/AIDS epidemic. CDC's program of assistance to Kenya focuses on several areas of national priority, including scaling up of activities and funding for HIV prevention, care, and treatment; improvement of the national blood safety program; and support for the National AIDS and STD Control Program.

CDC Kenya has already been supporting a number of local, indigenous, faith-based, and international organizations to provide HIV prevention education, VCT, PMTCT, and AIDS care services in their communities. Under PEPFAR, CDC

Kenya plans to provide support and capacity building to these organizations, and expand the number of such organizations to extend and strengthen their programs and services.

The measurable outcomes of the program will be in alignment with goals of the GAP to reduce HIV transmission and improve care of persons living with HIV/AIDS (PLWHA). They also will contribute to the goals of the PEPFAR which are: Within five years treat more than two million HIV-infected persons with effective combination anti-retroviral therapy; care for ten million HIV-infected and affected persons including those orphaned by HIV/AIDS; and prevent seven million infections in 14 countries throughout the world.

Some of the specific measurable outcomes from this program will be: The number of local organizations, including community- and faith-based organizations, receiving assistance from the awardee; the number of clients or patients receiving counseling and testing; the number of patients receiving basic care packages; the number of pregnant women receiving a comprehensive package of PMTCT and PMTCT+ services; the number of new patients served with ART, and those current ART patients receiving continuous service for more than 12 months; the number of people receiving prevention services including abstinence and faithfulness interventions; and the number of clinicians, counselors, community or religious leaders trained by these local organizations. An additional outcome is the number of these organizations that learn how to successfully apply for and manage funding independently, as a result of technical assistance provided by the awardee.

Activities: Awardee activities for this program are as follows:

- Develop a plan to support local organizations to provide a range of services, including VCT; PMTCT; ART; palliative care; prevention education, including abstinence and faithfulness services; and workplace programs.
- Develop a mechanism to identify prospective collaborating partners and provide capacity building and financial support to these agencies. In year one, these local partners must be consistent with the FY 2004 Kenya Country Operational Plan approved by the PEPFAR coordinator, though in future years the awardee should also identify new potential partners. In all years, activities proposed by these local partners must contribute to the achievement of PEPFAR targets for Kenya. Approximately 25 local partners are anticipated in year one, with total financial support ranging from $25,000 to $300,000 annually. Average anticipated funding to local partners will be approximately $125,000. Anticipated activities of the local partners include VCT; PMTCT; care and treatment, including ART; and prevention activities delivered in workplaces, churches, mosques, and communities.
- Provide fiscal oversight and technical assistance to these local partners in the areas of program and financial management, administration, personnel management, data management, and other aspects of institution strengthening.
- Develop and implement a plan to improve the capacity of the local partners to become independent and sustainable, and for these local groups to become effective contributors in their communities.
- Develop mechanisms for information sharing, including sharing of lessons learned among local partners, and referral systems between partners, when appropriate.
- Monitor, assess and report on the performance of the local partners.
- Assist the local partners to write reports describing their programs.
- Provide training and technical assistance to the local partners so they may develop the skills to apply for funds independently and manage funds effectively after the completion of the program.

Awardee should ensure that all of the above activities integrate into the national HIV/AIDS strategy.

In a cooperative agreement, CDC staff is substantially involved in the program activities, above and beyond routine grant monitoring.

CDC Activities for this program are as follows:

- Assist awardee in identifying prospective local partners. In particular, in year one, those partners must be consistent with the Kenya PEPFAR FY 2004 Country Operational Plan.
- Assist awardee in developing strategies and mechanisms to identify new partners for years two and three.
- Provide technical assistance in clinical, counseling and laboratory issues, training, data management, and program monitoring and evaluation.
- Monitor project and budget performance to ensure satisfactory progress towards the goals of the project.

II. Award Information

Type of Award: Cooperative Agreement. CDC involvement in this program is listed in the Activities Section above.

Fiscal Year Funds: 2004.

Approximate Total Funding: $12,000,000. (This amount is the approximate total funding amount for the entire three-year project period.)

Approximate Number of Awards: One or two.

Approximate Average Award: $4,000,000. (This amount is for the first 12-month budget period, and includes both direct and indirect costs.)

Floor of Award Range: $2,000,000.

Ceiling of Award Range: $4,000,000.

Anticipated Award Date: September 1, 2004.

Budget Period Length: 12 months.

Project Period Length: Three years.

Throughout the project period, CDC's commitment to continuation of awards will be conditioned on the availability of funds, evidence of satisfactory progress by the recipient (as documented in required reports), and the determination that continued funding is in the best interest of the Federal Government.

III. Eligibility Information

III.1. Eligible Applicants

Applications may be submitted by public nonprofit organizations, private nonprofit organizations, for-profit organizations, and faith-based organizations that meet the following criteria:

1. Have at least five years of documented experience in building the capacity of local and indigenous organizations, and in managing sub-grants to local organizations.

2. Have an existing program or office in Kenya. It is critical that this activity commence quickly, and that the applicant is not delayed by procedures required for programs to operate in Kenya.

III.2. Cost Sharing or Matching

Matching funds are not required for this program.

III.3. Other

If you request a funding amount greater than the ceiling of the award range, your application will be considered non-responsive, and will not be entered into the review process. You will be notified that your application did not meet the submission requirements.

If your application is incomplete or non-responsive to the requirements listed in this section, it will not be entered into the review process. You will be notified that your application did not meet submission requirements.

Note: Title 2 of the United States Code Section 1611 states that an organization

described in section 501(c)(4) of the Internal Revenue Code that engages in lobbying activities is not eligible to receive Federal funds constituting an award, grant, or loan.

IV. Application and Submission Information

IV.1. Address To Request Application Package

To apply for this funding opportunity use application form PHS 5161. Application forms and instructions are available on the CDC Web site, at the following Internet address: *www.cdc.gov/od/pgo/forminfo.htm.*

If you do not have access to the Internet, or if you have difficulty accessing the forms on-line, you may contact the CDC Procurement and Grants Office Technical Information Management Section (PGO–TIM) staff at: (770) 488–2700. Application forms can be mailed to you.

IV.2. Content and Form of Submission

Application: You must include a project narrative with your application forms. The narrative must be submitted in the following format:

- Maximum number of pages: 15. If your narrative exceeds the page limit, only the first pages which are within the page limit will be reviewed.
- Font size: 12 point unreduced.
- Double Spaced.
- Paper size: 8.5 by 11 inches.
- Page margin size: One inch.
- Printed only on one side of page.
- Held together only by rubber bands or metal clips; not bound in any other way.
- All pages should be numbered, and a complete index to the application and any appendices must be included.
- Submitted in English.

Your narrative should address activities to be conducted over the entire project period, and should consist of, as a minimum, a plan; objectives; activities; methods; an evaluation framework; and a budget highlighting any supplies mentioned in the Program Requirements, and any proposed capital expenditure. The budget justification will not be counted in the page limit stated above.

Additional information is optional and may be included in the application appendices. The appendices will not be counted toward the narrative page limit. Additional information could include, but is not limited to: Organizational charts, curriculum vitas, letters of support, etc.

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 Federal Government. The DUNS 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.

For more information, *see* the CDC Web site at: *http://www.cdc.gov/od/pgo/funding/pubcommt.htm.*

If your application form does not have a DUNS number field, please write your DUNS number at the top of the first page of your application, and/or include your DUNS number in your application cover letter.

Additional requirements that may require you to submit additional documentation with your application are listed in section "VI.2. Administrative and National Policy Requirements."

IV.3. Submission Dates and Times

Application Deadline Date: August 9, 2004.

Explanation of Deadlines: Applications must be received in the CDC Procurement and Grants Office by 4 p.m. eastern time on the deadline date. If you send your application by the United States Postal Service or commercial delivery service, you must ensure that the carrier will be able to guarantee delivery of the application by the closing date and time. If CDC receives your application after closing due to: (1) Carrier error, when the carrier accepted the package with a guarantee for delivery by the closing date and time, or (2) significant weather delays or natural disasters, you will be given the opportunity to submit documentation of the carriers guarantee. If the documentation verifies a carrier problem, CDC will consider the application as having been received by the deadline.

This announcement is the definitive guide on application submission address and deadline. It supersedes information provided in the application instructions. If your application does not meet the deadline above, it will not be eligible for review, and will be discarded. You will be notified that your application did not meet the submission requirements.

CDC will not notify you upon receipt of your application. If you have a question about the receipt of your application, first contact your courier. If you still have a question, contact the PGO–TIM staff at: (770) 488–2700. Before calling, please wait two to three days after the application deadline. This will allow time for applications to be processed and logged.

IV.4. Intergovernmental Review of Applications

Executive Order 12372 does not apply to this program.

IV.5. Funding Restrictions

Restrictions, which must be taken into account while writing your budget, are as follows:

- Funds may be used for: Establishing a program to improve the capacity of local organizations; provide sub-grants to local organizations; provide technical assistance to these organizations; and for procurement of equipment and supplies needed by these organizations.
- Antiretroviral Drugs—The purchase of antiretrovirals, reagents, and laboratory equipment for antiretroviral treatment projects require pre-approval from the GAP headquarters.
- Needle Exchange—No funds appropriated under this Act shall be used to carry out any program of distributing sterile needles or syringes for the hypodermic injection of any illegal drug.
- Funds may be spent for reasonable program purposes, including personnel, training, travel, supplies and services. Equipment may be purchased and renovations completed if deemed necessary to accomplish program objectives; however, prior written approval by CDC officials must be requested in writing.
- All requests for funds contained in the budget shall be stated in U.S. dollars. Once an award is made, CDC will not compensate foreign grantees for currency exchange fluctuations through the issuance of supplemental awards.
- The costs that are generally allowable in grants to domestic organizations are allowable to foreign institutions and international organizations, with the following exception: With the exception of the American University, Beirut, and the World Health Organization, Indirect Costs will not be paid (either directly or through sub-award) to organizations located outside the territorial limits of the United States or to international organizations regardless of their location.
- The applicant may contract with other organizations under this program, however, the applicant must perform a substantial portion of the activities relating to the management of sub-grants to local organizations and improving their capacity.
- An annual audit of these funds is required by a U.S. based audit firm with international branches and current licensure/authority in-country, and in accordance with International

Accounting Standards or equivalent standard(s) approved in writing by CDC. The audit should specify the use of funds and the appropriateness and reasonableness of expenditures.

• A fiscal Recipient Capability Assessment may be required with the potential awardee, pre or post award, in order to review their business management and fiscal capabilities regarding the handling of U.S. Federal funds.

• Prostitution and Related Activities. The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons.

Any entity that receives, directly or indirectly, U.S. Government funds in connection with this document ("recipient") cannot use such U.S. Government funds to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides. A recipient that is otherwise eligible to receive funds in connection with this document to prevent, treat, or monitor HIV/AIDS shall not be required to endorse or utilize a multisectoral approach to combating HIV/AIDS, or to endorse, utilize, or participate in a prevention method or treatment program to which the recipient has a religious or moral objection. Any information provided by recipients about the use of condoms as part of projects or activities that are funded in connection with this document shall be medically accurate and shall include the public health benefits and failure rates of such use.

In addition, any foreign recipient must have a policy explicitly opposing, in its activities outside the United States, prostitution and sex trafficking, except that this requirement shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency, if such entity is a recipient of U.S. government funds in connection with this document.

The following definitions apply for purposes of this clause:

• Sex trafficking means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act. 22 U.S.C. 7102(9).

• A foreign recipient includes an entity that is not organized under the laws of any State of the United States, the District of Columbia or the Commonwealth of Puerto Rico. Restoration of the Mexico City Policy, 66 FR 17303, 17303 (March 28, 2001).

All recipients must insert provisions implementing the applicable parts of this section, "Prostitution and Related Activities," in all subagreements under this award. These provisions must be express terms and conditions of the subagreement, acknowledge that each certification to compliance with this section, "Prostitution and Related Activities," are a prerequisite to receipt of U.S. Government funds in connection with this document, and must acknowledge that any violation of the provisions shall be grounds for unilateral termination of the agreement prior to the end of its term. In addition, all recipients must ensure, through contract, certification, audit, and/or any other necessary means, all the applicable requirements in this section, "Prostitution and Related Activities," are met by any other entities receiving U.S. Government funds from the recipient in connection with this document, including without limitation, the recipients' sub-grantees, sub-contractors, parents, subsidiaries, and affiliates. Recipients must agree that HHS may, at any reasonable time, inspect the documents and materials maintained or prepared by the recipient in the usual course of its operations that relate to the organization's compliance with this section, "Prostitution and Related Activities."

All primary grantees receiving U.S. Government funds in connection with this document must certify compliance prior to actual receipt of such funds in a written statement referencing this document (*e.g.*, "[Recipient's name] certifies compliance with the section, 'Prostitution and Related Activities.'") addressed to the agency's grants officer. Such certifications are prerequisites to the payment of any U.S. government funds in connection with this document.

Recipients' compliance with this section, "Prostitution and Related Activities," is an express term and condition of receiving U.S. Government funds in connection with this document, and any violation of it shall be grounds for unilateral termination by HHS of the agreement with HHS in connection with this document prior to the end of its term. The recipient shall refund to HHS the entire amount furnished in connection with this document in the event it is determined by HHS that the recipient has not complied with this section, 'Prostitution and Related Activities.'

Awards will not allow reimbursement of pre-award costs.

Guidance for completing your budget can be found on the United States Government Web site at the following address: *http://www.cdc.gov/od/pgo/funding/budgetguide.htm.*

IV.6. Other Submission Requirements

Application Submission Address: Submit the original and two hard copies of your application by mail or express delivery service to: Technical Information Management-PA 04261, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341. Applications may not be submitted electronically at this time.

V. Application Review Information

V.1. Criteria

You are required to provide measures of effectiveness that will demonstrate the accomplishment of the various identified objectives of the cooperative agreement. Measures of effectiveness must relate to the performance goals stated in the "Purpose" section of this announcement. Measures must be objective and quantitative, and must measure the intended outcome. These measures of effectiveness must be submitted with the application and will be an element of evaluation.

Your application will be evaluated against the following criteria:

1. Ability To Carry Out the Project (30 points)

Does the applicant document demonstrate capability to achieve the purpose of the project? Does the applicant have demonstrated and prior experience with providing capacity building and support to local and indigenous organizations in developing countries? Does the applicant demonstrate an understanding of the issues and problems facing local and indigenous organizations implementing HIV prevention and care services in Kenya?

2. Plans for Administration and Management of the Project (30 points)

Are there adequate plans for administering the project? Does the applicant have the capacity to award at least five to ten sub-grants within the first three months after the award, and at least 10 to 20 sub-grants by March 31, 2005? Does the applicant have the capacity to assist the local partners to achieve measurable outcomes to contribute to PEPFAR targets? Does the applicant describe activities which are

realistic, achievable, time-framed and appropriate to complete this program?

3. Personnel (25 points)

Are the professional personnel involved in this project qualified, with evidence of experience in working to support local, indigenous, faith-based, and small international organizations? Do the personnel have prior experience with improving the capacity of local and indigenous organizations in Kenya and elsewhere in developing countries? Do the personnel have appropriate technical qualifications?

4. Administrative and Accounting Plan (15 points)

Is there a plan to account for, prepare reports for, monitor, and audit expenditures under this agreement; manage the resources of the program; and produce, collect and analyze performance data?

5. Budget (not scored)

Is the itemized budget for conducting the project, along with justification, reasonable and consistent with stated objectives and planned program activities? Does the budget reflect a commitment to ensure that local organizations receive an adequate percentage of the total award so that they can achieve their targets? Is the percentage of funds designated for administration and capacity building, including technical oversight from a head office, reasonable?

V.2. Review and Selection Process

Applications will be reviewed for completeness by the Procurement and Grants Office (PGO) staff, and for responsiveness by the National Center for HIV, STD and TB Prevention (NCHSTP). Incomplete applications and applications that are non-responsive to the eligibility criteria will not advance through the review process. Applicants will be notified that their application did not meet submission requirements.

An objective review panel will evaluate complete and responsive applications according to the criteria listed in the "V.1. Criteria" section above.

No award will be made without the concurrence of the U.S. Embassy and the CDC representative in Kenya.

V.3. Anticipated Announcement Award Date

September 1, 2004.

VI. Award Administration Information

VI.1. Award Notices

Successful applicants will receive a Notice of Grant Award (NGA) from the CDC Procurement and Grants Office. The NGA shall be the only binding, authorizing document between the recipient and CDC. The NGA will be signed by an authorized Grants Management Officer, and mailed to the recipient fiscal officer identified in the application.

Unsuccessful applicants will receive notification of the results of the application review by mail.

VI.2. Administrative and National Policy Requirements

45 CFR part 74 and part 92.

For more information on the Code of Federal Regulations, see the National Archives and Records Administration at the following Internet address: *http://www.access.gpo.gov/nara/cfr/cfr-table-search.html.*

The following additional requirements apply to this project:

- AR–1 Human Subjects Requirements.
- AR–4 HIV/AIDS Confidentiality Provisions.
- AR–6 Patient Care.
- AR–8 Public Health System Reporting Requirements.
- AR–10 Smoke-Free Workplace Requirements.
- AR–14 Accounting System Requirements.

Additional information on these requirements can be found on the CDC Web site at the following Internet address: *http://www.cdc.gov/od/pgo/funding/ARs.htm.*

VI.3. Reporting Requirements

You must provide CDC with an original, plus two hard copies of the following reports:

1. Semi-annual reports are required 30 days after the end of the budget period.

2. Interim progress report, no less than 90 days before the end of the budget period. The progress report will serve as your non-competing continuation application, and must contain the following elements:

a. Current Budget Period Activities Objectives.

b. Current Budget Period Financial Progress.

c. New Budget Period Program Proposed Activity Objectives.

d. Budget.

e. Additional Requested Information.

f. Measures of Effectiveness.

3. Financial status report, no more than 90 days after the end of the budget period.

4. Final financial and performance reports, no more than 90 days after the end of the project period.

These reports must be mailed to the Grants Management or Contract Specialist listed in the "Agency Contacts" section of this announcement.

VII. Agency Contacts

For general questions about this announcement, contact: Technical Information Management Section, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341, telephone: (770) 488–2700.

For program technical assistance, contact: Elizabeth Marum, Ph.D., Project Officer, Global Aids Program (GAP), Kenya Country Team, National Center for HIV, STD and TB Prevention, Centers for Disease Control and Prevention [CDC], PO Box 606 Village Market, Nairobi, Kenya, telephone: 256–20–271–3008, e-mail: *emarum@cdcnairobi.mimcom.net.*

For budget assistance, contact: Diane Flournoy, Contract Specialist, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341, telephone: (770) 488–2072, e-mail: *dmf6@cdc.gov.*

Dated: July 2, 2004.

William P. Nichols,

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 04–15599 Filed 7–8–04; 8:45 am]

BILLING CODE 4163–18–U

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 04224]

Strengthening HIV Counselor Training in the Republic of Uganda; Amendment

A notice announcing the availability of fiscal year (FY) 2004 funds for a cooperative agreement entitled, "Strengthening HIV Counselor Training in the Republic of Uganda" was published in the **Federal Register** Thursday, June 24, 2004, Volume 69, Number 121, pages 35373–35377. The notice is amended as follows:

On page 35374, column three, section "II. Award Information,": Please change the anticipated award date from July 1, 2004, to September 1, 2004.

Dated: July 2, 2004.

Alan A. Kotch,

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 04–15600 Filed 7–8–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

HIV Prevention and Care Services for Young People in Kenya

Announcement Type: New.

Funding Opportunity Number: PA 04265.

Catalog of Federal Domestic Assistance Number: 93.941.

Dates: Application Deadline: August 9, 2004.

I. Funding Opportunity Description

Authority: This program is authorized under Sections 307 and 317(k)(2)of the Public Health Service Act, (42 U.S.C. 242l and 247b(k)(2)), as amended, and under Public Law 108–25 (United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003) (22 U.S.C. 7601).

Purpose: The Centers for Disease Control and Prevention (CDC) announces the availability of fiscal year (FY) 2004 funds for a cooperative agreement program to implement model programs for youth interventions in Kisumu, Kitale, Makindu, and other towns in Kenya. This program should include community centers and/or services, and outreach activities that target youth. The program should also involve members of the community, including parents and religious leaders, to reduce risk of HIV infection in young people in Kenya.

The Global AIDS Program (GAP) has established field operations to support national HIV/AIDS control programs in 25 countries. The CDC's GAP exists to help prevent HIV infection, improve care and support, and build capacity to address the global AIDS pandemic. CDC/GAP provides financial and technical assistance through partnerships with governments, community and faith-based organizations, the private sector, and national and international entities working in the 25 resource-constrained countries. CDC/GAP works with the Health Resources and Services Administration (HRSA), the National Institutes of Health (NIH), the U.S. Agency for International Development (USAID), the Peace Corps, the Departments of State, Labor and Defense, and other agencies and organizations. These efforts complement multilateral efforts, including UNAIDS, the Global Fund to Combat HIV, TB and Malaria, World Bank funding, and other private sector donation programs.

The U.S. Government seeks to reduce the impact of HIV/AIDS in specific countries within sub-Saharan Africa, Asia, and the Americas through the Presidential Emergency Plan for AIDS Relief (PEPFAR). Through this new initiative, CDC's GAP will continue to work with host countries to strengthen capacity and expand activities in the areas of: (1) Primary HIV prevention; (2) HIV care, support, and treatment; and (3) capacity and infrastructure development, especially for surveillance and training. Targeted countries represent those with the most severe epidemics where the potential for impact is greatest and where U.S. government agencies are already active. Kenya is one of these targeted countries.

To carry out its activities in these countries, CDC is working in a collaborative manner with national governments and other agencies to develop programs of assistance to address the HIV/AIDS epidemic. CDC's program of assistance to Kenya focuses on several areas of national priority including scaling up activities and funding for HIV prevention, care, and treatment; improvement of the national blood safety program; and support for the National AIDS and STD Control Program.

The highest rates of HIV infection in Kenya occur in Kisumu and Nyanza Province. A survey, in 1997, found 23 percent of young women aged 15 to 19 to be HIV infected, compared to 3.5 percent of young men. CDC Kenya has supported a rural intervention for youth, but now wishes to support a more urban oriented intervention program for young people in Kisumu. In addition, CDC Kenya proposes to support youth prevention and care efforts in other areas of Kenya, including Kitale, Makindu, the Mukuru slum and environs in Nairobi, and elsewhere.

The measurable outcomes of the program will be in alignment with goals of the GAP to reduce HIV transmission and improve care of persons living with HIV. They also will contribute to the goals of the PEPFAR which are: within five years treat more than two million HIV-infected persons with effective combination anti-retroviral therapy; care for seven million HIV-infected and affected persons including those orphaned by HIV/AIDS; and prevent ten million new infections. Some of the specific measurable outcomes from this program will be: the number of young people receiving HIV behavior change services; the number of persons trained to provide HIV behavior change services for youth; the number of community leaders, religious leaders, and parents involved with the program; the number of young people who receive voluntary counseling and testing (VCT) services as a result of activities sponsored by the program; and the number of HIV+ young people linked to care and treatment services.

Activities

Awardee activities for this program are as follows:

- Establish or maintain youth centers and/or programs intended to help young people reduce their risk of HIV infection.
- Provide training in targeted HIV behavior change for youth, including training related to abstinence and delay of sexual debut.
- Implement community outreach activities targeting youth, parents, and community and religious leaders; and provide opportunities for young people to participate in community outreach.
- Develop formal relationships or linkages with other programs and services providing VCT, sexually transmitted infections (STI) care, and AIDS care and treatment; and ensure that these services are provided in a manner which is "youth friendly."
- If not available nearby, provide youth friendly VCT, STI prevention and treatment, and AIDS care and treatment services.
- Provide directly, or collaborate with, partner organizations for the delivery of mobile VCT services targeting young people.
- Collect and analyze data on all of these services to track and evaluate program progress.
- Conduct regular and periodic assessments to determine the effectiveness of the program in achieving specific targets relating to the outcomes listed above, including the number of youth served and trained, and the number of youth learning HIV status, etc. Applicants may also propose to study the effectiveness of the interventions in changing behavior, such as median age of first sex and rates of abstinence and faithfulness.

Awardee should ensure that all of the above activities integrate into the national HIV/AIDS strategy and support the CDC/GAP Kenya mission priorities.

In a cooperative agreement, CDC staff is substantially involved in the program activities, above and beyond routine grant monitoring.

CDC Activities for this program are as follows:

- Provide technical assistance in youth interventions, youth oriented counseling, training, data management, and program development, monitoring and evaluation.

• Assist in the development of referral networks, information exchange, and dissemination of lessons learned with other CDC-supported youth interventions and care programs.

• Assist, as needed, in monitoring and evaluation of interventions funded by the program, and in development of further appropriate initiatives.

• Monitor project and budget performance to ensure satisfactory progress towards the goals of the project.

II. Award Information

Type of Award: Cooperative Agreement.

CDC involvement in this program is listed in the Activities Section above.

Fiscal Year Funds: 2004.

Approximate Total Funding: $8,000,000.

(This amount is the approximate total funding amount for the entire five-year project period.)

Approximate Number of Awards: 4 to 6.

Approximate Average Award: $250,000.

(This amount is for the first 12-month budget period, and includes direct costs.)

Floor of Award Range: $100,000.

Ceiling of Award Range: $500,000.

Anticipated Award Date: September 1, 2004.

Budget Period Length: 12 months.

Project Period Length: Five years.

Throughout the project period, CDC's commitment to continuation of awards will be conditioned on the availability of funds, evidence of satisfactory progress by the recipient (as documented in required reports), and the determination that continued funding is in the best interest of the Federal Government.

III. Eligibility Information

III.1. Eligible Applicants

Applications may be submitted by public nonprofit organizations, private nonprofit organizations, universities or colleges, and faith-based organizations that meet the following criteria:

1. Have at least three years of documented experience in conducting HIV prevention interventions in Kenya.

2. Have an existing program in Kenya at the selected site because it is critical that these activities commence quickly. Kisumu, Kitale, Makindu, and the Mukuru slum area of Nairobi are priority sites, though programs proposed for other locations will be considered.

III.2. Cost Sharing or Matching

Matching funds are not required for this program.

III.3. Other

If you request a funding amount greater than the ceiling of the award range, your application will be considered non-responsive, and will not be entered into the review process. You will be notified that your application did not meet the submission requirements.

If your application is incomplete or non-responsive to the requirements listed in this section, it will not be entered into the review process. You will be notified that your application did not meet submission requirements.

IV. Application and Submission Information

IV.1. Address To Request Application Package

To apply for this funding opportunity use application form PHS 5161. Application forms and instructions are available on the CDC web site, at the following Internet address: *http://www.cdc.gov/od/pgo/forminfo.htm.*

If you do not have access to the Internet, or if you have difficulty accessing the forms on-line, you may contact the CDC Procurement and Grants Office Technical Information Management Section (PGO–TIM) staff at: 770–488–2700. Application forms can be mailed to you.

IV.2. Content and Form of Submission

Application: You must include a project narrative with your application forms. The narrative must be submitted in the following format:

• Maximum number of pages: 15. If your narrative exceeds the page limit, only the first pages which are within the page limit will be reviewed.

• Font size: 12 point unreduced.

• Paper size: 8.5 by 11 inches.

• Double spaced.

• Page margin size: One inch.

• Printed only on one side of page.

• Held together only by rubber bands or metal clips; not bound in any other way.

• All pages should be numbered, and a complete index to the application and any appendices must be included.

• Submitted in English.

Your narrative should address activities to be conducted over the entire project period, and should consist of, as a minimum, a plan, objectives, activities, methods, an evaluation framework, a budget highlighting any supplies mentioned in the Program Requirements and any proposed capital expenditure. The budget justification will not be counted in the page limit stated above. Guidance for completing your budget can be found on the United States government Web site at the following address: *http://www.cdc.gov/od/pgo/funding/budgetguide.htm.*

Additional information is optional and may be included in the application appendices. The appendices will not be counted toward the narrative page limit. Additional information could include but is not limited to: organizational charts, curriculum vitas, letters of support, etc.

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 Federal government. The DUNS 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.

For more information, see the CDC Web site at: *http://www.cdc.gov/od/pgo/funding/pubcommt.htm.*

If your application form does not have a DUNS number field, please write your DUNS number at the top of the first page of your application, and/or include your DUNS number in your application cover letter.

Additional requirements that may require you to submit additional documentation with your application are listed in section "VI.2. Administrative and National Policy Requirements."

IV.3. Submission Dates and Times

Application Deadline Date: August 9, 2004.

Explanation of Deadlines: Applications must be received in the CDC Procurement and Grants Office by 4 p.m. eastern time on the deadline date. If you send your application by the United States Postal Service or commercial delivery service, you must ensure that the carrier will be able to guarantee delivery of the application by the closing date and time. If CDC receives your application after closing due to: (1) Carrier error, when the carrier accepted the package with a guarantee for delivery by the closing date and time, or (2) significant weather delays or natural disasters, you will be given the opportunity to submit documentation of the carriers guarantee. If the documentation verifies a carrier problem, CDC will consider the application as having been received by the deadline.

This announcement is the definitive guide on application submission address and deadline. It supersedes information provided in the application instructions. If your application does

not meet the deadline above, it will not be eligible for review, and will be discarded. You will be notified that your application did not meet the submission requirements.

CDC will not notify you upon receipt of your application. If you have a question about the receipt of your application, first contact your courier. If you still have a question, contact the PGO–TIM staff at: 770–488–2700. Before calling, please wait two to three days after the application deadline. This will allow time for applications to be processed and logged.

IV.4. Intergovernmental Review of Applications

Executive Order 12372 does not apply to this program.

IV.5. Funding Restrictions

Restrictions, which must be taken into account while writing your budget, are as follows:

- Funds may be used for: Hiring of staff needed to establish and operate the center or program; hiring and/or renovating facilities to ensure adequate and appropriate premises for the center or program; coordination and evaluation of the program; and purchase of supplies, equipment, vehicles, and commodities needed to provide the services.
- Antiretroviral Drugs—The purchase of antiretrovirals, reagents, and laboratory equipment for antiretroviral treatment projects require pre-approval from the GAP headquarters.
- Needle Exchange—No funds appropriated under this Act shall be used to carry out any program of distributing sterile needles or syringes for the hypodermic injection of any illegal drug.
- Funds may be spent for reasonable program purposes, including personnel, training, travel, supplies and services. Equipment may be purchased and renovations completed if deemed necessary to accomplish program objectives; however, prior written approval by CDC officials must be requested in writing.
- All requests for funds contained in the budget shall be stated in U.S. dollars. Once an award is made, CDC will not compensate foreign grantees for currency exchange fluctuations through the issuance of supplemental awards.
- The costs that are generally allowable in grants to domestic organizations are allowable to foreign institutions and international organizations, with the following exception: With the exception of the American University, Beirut, and the World Health Organization, Indirect Costs will not be paid (either directly or through sub-award) to organizations located outside the territorial limits of the United States or to international organizations regardless of their location.
- The applicant may contract with other organizations under this program, however, the applicant must perform a substantial portion of the activities, including program management and operations, and delivery of prevention and care services for which funds are requested.
- An annual audit of these funds is required by a U.S. based audit firm with international branches and current licensure/authority in-country, and in accordance with International Accounting Standards or equivalent standard(s) approved in writing by CDC. The audit should specify the use of funds and the appropriateness and reasonableness of expenditures.
- A fiscal Recipient Capability Assessment may be required with the potential awardee, pre or post award, in order to review their business management and fiscal capabilities regarding the handling of U.S. Federal funds.
- Prostitution and Related Activities: The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons.

Any entity that receives, directly or indirectly, U.S. Government funds in connection with this document ("recipient") cannot use such U.S. Government funds to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides. A recipient that is otherwise eligible to receive funds in connection with this document to prevent, treat, or monitor HIV/AIDS shall not be required to endorse or utilize a multisectoral approach to combating HIV/AIDS, or to endorse, utilize, or participate in a prevention method or treatment program to which the recipient has a religious or moral objection. Any information provided by recipients about the use of condoms as part of projects or activities that are funded in connection with this document shall be medically accurate and shall include the public health benefits and failure rates of such use.

In addition, any foreign recipient must have a policy explicitly opposing, in its activities outside the United States, prostitution and sex trafficking, except that this requirement shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency, if such entity is a recipient of U.S. government funds in connection with this document.

The following definitions apply for purposes of this clause:

- Sex trafficking means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act. 22 U.S.C. 7102(9).
- A foreign recipient includes an entity that is not organized under the laws of any State of the United States, the District of Columbia or the Commonwealth of Puerto Rico. Restoration of the Mexico City Policy, 66 FR 17303, (March 28, 2001).

All recipients must insert provisions implementing the applicable parts of this section, "Prostitution and Related Activities," in all subagreements under this award. These provisions must be express terms and conditions of the subagreement, acknowledge that each certification to compliance with this section, "Prostitution and Related Activities," are a prerequisite to receipt of U.S. government funds in connection with this document, and must acknowledge that any violation of the provisions shall be grounds for unilateral termination of the agreement prior to the end of its term. In addition, all recipients must ensure, through contract, certification, audit, and/or any other necessary means, all the applicable requirements in this section, "Prostitution and Related Activities," are met by any other entities receiving U.S. government funds from the recipient in connection with this document, including without limitation, the recipients' sub-grantees, sub-contractors, parents, subsidiaries, and affiliates. Recipients must agree that HHS may, at any reasonable time, inspect the documents and materials maintained or prepared by the recipient in the usual course of its operations that relate to the organization's compliance with this section, "Prostitution and Related Activities."

All primary grantees receiving U.S. Government funds in connection with this document must certify compliance prior to actual receipt of such funds in a written statement referencing this document (*e.g.*, "[Recipient's name] certifies compliance with the section, 'Prostitution and Related Activities.'")

addressed to the agency's grants officer. Such certifications are prerequisites to the payment of any U.S. Government funds in connection with this document.

Recipients' compliance with this section, "Prostitution and Related Activities," is an express term and condition of receiving U.S. government funds in connection with this document, and any violation of it shall be grounds for unilateral termination by HHS of the agreement with HHS in connection with this document prior to the end of its term. The recipient shall refund to HHS the entire amount furnished in connection with this document in the event it is determined by HHS that the recipient has not complied with this section, "Prostitution and Related Activities."

Awards will not allow reimbursement of pre-award costs.

Guidance for completing your budget can be found on the CDC Web site at the following Internet address: *http://www.cdc.gov/od/pgo/funding/budgetguide.htm.*

IV.6. Other Submission Requirements

Application Submission Address: Submit the original and two hard copies of your application by mail or express delivery service to: Technical Information Management—PA 04265, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341.

Applications may not be submitted electronically at this time.

V. Application Review Information

V.1. Criteria

You are required to provide measures of effectiveness that will demonstrate the accomplishment of the various identified objectives of the cooperative agreement. Measures of effectiveness must relate to the performance goals stated in the "Purpose" section of this announcement. Measures must be objective and quantitative, and must measure the intended outcome. These measures of effectiveness must be submitted with the application and will be an element of evaluation.

Your application will be evaluated against the following criteria:

1. Understanding the Issues Relating to the Prevalence of HIV Infection in Young People in Kenya, and Developing a Creative and Innovative Approach to Preventing HIV Infection in This Population (30 points)

Does the applicant demonstrate an understanding of the social, behavioral, and contextual issues relating to the high risk of HIV infection in young people in Kenya? Does the applicant demonstrate creative and innovative ideas for addressing this multi-sectoral problem? Does the applicant provide evidence that the proposed approach has been effective in changing behavior of young people in Kenya or elsewhere; or that it is based on best practices in HIV prevention?

2. Ability To Carry Out the Proposal (25 points)

Does the applicant demonstrate the capability to achieve the purpose of this proposal? Does the applicant demonstrate an ability to set up and operate an intervention program in Kenya? Does the applicant demonstrate an ability, and a reasonable plan, to scale up activities quickly and reach large numbers of young people with HIV prevention messages and services?

3. Personnel (20 points)

Are the technical personnel involved in this project qualified, including evidence of at least three years' experience in providing HIV interventions for youth? Do the technical personnel have demonstrated capacity for creative approaches to complex problems?

4. Plans for Administration, Management, and Evaluation of the Project (15 points)

Does the applicant describe activities that are realistic, achievable, time-framed and appropriate to complete this program? Are the plans for monitoring and evaluating the project appropriate and consistent with monitoring requirements associated with the PEPFAR?

5. Administrative and Accounting Plan (10 points)

Is there a plan to account for, prepare reports, monitor and audit expenditures under this agreement; manage the resources of the program; and produce, collect and analyze performance data?

6. Budget (not scored, but evaluated)

Is the itemized budget for conducting the project, along with justification, reasonable and consistent with stated objectives and planned program activities?

V.2. Review and Selection Process

Applications will be reviewed for completeness by the Procurement and Grants Office (PGO) staff, and for responsiveness by the National Center for HIV, STD and TB Prevention (NCHSTP). Incomplete applications and applications that are non-responsive to the eligibility criteria will not advance through the review process. Applicants will be notified that their application did not meet submission requirements.

An objective review panel will evaluate complete and responsive applications according to the criteria listed in the "V.1. Criteria" section above.

No award will be made without the concurrence of the U.S. Embassy and the CDC representative in Kenya.

V.3. Anticipated Announcement and Award Date

September 1, 2004.

VI. Award Administration Information

VI.1. Award Notices

Successful applicants will receive a Notice of Grant Award (NGA) from the CDC Procurement and Grants Office. The NGA shall be the only binding, authorizing document between the recipient and CDC. The NGA will be signed by an authorized Grants Management Officer, and mailed to the recipient fiscal officer identified in the application.

Unsuccessful applicants will receive notification of the results of the application review by mail.

VI.2. Administrative and National Policy Requirements

45 CFR Part 74 and Part 92

For more information on the Code of Federal Regulations, see the National Archives and Records Administration at the following Internet address: *http://www.access.gpo.gov/nara/cfr/cfr-table-search.html.*

The following additional requirements apply to this project:

- AR–1—Human Subjects Requirements.
- AR–4—HIV/AIDS Confidentiality Provisions.
- AR–6—Patient Care.
- AR–8—Public Health System Reporting Requirements.
- AR–10—Smoke-Free Workplace Requirements.
- AR–14—Accounting System Requirements.

Additional information on these requirements can be found on the CDC Web site at the following Internet address: *http://www.cdc.gov/od/pgo/funding/ARs.htm.*

VI.3. Reporting Requirements

You must provide CDC with an original, plus two hard copies of the following reports:

1. Semi-annual progress reports, no more than 30 days after the end of the budget period.

2. Interim progress report, no less than 90 days before the end of the budget period. The progress report will serve as your non-competing continuation application, and must contain the following elements:

a. Current Budget Period Activities Objectives.

b. Current Budget Period Financial Progress.

c. New Budget Period Program Proposed Activity Objectives.

d. Budget.

e. Additional Requested Information.

f. Measures of Effectiveness.

3. Financial status report, no more than 90 days after the end of the budget period.

4. Final financial and performance reports, no more than 90 days after the end of the project period.

These reports must be mailed to the Grants Management or Contract Specialist listed in the "Agency Contacts" section of this announcement.

VII. Agency Contacts

For general questions about this announcement, contact: Technical Information Management Section, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341, telephone: 770–488–2700.

For program technical assistance, contact: Elizabeth Marum, Ph.D., Project Officer, Global Aids Program [GAP], Kenya Country Team, National Center for HIV, STD and TB Prevention, Centers for Disease Control and Prevention [CDC], PO Box 606 Village Market, Nairobi, Kenya, telephone: 256–20–271–3008, e-mail: *emarum@cdcnairobi.mimcom.net.*

For budget assistance, contact: Diane Flournoy, Contract Specialist, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341, telephone: 770–488–2072, e-mail: *dmf6@cdc.gov.*

Dated: July 2, 2004.

William P. Nichols,

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 04–15602 Filed 7–8–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0049]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Control of Communicable Diseases; Restrictions on African Rodents, Prairie Dogs, and Certain Other Animals

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by August 9, 2004.

ADDRESSES: OMB is still experiencing significant delays in the regular mail, including first class and express mail, and messenger deliveries are not being accepted. To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: Fumie Yokota, Desk Officer for FDA, FAX: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Jonna Capezzuto, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4659.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Control of Communicable Diseases; Restrictions on African Rodents, Prairie Dogs, and Certain Other Animals (OMB Control Number 0910–0519)—Extension

Under § 1240.63(a)(2)(ii) (21 CFR 1240.63(a)(2)(ii)), an individual must submit a written request to seek permission to capture, offer to capture, transport, offer to transport, sell, barter, or exchange, offer to sell, barter, or exchange, distribute, offer to distribute, and/or release into the environment any of the following animals:

- Prairie dogs (*Cynomys sp.*),
- African Tree squirrels (*Heliosciurus sp.*),
- Rope squirrels (*Funisciurus sp.*),
- African Dormice (*Graphiurus sp.*),
- Gambian giant pouched rats (*Cricetomys sp.*),
- Brush-tailed porcupines (*Atherurus sp.*),
- Striped mice (*Hybomys sp.*), or
- Any other animal so prohibited by order of the Commissioner of Food and Drugs (the Commissioner) because of that animal's potential to transmit the monkeypox virus.

The request may not seek written permission to sell, barter, or exchange, or offer to sell, barter, or exchange, as a pet, the animals listed previously or any animal covered by an order of the Commissioner.

The request must state, among other things, the reasons why an exemption is needed, describe the animals involved, and explain why an exemption will not result in the spread of monkeypox within the United States.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total No. of Responses	Hours per Response	Total Hours
1240.63(a)(2)(ii)	120	1	120	4	480

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Our estimates are based on our experience to date with the interim final rule. To estimate the number of respondents, we examined the number of requests we have received since the June 11, 2003, order. FDA has received approximately 65 requests in a 7-month period, and most requests involved requests to move an animal from one location to another. As the agency cannot predict how the monkeypox outbreak will be resolved, FDA will tentatively estimate that 120 respondents would be affected. Furthermore, based on FDA's experience with requests submitted thus far, and the parties submitting those requests, the agency estimates that each respondent will need 4 hours to complete its request for an exemption. Therefore, the total reporting burden

under § 1240.63(a)(2)(ii) will be 480 hours (120 respondents x 4 hours per response = 480 hours).

In the **Federal Register** of February 19, 2004 (69 FR 7752), FDA published a 60-day notice requesting public comment on the information collection provisions. We received nearly 700 comments on the interim final rule and the notice that invited public comment on the proposed collection of information. Over 140 of these comments were submitted after February 19, 2004 (the date on which we published the notice concerning the collection of information), but the majority of these later comments apparently interpreted that notice as another opportunity to comment on the interim final rule's merits rather than comment on the collection of information itself. This notice simply announces that we are seeking renewal of OMB's paperwork approval for the interim final rule and addresses those comments regarding the collection of information. It is not an issuance of a final rule and we are not seeking additional comments on the interim final rule.

Of the few comments that may pertain to the collection of information, none agreed with the collection of information or the estimates themselves. Here we address the comments on the collection of information, not the comments on the substance of the rule itself.

Some comments claimed that we take 2 1/2 to 4 months to process a permit request. Of these comments, some also claimed that the permit process was too burdensome because State agencies had to be involved. One comment claimed that the permit process requires a person to describe the benefits that would result if we granted the permit and indicated that it is sometimes difficult to show a benefit.

We disagree with the comments for several reasons. First, we disagree with the claim that our permit process takes several months to complete. While permit requests vary in their complexity, and complex and incomplete requests may take more time to process, our records indicate that we respond to permit requests, on average, within 27 days (including weekends and holidays).

Second, although a person seeking a permit must also comply with all State and local requirements related to the handling and transport of animals subject to the interim final rule, nothing in the interim final rule's permit provision requires a person to contact State agencies as part of FDA's permit process. We may consult State agencies about a particular permit request, but this consultation does not create an information collection burden on the person requesting the permit. Furthermore, the interim final rule does not require a person seeking a permit to describe the benefit that would result if we granted their request. The interim final rule does require a person to explain why an exemption will not result in the spread of monkeypox in the United States, and this explanation can be derived from the facts accompanying the permit request. For example, the description of the animals involved (species, absence of contact with infected animals, the animals' origin) may help explain why the animals involved do not present a risk of having the monkeypox virus. The description of the precautions taken may help explain why there is no risk of spreading the monkeypox virus. In other words, the interim final rule does not require a person to show that a "benefit" would result if we granted the permit, but it does seek information to help us assess the risk associated with the request.

Other comments appeared to address the estimated number of respondents or our data. One comment stated that it believed the estimated number of respondents (i.e., persons who would request a permit) is too low, although it offered no different estimates itself. The comment further stated that there are people who are ignoring the rule or are unaware of the rule, but offered no estimates. Another comment declared "there are major flaws with the data collection in this docket," but did not discuss the permit process or any specific estimate.

As we explained in the February 19, 2004, notice, we based our estimates on our experience with the permit process, including the experience of those submitting permit requests. We have no reasonable basis for adjusting our estimates to reflect the possibility that persons are either intentionally or unintentionally failing to seek permits, and the comments offered none. Consequently, in the absence of any new data or conflicting estimates, we decline to revise our estimates.

Dated: July 2, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–15658 Filed 7–8–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0103]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Guidance for Industry on Special Protocol Assessment

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by August 9, 2004.

ADDRESSES: OMB is still experiencing significant delays in the regular mail, including first class and express mail, and messenger deliveries are not being accepted. To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: Fumie Yokota, Desk Officer for FDA, FAX: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Karen L. Nelson, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1482.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Guidance for Industry on Special Protocol Assessment—(OMB Control Number 0910–0470)—Extension

In the **Federal Register** of March 22, 2004 (69 FR 13304), FDA published a 60-day notice requesting public comment on the information collection provisions. No comments were received.

The "Guidance for Industry on Special Protocol Assessment" (69 FR 13304) describes agency procedures to evaluate issues related to the adequacy (e.g., design, conduct, analysis) of certain proposed studies. The guidance describes procedures for sponsors to request special protocol assessment and for the agency to act on such requests. The guidance provides information on how the agency will interpret and apply

provisions of the Food and Drug Administration Modernization Act of 1987 and the specific Prescription Drug User Fee Act of 1992 (PDUFA) goals for special protocol assessment associated with the development and review of PDUFA products.

The guidance describes two collections of information: (1) The submission of a notice of intent to request special protocol assessment of a carcinogenicity protocol, and (2) the submission of a request for special protocol assessment.

A. Notification for a Carcinogenicity Protocol

As described in the guidance, a sponsor interested in agency assessment of a carcinogenicity protocol should notify the appropriate division in FDA's Center for Drug Evaluation and Research (CDER) or the Center for Biologics Evaluation and Research (CBER) of an intent to request special protocol assessment at least 30 days prior to submitting the request. With such notification, the sponsor should submit relevant background information so that the agency may review reference material related to carcinogenicity protocol design prior to receiving the carcinogenicity protocol.

B. Request for Special Protocol Assessment

In the guidance, CDER and CBER ask that a request for special protocol assessment be submitted as an amendment to the investigational new drug application (IND) for the underlying product and that it be submitted to the agency in triplicate with Form FDA 1571 attached. The agency also suggests that the sponsor submit the cover letter to a request for special protocol assessment via facsimile to the appropriate division in CDER or CBER. Agency regulations (§ 312.23(d)) state that information provided to the agency as part of an IND is to be submitted in triplicate and with the appropriate cover form, Form FDA 1571. An IND is submitted to FDA under existing regulations in part 312 (21 CFR part 312), which specifies the information that manufacturers must submit so that FDA may properly evaluate the safety and effectiveness of investigational drugs and biological products. The information collection requirements resulting from the preparation and submission of an IND under part 312 have been estimated by FDA and the reporting and recordkeeping burden has been approved by OMB until January 31, 2006, under OMB control number 0910–0014.

FDA suggests that the cover letter to the request for special protocol assessment be submitted via facsimile to the appropriate division in CDER or CBER to enable agency staff to prepare for the arrival of the protocol for assessment. The agency recommends that a request for special protocol assessment be submitted as an amendment to an IND for two reasons: (1) To ensure that each request is kept in the administrative file with the entire IND, and (2) to ensure that pertinent information about the request is entered into the appropriate tracking databases. Use of the information in the agency's tracking databases enables the appropriate agency official to monitor progress on the evaluation of the protocol and to ensure that appropriate steps will be taken in a timely manner.

CDER and CBER have determined and the guidance recommends that the following information should be submitted to the appropriate Center with each request for special protocol assessment so that the Center may quickly and efficiently respond to the request:

- Questions to the agency concerning specific issues regarding the protocol; and
- All data, assumptions, and information needed to permit an adequate evaluation of the protocol, including: (1) The role of the study in the overall development of the drug; (2) information supporting the proposed trial, including power calculations, the choice of study endpoints, and other critical design features; (3) regulatory outcomes that could be supported by the results of the study; (4) final labeling that could be supported by the results of the study; and (5) for a stability protocol, product characterization and relevant manufacturing data.

Description of Respondents: A sponsor, applicant, or manufacturer of a drug or biologic product regulated by the agency under the Federal Food, Drug, and Cosmetic Act (the act) or section 351 of the Public Health Service Act (42 U.S.C. 262) who requests special protocol assessment.

Burden Estimate: Table 1 of this document provides an estimate of the annual reporting burden for requests for special protocol assessment. The procedures for requesting special protocol assessment that are set forth in the guidance document have not been previously described by the agency, although the PDUFA goals and the requirements of section 505(b)(4)(B) of the act (21 U.S.C. 355(b)(4)(B)) have been in effect since October and November 1998, respectively.

Notification for a Carcinogenicity Protocol. Based on data collected from the review divisions and offices within CDER and CBER, including the number of notifications for carcinogenicity protocols and the number of carcinogenicity protocols submitted in fiscal year (FY) 2003, CDER estimates that it will receive approximately 40 notifications of an intent to request special protocol assessment of a carcinogenicity protocol per year from approximately 20 sponsors. CBER anticipates one notification. The hours per response, which is the estimated number of hours that a sponsor would spend preparing the notification and background information to be submitted in accordance with the guidance, is estimated to be approximately 8 hours.

Requests for Special Protocol Assessment. Based on data collected from the review divisions and offices within CDER and CBER, including the number of requests for special protocol assessment submitted in FY 2003, CDER estimates that it will receive approximately 273 requests for special protocol assessment per year from approximately 102 sponsors. CBER estimates that it will receive approximately 20 requests from approximately 12 sponsors. The hours per response is the estimated number of hours that a respondent would spend preparing the information to be submitted with a request for special protocol assessment, including the time it takes to gather and copy questions to be posed to the agency regarding the protocol and data, assumptions, and information needed to permit an adequate evaluation of the protocol. Based on the agency's experience with these submissions, FDA estimates approximately 15 hours on average would be needed per response. Overall, FDA estimates that respondents will spend 4,523 hours per year to participate in the programs described in the guidance document.

FDA estimates the burden of this collection as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

	No. of Respondents	No. of Responses per Respondent	Total Annual Responses	Hours per Response	Total Hours
Notification for carcinogenicity protocols	21	1.78	41	8	328
Requests for special protocol assessment	114	2.57	293	15	4,395
Total					4,723

[1] There are no capital costs or operating and maintenance costs associated with this collection.

Dated: July 2, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–15659 Filed 7–8–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0161]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Request for Information From United States Processors That Export to the European Community

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by August 9, 2004.

ADDRESSES: OMB is still experiencing significant delays in the regular mail, including first class and express mail, and messenger deliveries are not being accepted. To ensure that comments on the information collection are received, OMB recommends that comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: Fumie Yokota, Desk Officer for FDA, FAX: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Peggy Robbins, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1223.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Request for Information From U.S. Processors That Export to the European Community—(OMB Control Number 0910–0320)—Extension

The European Community (EC) is a group of 15 European countries (with 10 additional countries joining on May 1, 2004), that have agreed to harmonize their commodity requirements to facilitate commerce among member States. EC legislation for intraEC trade has been extended to trade with nonEC countries, including the United States. For certain food products, including those listed in this document, EC legislation requires assurances from the responsible authority of the country of origin that the processor of the food is in compliance with applicable regulatory requirements.

With the assistance of trade associations and State authorities, FDA requests information from processors that export certain animal-derived products (e.g., shell eggs, dairy products, game meat, game meat products, animal casings, and gelatin) to EC. FDA uses the information to maintain lists of processors that have demonstrated current compliance with U.S. requirements and provides the lists to EC quarterly. Inclusion on the list is voluntary. EC member countries refer to the lists at ports of entry to verify that products offered for importation to EC from the United States are from processors that meet U.S. regulatory requirements. Products processed by firms not on the list are subject to detention and possible refusal at the port. FDA requests the following information from each processor:

(1) Business name and address;

(2) Name and telephone number of person designated as business contact;

(3) Lists of products presently being shipped to EC and those intended to be shipped in the next 6 months;

(4) Name and address of manufacturing plants for each product;

(5) Names and affiliations of any Federal, State, or local governmental agencies that inspect the plant, government-assigned plant identifier such as plant number, and last date of inspection; and

(6) Assurance that the firm or individual representing the firm and submitting a certificate for signature to FDA is aware of and knows that they are subject to the provisions of 18 U.S.C. 1001. This law provides that it is a criminal offense to knowingly and willfully make a false statement or alter or counterfeit documents in a matter within the jurisdiction of a U.S. agency.

In the **Federal Register** of April 16, 2004 (69 FR 20630), FDA published a 60-day notice requesting public comment on the information collection provisions. No comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

Product	No. of Respondents	Annual Frequency per Respondent	Total Annual Responses	Hours per Response	Total Hours
Shell eggs	10	1	10	0.25	3
Dairy	100	1	100	0.25	25
Game meat and meat products	5	1	5	0.25	1
Animal casings	5	1	5	0.25	1
Gelatin	3	1	3	0.25	1
Collagen	3	1	3	0.25	1
Total					32

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2.—ESTIMATED ANNUAL REPORTING BURDEN (DISCLOSURE)[1]

Product	No. of Respondents	Annual Frequency per Respondent	Total Annual Responses	Hours per Response	Total Hours
Trade association	15	1	15	8	120
State	50	1	50	8	400
Total					520

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

It is estimated that the annual reporting burden would be no more than 32 hours. The time to respond to the questions should take approximately 15 minutes using any of the technologies available to transmit the information. All of the information asked for should be readily available. The number of respondents is a rough estimate based on volume of exports and responses received to date. No record retention is required. Therefore, the proposed annual burden for this information collection is 32 hours.

Dated: July 2, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–15661 Filed 7–8–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0132]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Premarket Approval of Medical Devices

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written-comments on the collection of information by August 9, 2004.

ADDRESSES: OMB is still experiencing significant delays in the regular mail, including first class and express mail, and messenger deliveries are not being accepted. To ensure that comments on the information collection are received, OMB recommends that comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: Fumie Yokota, Desk Officer for FDA, FAX: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Peggy Robbins, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1223.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Premarket Approval of Medical Devices—21 CFR Part 814 (OMB Control Number 0910–0231)—Extension

Section 515 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360e) sets forth the requirements for premarket approval of certain class III medical devices. Class III devices are either preamendments devices that have been classified into class III, postamendments devices which are not substantially equivalent to a preamendments device, or transitional devices. Class III devices are devices such as implants, life-sustaining or life-supporting devices, or devices which otherwise present a potentially unreasonable risk of illness or injury, or are of substantial importance in preventing impairment of human health. Most premarket approval application (PMAs) are for postamendments class III devices.

Under section 515 of the act, an application must contain several pieces of information including full reports of all information concerning investigations showing whether the device is reasonably safe and effective. The application should also include a statement of components, ingredients, and properties and of the principle or principles of operation of such a device and should also include a full description of the methods used in, and the facilities and controls used for the

manufacture and processing of the device; and labeling specimens.

The implementing regulations, contained in part 814 (21 CFR part 814), further specify the contents of a PMA for a class III medical device and the criteria FDA employs in approving, denying, or withdrawing approval of a PMA and supplements to PMAs. The regulation's purpose is to establish an efficient and thorough procedure for FDA's review of PMAs and supplements to PMAs for certain class III (premarket approval) medical devices. The regulations contained in part 814 facilitate the approval of PMAs and supplements to PMAs for devices that have been shown to be reasonably safe and effective and otherwise meet the statutory criteria for approval. The regulations also ensure the disapproval of PMAs and supplements to PMAs for devices that have not been shown to be reasonably safe and effective and that do not otherwise meet the statutory criteria for approval.

The Food and Drug Modernization Act of 1997 (FDAMA) (Public Law 105–115) was enacted on November 21, 1997, to implement revisions to the act by streamlining the process of bringing safe and effective drugs, medical devices, and other therapies to the U.S. market. Several provisions of FDAMA affect the PMA process, such as section 515(d)(6) of the act. This section of the act provided that PMA supplements were required for all device changes that affect safety and effectiveness of a device unless such changes are modifications to manufacturing procedures or method of manufacture. This type of manufacturing change requires a 30-day notice, or where FDA finds such notice inadequate, a 135-day PMA supplement.

To make the PMA process more efficient, in the past 3 years FDA has done the following: Made changes to the PMA program based on comments received, complied with changes to the program mandated by FDAMA, and worked towards completion of its PMA reinvention efforts.

Respondents to this information collection are persons filing a PMA application or a PMA supplement with FDA for approval of certain class III medical devices. Part 814 defines a person as any individual, partnership, corporation, association, scientific or academic establishment, government agency or organizational unit, or other legal entity. These respondents include entities meeting the definition of manufacturers such as manufacturers of commercial medical devices in distribution prior to May 28, 1976 (the enactment date of the Medical Device Amendments). Additionally, hospitals that reuse single use devices (SUDs) are also included in the definition of manufacturers. It is expected that FDA will receive four PMA applications from hospitals that remanufacture SUDs annually. This figure has been included intable 1 of this document, as part of the reporting burden in § 814.15.

In the **Federal Register** of April 5, 2004 (69 FR 17689), FDA published a 60-day notice requesting public comment on the information collection provisions. No comments were received.

The total estimated reporting and recordkeeping burden for this information collection is 113,464 hours. FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
814.15, 814.20, and 814.37	64	1	64	837	53,568
814.39(f)	581	1	581	66	33,346
814.82	45	1	45	135	6,075
814.84	45	1	45	10	450
Section 201 (FDAMA)	10	1	10	10	100
Section 202 (FDAMA)	15	1	15	10	150
Section 205 (FDAMA)	8	1	8	50	400
Section 208 (FDAMA)	26	1	26	30	780
Section 209 (FDAMA)	8	1	8	40	320
Total					95,189

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

21 CFR Section	No. of Recordkeepers	Annual Frequency of Recordkeeping	Total Annual Records	Hours per Recordkeeper	Total Hours
814.82(a)(5) and (a)(6)	1,075	1	1,075	17	18,275
Total					18,275

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The industry-wide burden estimate for PMAs is based on an FDA actual average fiscal year (FY) annual rate of receipt of 64 PMA original applications and 581 PMA supplements, using FY 1998 through 2002 data.

The burden data for PMAs is based on data provided by manufacturers by device type and cost element in an earlier study. The specific burden elements for which FDA has data are as follows:

- Clinical investigations: 67 percent of total burden estimate;
- Submission of additional data or information to FDA during a PMA review: 12 percent;
- Additional device development cost (e.g., testing): 10 percent; and
- PMA and PMA supplement preparation and submissions, and development of manufacturing and controls data: 11 percent.

Paperwork Burden Estimate

The burden estimates were derived by consultation with FDA and industry personnel. FDA's estimates are based on actual data collected from industry over the past 3 years. An evaluation of the type and scope of information requested was also used to derive some time estimates. For example, disclosure information primarily requires time only to update and maintain existing manuals.

Reporting/Disclosure

The reporting burden can be broken out by certain sections of the PMA regulation as follows:

- § 814.15—Research conducted outside the United States
- § 814.20—Application
- § 814.3—PMA amendments and resubmitted PMAs

The majority of the burden—53,568 burden hours—is due to the previously listed three requirements. Included in these three requirements are the conduct of laboratory and clinical trials as well as the analysis, review, and physical preparation of the PMA application. FDA estimates that 64 manufacturers (including hospital remanufacturers of single use devices) will be affected by these requirements based on actual average FDA receipt of new PMA applications in FY 1998 through 2002. FDA's estimate of the hours per response (837) was derived through FDA's experience and consultationwith industry and trade associations. Included in these three requirements are the conduct of laboratory and clinical trails as well as the analysis, review, and physical preparation of the PMA application. In addition, FDA has based its estimate on the results of an earlier study that these requirements account for the bulk of the burden identified by manufacturers.

- § 814.39(f)—PMA supplements: 33,346 burden hours

FDA believes that the amendments mandated by FDAMA for § 814.39(f), permitting the submission of the 30-day notices in lieu of regular PMA supplements, will result in an approximate 10 percent reduction in the total number of hours as compared to regular PMA supplements. As a result, FDA estimates that 33,346 hours of burden are needed to complete the requirements for regular PMA supplements.

- § 814.82—Postapproval requirements: 6,075 burden hours

Postapproval requirements concern approved PMAs that were not reclassified and require a periodic report. The range of PMAs that fit this category averaged approximately 45 per year (70 percent of the 64 periodic submissions). Most approved PMAs have been subject to some postapproval study requirement. Approximately half of the average submitted PMAs (32) require associated postapproval studies (i.e., followup of patients used in clinical trials to support the PMA or additional preclinical information) that is labor-intensive to compile and complete, and the other PMAs require minimal information. Based on experience and consultation with industry, FDA has estimated that preparation of reports and information required by § 814.82 require 6,075 hours (135 hours per respondent).

- § 814.84—Reports: 450 burden hours

Postapproval requirements described in § 814.82 require a periodic report. FDA has determined respondents meeting the criteria of § 814.84 will submit reports on a periodic basis. As stated previously in this document, the range of PMAs fitting this category averaged approximately 45 per year. These reports have minimal information requirements. FDA estimates that respondents will construct their report and meet their requirements in approximately 10 hours. This estimate is based on FDA's experience and on consultation with industry. FDA estimates that the periodic reporting required by § 814.84 will take 450 hours.

Statutory Burden

The total hours for statutory burden is 1,750. This burden estimate was based on actual real FDA data tracked from January 1, 1998, to the present, and an estimate was derived to forecast future expectations with regard to this statutory data.

Recordkeeping

The recordkeeping burden in this section involves the maintenance of records used to trace patients and the organization and indexing of records into identifiable files to ensure the device's continued safety and effectiveness. These records would be required only of those manufacturers who have an approved PMA and who had original clinical research in support of that PMA. For a typical year's submissions, 70 percent of the PMAs are eventually approved and 75 percent of those have original clinical trial data. Therefore, approximately 45 PMAs a year (64 annual submissions x 70 percent) would be subject to these requirements. Also, because the requirements apply to all active PMAs, all holders of active PMA applications must maintain these records. PMAs have been required since 1976, and there are 1,075 active PMAs that could be subject to these requirements, based on actual FDA data. Each study has approximately 200 subjects, and at an average of 5 minutes per subject, there is a total burden per study of 1,000 minutes, or 17 hours. The aggregate burden for all 1,075 holders of approved

original PMAs, therefore, is 18,275 hours (1,075 approved PMAs with clinical data x 17 hours per PMA).

The applicant determines which records should be maintained during product development to document and/or substantiate the device's safety and effectiveness. Records required by the current good manufacturing practices for medical devices regulation (21 CFR part 820) may be relevant to a PMA review and may be submitted as part of an application. In individual instances, records may be required as conditions to approval to ensure the device's continuing safety and effectiveness.

Dated: July 2, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–15662 Filed 7–8–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0275]

Agency Emergency Processing Under Office of Management and Budget Review; Application for Participation in the Medical Device Fellowship Program

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for emergency processing under the Paperwork Reduction Act of 1995 (the PRA). The proposed collection of information is for an application form for participation in the medical device fellowship program (MDFP). FDA will use the information collected to identify qualified health professionals and students to provide expertise in the Center for Drugs and and Radiological Health (CDRH) regulatory process for medical devices.

DATES: Fax written comments on the collection of information by August 9, 2004. FDA is requesting approval of this emergency processing by August 23, 2004.

ADDRESSES: OMB is still experiencing significant delays in the regular mail, including first class and express mail, and messenger deliveries are not being accepted. To ensure that comments on the information collection are received, OMB recommends that comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: Fumie Yokota, Desk Officer for FDA, FAX: 202–205–6974.

FOR FURTHER INFORMATION CONTACT: Peggy Robbins, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1223.

SUPPLEMENTARY INFORMATION: FDA is requesting emergency processing of this proposed collection of information under section 3507(j) of the PRA and 5 CFR 1320.13. This information is needed immediately so that the agency can effectively recruit outside expertise to aid in the review of medical device marketing applications. Outside experts are needed to fill gaps in current expertise and provide a flexible workforce capable of addressing changing medical device technology. A formal application and collection process would enable FDA to collect the necessary information from applicants in a timely and consistent manner. The application form will provide clear directions for applicants on what information to submit and a user-friendly format for submitting it, as well as reduce administrative costs for CDRH in collecting the information. The information to be collected is not available elsewhere.

With respect to the following collection of information FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Application for Participation in the Medical Device Fellowship Program; Form FDA 3608

Collecting applications for the MDFP will allow CDRH to easily and efficiently elicit and review information from students and health care professionals who are interested in becoming involved in CDRH activities. The process will reduce the time and cost of submitting written documentation to the agency and lessen the likelihood of applications being misrouted within the agency mail system. It will assist the agency in promoting and protecting the public health by encouraging outside persons to share their expertise with CDRH.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

FDA Form No.	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
3608	100	1	100	1	100

[1] There are no capital costs or operating and maintenance costs associated with this collection collection of information.

FDA based these estimates on the number of inquiries we've received about the program and requests for application forms over the past year. We anticipate the number of interested individuals and universities, and subsequent number of applications, to increase as we continue to develop an outreach program and an alumni base.

In addition, we would expect applicants who are not selected for their preferred term of employment to reapply at a later date. For these reasons we would expect that the number of applications submitted in the second and third years would increase substantially. During the first year, we expect to receive 100 applications. We believe that we will receive approximately 100 applications the second year and 100 applications the third year. FDA believes it will take individuals 1 hour to complete the application. This is based on similar applications submitted to FDA.

Dated: July 2, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–15663 Filed 7–8–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Notice of Approval of Abbreviated New Animal Drug Application; Oxytocin Injection

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration's Center for Veterinary Medicine (CVM) is providing notice that it has approved an original abbreviated new animal drug application (ANADA) filed by Cross Vetpharm Group, Ltd. The ANADA provides for the veterinary prescription use of oxytocin injectable solution in ewes, sows, cows, and horses. The applicable section of the regulation did not require amendment.

FOR FURTHER INFORMATION CONTACT: Lonnie W. Luther, Center for Veterinary Medicine (HFV–104), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 301–827–8549, e-mail: *lluther@cvm.fda.gov.*

SUPPLEMENTARY INFORMATION: In accordance with section 512(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(i)) and 21 CFR 514.105(a) and 514.106(a), CVM is providing notice that it has approved original ANADA 200–328 filed by Cross Vetpharm Group, Ltd., Broomhill Rd., Tallaght, Dublin 24, Ireland. ANADA 200–328 provides for the veterinary prescription use of Oxytocin Injection in ewes, sows, cows, and horses. Cross Vetpharm Group's Oxytocin Injection is approved as a generic copy of Phoenix Scientific, Inc.'s PVL Oxytocin Injectable, approved under NADA 124–241. The ANADA is approved as of May 21, 2004. The basis of approval is discussed in the freedom of information summary. The applicable sections of the regulation did not require amendment.

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.

The agency 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.

Dated: June 14, 2004.

Linda Tollefson,

Acting Center Director, Center for Veterinary Medicine.

[FR Doc. 04–15570 Filed 7–8–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003E–0249]

Determination of Regulatory Review Period for Purposes of Patent Extension; ELITEK

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for ELITEK and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of Patents and Trademarks, Department of Commerce, for the extension of a patent which claims that human biological product.

ADDRESSES: Submit written or electronic comments and petitions 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.

FOR FURTHER INFORMATION CONTACT: Claudia Grillo, Office of Regulatory Policy (HFD–013), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 240–453–6699.

SUPPLEMENTARY INFORMATION: The Drug Price Competition and Patent Term Restoration Act of 1984 (Public Law 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Public Law 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human biological products, the testing phase begins when the exemption to permit the clinical investigations of the biological becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human biological product and continues until FDA grants permission to market the biological product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of Patents and Trademarks may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a biological drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA recently approved for marketing the human biological product ELITEK (rasburicase). ELITEK is indicated for the initial management of plasma uric acid levels in pediatric patients with leukemia, lymphoma, and solid-tumor malignancies who are receiving anti-cancer therapy expected to result in tumor lysis and subsequent elevation of plasma uric acid. Subsequent to this approval, the Patent and Trademark Office received a patent term restoration application for ELITEK (U.S. Patent No. 5,382,518) from Sanofi-Synthelabo, and the Patent and Trademark Office requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated November 18, 2003, FDA advised the Patent and Trademark Office that this human biologic product had undergone a regulatory review period and that the approval of ELITEK represented the first permitted commercial marketing or use of the product. Shortly thereafter, the Patent and Trademark Office requested that FDA determine the product's regulatory review period.

FDA has determined that the applicable regulatory review period for ELITEK is 2,360 days. Of this time, 1,420 days occurred during the testing phase of the regulatory review period, while 940 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug,*

and Cosmetic Act (21 U.S.C. 355(i)) became effective: January 27, 1996. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on January 27, 1996.

2. *The date the application was initially submitted with respect to the human biological product under section 351 of the Public Health Service Act (42 U.S.C. 262)*: December 16, 1999. FDA has verified the applicant's claim that the biological license application (BLA) for ELITEK (BLA 103946/0) was initially submitted on December 16, 1999.

3. *The date the application was approved*: July 12, 2002. FDA has verified the applicant's claim that BLA 103946/0 was approved on July 12, 2002.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 1,638 days of patent term extension.

Anyone with knowledge that any of the dates as published are incorrect may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments and ask for a redetermination by September 7, 2004. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by January 5, 2005. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Comments and petitions should be submitted to the Division of Dockets Management. Three copies of any mailed information are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Comments and petitions may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: June 21, 2004.

Jane A. Axelrad,

Associate Director for Policy, Center for Drug Evaluation and Research.

[FR Doc. 04–15569 Filed 7–8–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0234]

Annual Guidance Agenda

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is publishing its annual guidance document agenda. FDA committed to publishing, on an annual basis, a list of possible topics for future guidance document development or revision during the next year, and seeking public comment on additional ideas for new guidance documents or revisions of existing ones. This commitment was made in FDA's September 2000 good guidance practices (GGPs) final rule, which sets forth the agency's policies and procedures for the development, issuance, and use of guidance documents. This list is intended to seek public comment on possible topics for guidance documents and possible revisions to existing guidances.

DATES: Submit written or electronic comments on this list and on agency guidance documents at any time.

ADDRESSES: Submit written comments 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.*

FOR FURTHER INFORMATION CONTACT:

For general information regarding this list contact: Diane Sullivan, Office of Policy (HF–26), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–3480.

For information regarding specific topics or guidances: Please see contact persons listed in the table in the **SUPPLEMENTARY INFORMATION** section.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of September 19, 2000 (65 FR 56468), FDA published a final rule announcing its GGPs, which set forth the agency's policies and procedures for the development, issuance, and use of guidance documents. The agency adopted the GGPs to ensure public involvement in the development of guidance documents and to enhance public understanding of the availability, nature, and legal effect of such guidance.

As part of FDA's effort to ensure meaningful interaction with the public regarding guidance documents, the agency committed to publishing an annual guidance document agenda of possible guidance topics or documents for development or revision during the coming year. The agency also committed to soliciting public input regarding these and additional ideas for new topics or revisions to existing guidance documents (65 FR 56468 at 56477, 21 CFR 10.115(f)(5)).

The agency is neither bound by this list of possible topics nor required to issue every guidance document on this list or precluded from issuing guidance documents not on the list set forth in this document.

The following list of guidance topics or documents represents possible new topics or revisions to existing guidance documents that the agency is considering. The agency solicits comments on the topics listed in this document and also seeks additional ideas from the public.

The guidance documents are organized by the issuing center or office within FDA, and are further grouped by topic categories. The agency's contact persons are listed for each specific area in the table.

TITLE/TOPIC OF GUIDANCE	CONTACT
II. CENTER FOR BIOLOGICS EVALUATION AND RESEARCH (CBER)	
CATEGORY—COMPLIANCE AND INSPECTION	
Reprocessing, Reworking, and Blending of Biological Drug Substances and Drug Products	Stephen M. Ripley, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448, 301–827–6210.

TITLE/TOPIC OF GUIDANCE	CONTACT
Design, Installation and Operation of Heating, Ventilation and Air Conditioning Systems Used in the Manufacture of Products Regulated by the Center for Biologics Evaluation and Research and the Center for Drug Evaluation and Research	Same as above (Do)
Compliance Program 7341.002—Inspection of Tissue Establishments	Do
Compliance Program 7342.001—Inspection of Licensed and Unlicensed Blood Banks, Brokers, Reference Laboratories, and Contractors	Do
Compliance Program 7342.002—Inspection of Source Plasma Establishments	Do
Compliance Program 7342.008—Inspections of Licensed Viral Marker Test Kits	Do
Compliance Program 7345.001—Inspection of Center for Biologics Evaluation and Research-Regulated Biological Drug Products	Do
CATEGORY—CELLULAR, TISSUE, AND GENE THERAPY	
Submission of Information for the National Xenotransplantation Database	Do
Guidance for Reviewers: Instructions and Template for Chemistry, Manufacturing, and Controls Reviewers of Human Gene Therapy Investigational New Drug Applications	Do
Submission of Information for Adverse Event and Annual Reports for Gene Therapy Investigational New Drug Applications	Do
Eligibility Determination for Donors of Human Cells, Tissue and Cellular and Tissue-Based Products	Do
CATEGORY—BLOOD AND BLOOD COMPONENTS	
Blood Establishment Software	Do
Collection of Platelets, Pheresis Prepared by Automated Methods	Do
Validation of the Computer Crossmatch	Do
Blood Contact Materials	Do
Nucleic Acid Testing for Human Immunodeficiency Virus and Hepatitis C Virus; Testing, Product Disposition, Donor Deferral and Re-entry	Do
Efficacy, Pharmokinetic, and Safety Studies to Support Marketing of Immune Globulin Intravenous (Human) as a Replacement Therapy for Primary Humoral Immunodeficiency	Do
Guidance on the Content of Premarket Submissions for Center for Biologics Evaluation and Research-Regulated Automated Instruments and Associated Software Systems for Donor Blood Collection and Screening	Do
CATEGORY—VACCINES	
Characterization and Qualification of Cell Substances and Viral Seeds Used to Produce Viral Vaccines	Do
Preclinical Toxicity Studies for Prophylactic Vaccines	Do
Immunization Human Plasma Donors to Obtain Source Plasma for Preparation of Specific Immune Globulins	Do
Content and Format of Chemistry, Manufacturing, and Controls Information and Establishment Description Information for a Vaccine or Related Product	Do
Content and Format of Chemistry, Manufacturing, and Controls Information and Establishment Description Information for an Allergenic Extract or Allergen Patch Test	Do
CATEGORY—OTHER	
Providing Regulatory Submission in Electronic Format—Stability	Do
Environmental Assessment/National Environmental Policy Act	Do
Filing and Application When the Applicant Protests a Refusal to File Action	Do

TITLE/TOPIC OF GUIDANCE	CONTACT
Multi-Product Manufacturing With Spore-Forming Microorganisms	Do
Good Review Practices—Track IV	Do
Submission of Chemistry, Manufacturing, and Controls and Establishment Description Information for Human Plasma-Derived Biological Products, Animal Plasma or Serum-Derived Products	Do
Submission of Chemistry, Manufacturing, and Control Information for a Therapeutic Recombinant Deoxyribonucleic Acid-Derived Product or a Monoclonal Antibody for In-Vivo Use	Do
III. CENTER FOR DEVICES AND RADIOLOGICAL HEALTH	
Implementation of the Inspection by Accredited Persons Program Under the Medical Device User Fee and Modernization Act of 2002; Accreditation Criteria: Guidance for Industry, FDA Staff and Third Parties	John F. Stigi, Center for Devices and Radiological Health (HFZ–220), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–443–0806
Implementation of Third Party Programs Under the FDA Modernization Act of 1997; Final Guidance for Staff, Industry, and Third Parties	Do
Mutual Recognition Agreement Between the European Union and the United States of America: Confidence Building Programme: Overview and Procedure; Medical Device Annex, Version 7, June 29, 2000; Draft	Christine Nelson, Center for Devices and Radiological Health (HFZ–220), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–443–0806
Regulation of Medical Devices; Background Information for International Officials (Entire Document Available on Disk)	Ron Parr, Center for Devices and Radiological Health (HFZ–220), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–443–0806
Guidance for Staff, Industry, and Third Parties: Third Party Programs Under the Sectoral Annex on Medical Devices to the Agreement on Mutual Recognition Between the United States of America and the European Community	John F. Stigi, Center for Devices and Radiological Health (HFZ–220), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–443–0806
Medical Device Appeals and Complaints: A Guidance on Dispute Resolution	Do
Overview of Food and Drug Administration Modernization Act of 1997 Medical Device Provisions (Food and Drug Administration Modernization Act)	Do
Medical Device Reporting for Manufacturers	Do
In Vitro Diagnostic Devices: Guidance for the Preparation of Premarket Notification Submissions (FDA 97–4224)	Do
Medical Device Quality Systems Manual: A Small Entity Compliance Guide	Do
Comparison Chart: 1996 Quality System Reg vs. 1978 Good Manufacturing Practices Reg vs. ANSI/ISO/ASQC Q9001 and ISO/DI 13485:1996 (Include 126)	Do
Premarket Notification: 510(k)—Regulatory Requirements for Medical Devices (FDA 95–4158)	Do
Labeling—Regulatory Requirements for Medical Devices (FDA 89–4203)	Paula G. Silberberg, Center for Devices and Radiological Health (HFZ–230), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1217
Impact Resistant Lenses: Questions and Answers (FDA 87–4002)	Do
Use of Symbols on Labels and in Labeling of In Vitro Diagnostic Devices Intended for Professional Use (Draft)	Lily Ng, Center for Devices and Radiological Health (HFZ–510), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–827–0885
Frequently Asked Questions About the Reprocessing and Reuse of Single-Use Devices by Third-Party and Hospital Reprocessors; Three Additional Questions	Do
Frequently Asked Questions About the Reprocessing and Reuse of Single-Use Devices by Third-Party and Hospital Reprocessors; Final Guidance for Industry and FDA Staff	Paula G. Silberberg, Center for Devices and Radiological Health (HFZ–230), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1217

TITLE/TOPIC OF GUIDANCE	CONTACT
Guidance on Medical Device Patient Labeling; Final Guidance for Industry and FDA Reviewers	Do
Center for Devices and Radiological Health Manual for the Good Guidance Practices Regulations; Final Guidance for FDA Staff	Ron D. Kaye, Center for Devices and Radiological Health (HFZ–205), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–3265
Medical Device Use—Safety: Incorporating Human Factors Engineering Into Risk Management; Guidance for Industry and FDA Premarket and Design Control Reviewers	Center for Devices and Radiological Health (HFZ–230), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1217
Human Factors Points to Consider for Investigational Device Exemption Devices	Alvin W. Thomas, Center for Devices and Radiological Health (HFZ–230), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–443–2436
Do It By Design—An Introduction to Human Factors in Medical Devices	Walter I. Scott, Center for Devices and Radiological Health (HFZ–240), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–3266
Medical Device Reporting for User Facilities	Margaret T. Tolbert, Center for Devices and Radiological Health (HFZ–230), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–443–2436
Human Factors Principles for Medical Device Labeling	Center for Devices and Radiological Health (HFZ–230), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1217
Write It Right	Charles A. Finder, Center for Devices and Radiological Health (HFZ–240), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–3332
The Mammography Quality Standards Act Final Regulations Modifications and Additions to Policy Guidance Help System #8 (Incorporated into Policy Guidance Help Systems)	Do
The Mammography Quality Standards Act Final Regulations Modifications and Additions to Policy Guidance Help System #6; Guidance for Industry and FDA (Incorporated into Policy Guidance Help System)	Do
The Mammography Quality Standards Act Final Regulations Modifications and Additions to Policy Guidance Help System #7; Guidance for Industry and FDA (Incorporated into Policy Guidance Help System)	Do
The Mammography Quality Standards Act Final Regulations Modifications and Additions to Policy Guidance Help System #5; Guidance for Industry and FDA (Incorporated into Policy Guidance Help System)	Do
The Mammography Quality Standards Act Final Regulations Modifications and Additions to Policy Guidance Help System #4; Guidance for Industry and FDA (Incorporated into Policy Guidance Help System)	Do
Compliance Guidance—The Mammography Quality Standards Act Final Regulations—Preparing for Mammography Quality Standards Act Inspections (Incorporated into Policy Guidance Help System)	Do
The Mammography Quality Standards Act Final Regulations Modifications and Additions to Policy Guidance Help System #3; Guidance for Industry and FDA (Incorporated into Policy Guidance Help System)	Do
The Mammography Quality Standards Act Final Regulations Modifications to the Policy Guidance Help System Due to the September 11, 2001, Terrorist Attacks; Final Guidance for Industry and FDA (Incorporated into Policy Guidance Help System)	Do
The Mammography Quality Standards Act Final Regulations Modifications and Additions to Policy Guidance Help System #4; Guidance for Industry and FDA (Incorporated into Policy Guidance Help System)	Do

TITLE/TOPIC OF GUIDANCE	CONTACT
The Mammography Quality Standards Act Final Regulations; Modifications and Additions to Policy Guidance Help System #2; Final Guidance for Industry and FDA (Incorporated into Policy Guidance Help System)	Do
Compliance Guidance—Mammography Facility Survey, Equipment Evaluation and Medical Physicist Qualification Requirements Under MQSA; Final (Incorporated into Policy Guidance Help System)	Do
Compliance Guidance: The Mammography Quality Standards Act Final Regulations Document #3 (Incorporated into Policy Guidance Help System)	Do
The Mammography Quality Standards Act Final Regulations Modifications to the Policy Guidance Help System #1; Guidance for Industry and FDA (Incorporated into Policy Guidance Help System)	Do
Compliance Guidance: The Mammography Quality Standards Act Final Regulations Document #2 (Incorporated into Policy Guidance Help System)	Do
Compliance Guidance: The Mammography Quality Standards Act Final Regulations Quality Assurance Documentation (Incorporated into Policy Guidance Help System)	Do
Guidance for Request and Issuance of Interim Notice Letters for Mammography Facilities Under the Mammography Quality Standards Act (42 U.S.C. 263(b)) (Incorporated into Policy Guidance Help System)	Do
Compliance Guidance: The Mammography Quality Standards Act Final Regulations Motion of Tube-Image Receptor Assembly (Incorporated into Policy Guidance Help System)	Do
Guidance: The Mammography Quality Standards Act Final Regulations Document #1 (Incorporated into Policy Guidance Help System)	Do
Guidance for Industry—Requalification for Interpreting Physician's Continuing Experience Requirement (Incorporated into Policy Guidance Help System)	Do
Policy and Standard Operating Procedures When Mammography Facilities in States That Have Accreditation Bodies Intend to Change Accreditation Bodies (Incorporated into Policy Guidance Help System)	Do
Guidance for Review of Requests for Reconsideration of Adverse Decisions on Accreditation of Mammography Facilities Under the Mammography Quality Standards Act (42 U.S.C. 263(b)) (April 8, 1998) (Incorporated into Policy Guidance Help System)	Paula G. Silberberg, Center for Devices and Radiological Health (HFZ–230), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1217
Guidance for Submission of Request for Reconsideration of Adverse Decisions on Accreditation of Mammography Facilities Under the Mammography Quality Standards Acts (42 U.S.C. 263(b)) (April 8, 1998) (Incorporated into Policy Guidance Help System)	Do
Continuing Education Credit for Reading/Writing Articles/Papers and Presenting Courses/Lectures (Incorporated into the Policy Guidance Help System)	Do
Accidental Radioactive Contamination of Human Food and Animal Feeds: Recommendations to State and Local Agencies	Thomas E. Cardamone, Center for Devices and Radiological Health (HFZ–220), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–443–0806, ext. 117
Office of Device Evaluation	
Fiscal Year 2004 MDUFMA Small Business Qualification Worksheet and Certification—Guidance for Industry and FDA	Joanne R. Less, Center for Devices and Radiological Health (HFZ–403), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1190
Premarket Assessment of Pediatric Medical Devices—Draft Guidance for Industry and FDA Staff	Heather S. Rosecrans, Center for Devices and Radiological Health (HFZ–230), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1190
Pediatric Expertise for Advisory Panels—Guidance for Industry and FDA Staff	Joanne R. Less, Center for Devices and Radiological Health (HFZ–403), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1190

TITLE/TOPIC OF GUIDANCE	CONTACT
Premarket Approval Application Filing Review—Guidance for Industry and FDA Staff	Center for Devices and Radiological Health (HFZ–403), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1190
Guidance for Industry and FDA: Fiscal Year 2003 MDUFMA Small Business Qualification Worksheet and Certification	Do
Assessing User Fees: Premarket Approval Application Supplement Definitions, Modular Premarket Approval Application Fees, Biologics License Application and Efficacy Supplement Definitions, Bundling Multiple Devices in a Single Application, and Fees for Combination Products	Do
Determination of Intended Use for 510(k) Devices; Guidance for Center for Devices and Radiological Health Staff	Do
The Least Burdensome Provisions of the FDA Modernization Act of 1997: Concept and Principles: Final Guidance for FDA and Industry	Thninh Nguyen, Center for Devices and Radiological Health (HFZ–402), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2186
Updated 510(k) Sterility Review Guidance K90–1; Final Guidance for Industry and FDA	Robert R. Gatling, Center for Devices and Radiological Health (HFZ–402), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1190
Availability of Information Given to Advisory Committee Members in Connection With Center for Devices and Radiological Health Open Public Panel Meetings; Draft Guidance for Industry and FDA Staff	Nancy J. Pluhowski, Center for Devices and Radiological Health (HFZ–400), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2022
Humanitarian Device Exemptions Regulation: Questions and Answers; Final Guidance for Industry	Heather S. Rosecrans, Center for Devices and Radiological Health (HFZ–230), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1190
Changes or Modifications During the Conduct of a Clinical Investigation; Final Guidance for Industry and Center for Devices and Radiological Health Staff	Donna-Bea Tillman, Center for Devices and Radiological Health (HFZ–400), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2022
Early Collaboration Meetings Under the FDA Modernization Act; Final Guidance for Industry and for Center for Devices and Radiological Health Staff	Do
Deciding When to Submit a 510(k) for a Change to an Existing Wireless Telemetry Medical Device; Final Guidance for FDA Reviewers and Industry	Karen F. Warbuton, Center for Devices and Radiological Health (HFZ–460), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1744
Guidance on Section 216 of the Food and Drug Administration Modernization Act of 1997	Nicole Wolanski, Center for Devices and Radiological Health (HFZ–402), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2186
Guidance on Amended Procedures for Advisory Panel Meetings; Final	Daniel G. Schultz, Center for Devices and Radiological Health (HFZ–400), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2022
Guidance on the Use of Standards in Substantial Equivalence Determinations; Final	Heather S. Rosecrans, Center for Devices and Radiological Health (HFZ–230), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1190
Guidance for Off-the-Shelf Software Use in Medical Devices; Final	Joanna H. Weitershausen, Center for Devices and Radiological Health (HFZ–480), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–443–8611
Medical Devices Containing Materials Derived From Animal Sources (Except In Vitro Diagnostic Devices), Guidance for FDA Reviewers and Industry; Final	Nicole Wolanski, Center for Devices and Radiological Health (HFZ–402), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2186

TITLE/TOPIC OF GUIDANCE	CONTACT
Premarket Approval Application Modular Review	Philip J. Phillips, Center for Devices and Radiological Health (HFZ–400), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2022
Guidance for Industry; General/Specific Intended Use; Final	Thninh Nguyen, Center for Devices and Radiological Health (HFZ–402), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2186
Frequently Asked Questions on the New 510(k) Paradigm; Final	Do
Guidance for the Content of Premarket Submissions for Software Contained in Medical Devices; Final	Do
Guidance to Industry Supplements to Approved Applications for Class III Medical Devices: Use of Published Literature, Use of Previously Submitted Materials, and Priority Review; Final	Do
A New 510(k) Paradigm—Alternate Approaches to Demonstrating Substantial Equivalence in Premarket Notifications	Do
Guidance for Industry and FDA Staff: Expedited Review of Premarket Submissions for Devices	Joanne R. Less, Center for Devices and Radiological Health (HFZ–403), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1190
PMA/510(k) Expedited Review G94–4 (blue book memo)	Thninh Nguyen, Center for Devices and Radiological Health (HFZ–402), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2186
30-Day Notices and 135-Day Premarket Approval Application Supplements for Manufacturing Method or Process Changes, Guidance for Industry and Center for Devices and Radiological Health (Docket 98D–0080); Final	Heather S. Rosecrans, Center for Devices and Radiological Health (HFZ–230), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1190
Guidance on Premarket Approval Application Interactive Procedures for Day-100 Meetings and Subsequent Deficiencies—for Use by Center for Devices and Radiological Health and Industry; Final	Thninh Nguyen, Center for Devices and Radiological Health (HFZ–402), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2186
New Section 513(f)(2)—Evaluation of Automatic Class III Designation: Guidance for Industry and Center for Devices and Radiological Health Staff; Final	Do
Procedures for Class II Device Exemptions From Premarket Notification Guidance for Industry and Center for Devices and Radiological Health Staff; Final	Do
Guidance on Investigational Device Exemption Policies and Procedures; Final	Heather S. Rosecrans, Center for Devices and Radiological Health (HFZ–230), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1190
Distribution and Public Availability of Premarket Approval Application Summary of Safety and Effectiveness Data Packages	Do
Kit Certification for Premarket Notifications	Do
Convenience Kits Interim Regulatory Guidance	Do
Real-Time Review Program for Premarket Approval Application Supplements	Do
Deciding When to Submit a Premarket Notification for a Change to an Existing Device (K97–1)	Do
Questions and Answers for the FDA Reviewer Guidance: Labeling Reusable Medical Devices for Reprocessing in Health Care Facilities	Do
Memorandum of Understanding Regarding Patient Labeling Review (blue book memo #G96–3)	Do
Continued Access to Investigational Devices During Premarket Approval Application Preparation and Review (blue book memo) (D96–1)	Do

TITLE/TOPIC OF GUIDANCE	CONTACT
Format for Investigational Device Exemption Progress Reports	Do
Labeling Reusable Medical Devices for Reprocessing in Health Care Facilities: FDA Reviewer Guidance	Do
Premarket Notification Quality Review Program (blue book memo)	Do
Suggested Content for Original Investigational Device Exemption Application Cover Letter	Do
Indications for Use Statement	Do
Cover Letter: Premarket Notification Requirements During Firm-Initiated Recalls; Attachment A: Guidance on Recall and Premarket Notification Review Procedures During Firm-Initiated Recalls of Legally Marketed Devices (blue book memo #K95–1)	Do
#D95–2, Attachment A (Interagency Agreement Between FDA & Health Care Financing Administration	Do
#D95–2, Attachment B (Criteria for Categorization of Investigational Devices Health Care Financing Administration	Do
Health Care Financing Administration Reimbursement Categorization Determinations for FDA-Approved Investigational Device Exemptions	Do
Implementation of the FDA/Health Care Financing Administration Interagency Agreement Regarding Reimbursement Categorization of Investigational Devices, Attachment A Interagency Agreement, Attachment B Criteria for Categorization of Investigational Devices, and Attachment C -List #D95–2 (blue book memo)	Do
Goals and Initiatives for the Investigational Device Exemption Program #D95–1 (blue book memo)	Joanne R. Less, Center for Devices and Radiological Health (HFZ–403), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1190
Memorandum: Electromagnetic Compatibility for Medical Devices: Issues and Solutions	Heather S. Rosecrans, Center for Devices and Radiological Health (HFZ–230), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1190
Use of International Standard ISO–10993, 'Biological Evaluation of Medical Devices Part 1: Evaluation and Testing7rsquo; (Replaces #G87–1 #8294) (blue book memo)	Do
Premarket Approval Application Closure #P94–2 (blue book memo)	Do
Premarket Notification Sign-Off Procedures #K94–2 (blue book memo)	Do
Letter to Industry, Powered Wheelchair/Scooter or Accessory/Component Manufacturer From Susan Alpert	Do
Premarket Notification Refuse to Accept Procedures #K94–1 (blue book memo)	Do
Investigational Device Exemption Refuse to Accept Procedures #D94–1 (blue book memo)	Do
Preamendments Class III Strategy Premarket Notification Status Request Form	Do
Documentation and Resolution of Differences of Opinion on Product Evaluations #G93–1 (blue book memo)	Do
Premarket Notification Additional Information Procedures #K93–1 (blue book memo)	Do
Center for Devices and Radiological Health's Investigational Device Exemption Refuse to Accept Policy	Do
Center for Devices and Radiological Health's Premarket Notification Refuse to Accept Policy—(Updated Checklist for March 14, 1995)	Do
Classified Convenience Kits	Do
Telephone Communications Between Office of Device Evaluation Staff and Manufacturers #I93–1 (blue book memo)	Do
Preamendment Class III Devices	Do

TITLE/TOPIC OF GUIDANCE	CONTACT
Nondisclosure of Financially Sensitive Information #I92–1 (blue book memo)	Do
Document Review Processing #I91–1 (blue book memo)	Do
Integrity of Data and Information Submitted to Office of Device Evaluation #I91–2 (blue book memo)	Do
Panel Review of Premarket Approval Applications #P91–2 (blue book memo)	Do
Premarket Approval Application Compliance Program #P91–3 (blue book memo)	Do
Shelf Life of Medical Devices	Do
Device Labeling Guidance #G91–1 (blue book memo)	Do
Consolidated Review of Submissions for Diagnostic Ultrasound Equipment, Accessories and Related Measurement Devices #G90–2 (blue book memo)	Do
Consolidated Review of Submissions for Lasers and Accessories #G90–1 (blue book memo)	Do
Assignment of Review Documents #I90–2 (blue book memo)	Do
Policy Development and Review Procedures #I90–1 (blue book memo)	Do
Substantial Equivalence Decision Making Documentation ATTACHED: 'SE' Decision Making Process (Detailed) (i.e., the decision making tree)	Do
Threshold Assessment of the Impact of Requirements for Submission of Premarket Approval Applications for 31 Medical Devices Marketed Prior to May 28, 1976	Do
Meetings With the Regulated Industry #I89–3 (blue book memo)	Do
Toxicology Risk Assessment Committee #G89–1 (blue book memo)	Do
Review of IDEs for Feasibility Studies #D89–1 (blue book memo)	Do
Premarket Notification—Consistency of Reviews #K89–1 (blue book memo)	Do
Review of Laser Submissions #G88–1 (blue book memo)	Do
Guideline on Validation of the Limulus Amebocyte Lysate Test as an End-Product Endotoxin Test	Do
Limulus Amebocute Lysate; Reduction of Samples for Testing	M. Sussan Runer, Center for Devices and Radiological Health (HFZ–480), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–827–5283
Master Files Part III; Guidance on Scientific and Technical Information	Do
Guideline on General Principles of Process Validation	Do
Industry Representatives on Scientific Panel	Do
Guidance on the Center for Devices and Radiological Health's Premarket Notification Review Program #K86–3 (blue book memo)	Do
Panel Report and Recommendations on PMA Approvals #P86–5 (blue book memo)	Do
Points to Consider in the Characterization of Cell Lines Used to Produce Biological Products	Do
Application of the Device Good Manufacturing Practice Regulation to the Manufacture of Sterile Devices	Do
Methods for Conducting Recall Effectiveness Checks	Do
Guidance for Submitting Reclassification Petition	Do
Guidance for Industry and FDA: User Fees and Refunds for Premarket Approval Applications	Do
Bundling Multiple Devices or Multiple Indications in a Single Submission—Guidance for Industry and FDA Staff	Do

TITLE/TOPIC OF GUIDANCE	CONTACT
FDA and Industry Actions on Premarket Approval Applications: Effect on FDA Review Clock and Performance Assessment	Do
Reprocessing and Reuse of Single-Use Devices: Review Prioritization Scheme; Draft	Do
Class II Special Controls Guidance Document: Apnea Monitors; Guidance for Industry and FDA	Do
Class II Special Controls Guidance Document: Cutaneous Carbon Dioxide ($PcCo_2$ and Oxygen (PcO_2) Monitors; Guidance for Industry and FDA	Do
Class II Special Controls Guidance Document: Indwelling Blood Gas Analyzers; Final Guidance for Industry and FDA	Do
Heated Humidifier Review Guidance	Do
Class II Special Controls Guidance Document: Optical Impression Systems for Computer Assisted Design and Manufacturing of Dental Restorations; Guidance for Industry and FDA	Anthony Watson, Center for Devices and Radiological Health (HFZ–480), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–824–1287
Class II Special Controls Guidance Document: Intraoral Devices for Snoring and/or Obstructive Sleep Apnea; Guidance for Industry and FDA	Do
Class II Special Controls Guidance Document: Dental Sonography and Jaw Tracking Devices; Guidance for Industry and FDA Reviewers	Do
Class II Special Controls Guidance Document: Root-Form Endosseous Dental Implants and Abutments; Draft Guidance for Industry and FDA	Do
Overview of Information Necessary for Premarket Notification Submissions for Endosseous Implants; Final	Do
Guidance for the Preparation of Premarket Notifications for Dental Composites	Do
Dental Cements—Premarket Notification; Final	Do
Dental Impression Materials—Premarket Notification; Final	Do
Over-the-Counter Denture Cushions, Pads, Reliners, Repair Kits, and Partially Fabricated Denture Kits; Final	Do
Information Necessary for Premarket Notification Submissions for Screw-Type Endosseous Implants	Kevin Mulry, Center for Devices and Radiological Health (HFZ–480), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–827–5283
Guidance Document on Dental Handpieces	Do
Guidance for the Arrangement and Content of a Premarket Approval Application for an Endosseous Implant for Prosthetic Attachment	Do
Premarket Notification Submissions for Chemical Indicators; Guidance for Industry and FDA Staff	Do
Draft Guidance for Industry and FDA Staff; Class II Special Controls Guidance Document: Dental Precious Metal Alloys	Do
Draft Guidance for Industry and FDA Staff; Class II Special Controls Guidance Document: Dental Base Metal Alloys	Do
Supplementary Guidance on Premarket Notifications for Medical Devices With Sharps Injury Prevention Features; Guidance for Industry and FDA	Do
Guidance on Premarket Notifications for Intravascular Administration Sets	Do
Neonatal and Neonatal Transport Incubators—Premarket Notifications; Final	Do
Guidance on the Content of Premarket Notification Submissions for Protective Restraints	Do
Guidance on Premarket Notification Submissions for Short-Term and Long-Term Intravascular Catheters	Do

TITLE/TOPIC OF GUIDANCE	CONTACT
Guidance on the Content of Premarket Notification Submissions for Hypodermic Single Lumen Needles	Do
Guidance on the Content of Premarket Notification Submissions for Piston Syringes	Do
Guidance on the Content of Premarket Notification Submissions for Clinical Electronic Thermometers	Do
Guidance on the Content of Premarket Notification Submissions for External Infusion Pumps	Do
Guidance on Premarket Notification Submissions for Implanted Infusion Ports	Do
Surgical Masks—Premarket Notification Submissions; Draft Guidance	Bram D. Zuckerman, Center for Devices and Radiological Health (HFZ–450), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–443–8320
Regulatory Status of Disinfectants Used to Process Dialysate Delivery Systems and Water Purification Systems for Hemodialysis; Guidance for Industry and FDA	Do
Premarket Notification Submissions for Medical Sterilization Packaging Systems in Health Care Facilities; Draft Guidance for Industry and FDA	Do
Premarket Notifications for Biological Indicators Intended to Monitor Sterilizers Used in Health Care Facilities; Draft Guidance for Industry and FDA Reviewers	Elias Mallis, Center for Devices and Radiological Health (HFZ–450), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–443–8517
Premarket Approval Applications for Sharps Needle Destruction Devices; Final Guidance for Industry and FDA	Do
Guidance on the Content and Format of Premarket Notification Submissions for Liquid Chemical Sterilants and High Level Disinfectants; Final	Do
Premarket Notification Submissions for Testing for Skin Sensitization to Chemicals in Natural Rubber Products; Final	Do
Center for Devices and Radiological Health Regulatory Guidance for Washers and Washer-Disinfectors Intended for Use in Processing Reusable Medical Devices	Do
Testing for Sensitizing Chemicals in Natural Rubber Latex Medical Devices (Addendum to 944)	Do
Addendum to: Guidance on Premarket Notification Submissions for Sterilizers Intended for Use in Health Care Facilities	Dina Fleisher, Center for Devices and Radiological Health (HFZ–450), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–443–8517
Guidance on the Content and Format of Premarket Notification Submissions for Sharps Containers	Do
Guidance on Premarket Notification Submissions for Automated Endoscope Washers, Washer/Disinfectors, and Disinfectors Intended for Use in Health Care Facilities	Do
Guidance on Premarket Notification Submissions for Surgical Gowns and Surgical Drapes	Do
Guidance on Premarket Notification for Sterilizers Intended for Use in Health Care Facilities	Ashley Boam, Center for Devices and Radiological Health (HFZ–450), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–443–8243
Battery Guidance	Megan Moynaham, Center for Devices and Radiological Health (HFZ–450), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–443–8517
Policy for Expiration Dating (DCRND RB92–G)	Do
Balloon Valvuloplasty Guidance for the Submission of an Investigational Device Exemption Application and a Premarket Approval Application	A. Doyle Gantt, Center for Devices and Radiological Health (HFZ–450), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–443–8262

TITLE/TOPIC OF GUIDANCE	CONTACT
Class II Special Controls Guidance Document: Arrhythmia Detector and Alarm	Do
Cardiac Ablation Catheters Generic Arrhythmia Indications for Use; Guidance for Industry	Do
Investigational Device Exemption Study Enrollment for Cardiac Ablation of Typical Atrial Flutter; Final Guidance for Industry and FDA Reviewers	Do
Recommended Clinical Study Design for Ventricular Tachycardia Ablation	Neil R. Ogden, Center for Devices and Radiological Health (HFZ–410), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1307
Nonautomated Sphygmomanometer (Blood Pressure Cuff) Guidance Version 1; Final	Do
Noninvasive Blood Pressure Monitor Guidance	Do
Electrocardiograph Electrode	Do
Electrocardiograph Lead Switching Adapter	Do
Electrocardiograph Surface Electrode Tester	Do
Clinical Study Designs for Percutanwous Catheter Ablation for Treatment of Atrial Fibrillation—Guidance for Industry and FDA Staff	Do
Guidance for Annuloplasty Rings Premarket Notification Submissions; Final Guidance for Industry and FDA Staff	Barbara Zimmerman, Center for Devices and Radiological Health (HFZ–410), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2036
Guidance for Cardiopulmonary Bypass Arterial Line Blood Filter Premarket Notification Submissions; Final Guidance for Industry and FDA	Do
Guidance for Extracorporeal Blood Circuit Defoamer Premarket Notification Submissions; Final Guidance for Industry and FDA	Do
Guidance for Cardiopulmonary Bypass Oxygenators Premarket Notification Submissions; Final Guidance for Industry and FDA Staff	Do
Guidance for the Preparation of the Annual Report to the Premarket Approval Application Approved Heart Valve Prostheses	Do
Coronary and Cerebrovascular Guidewire Guidance	Do
Guidance for the Submission of Research and Marketing Applications for Permanent Pacemaker Leads and for Pacemaker Lead Adaptor Premarket Notification Submissions	Do
Implantable Pacemaker Testing Guidance	Do
Guidance Document for Vascular Prostheses Premarket Notification Submissions	Do
Guidance for Cardiovascular Intravascular Filter Premarket Notification Submissions; Final	Do
Carotid Stent—Suggestions for Content of Submissions to the Food and Drug Administration in Support of Investigational Devices Exemption Applications	Do
Class II Special Controls Guidance Document: Vascular and Neurovascular Embolization Devices—Draft Guidance for Industry and FDA Staff	Do
Guidance Document for Powered Suction Pump Premarket Notifications	Steven Rhodes, Center for Devices and Radiological Health (HFZ–410), Food and Drug Administration 9200 Corporate Blvd., Rockville, MD 20850, 301–594–3090
Guidance Document for Surgical Lamp Premarket Notification; Final	Do
Guidelines for Reviewing Premarket Notifications That Claim Substantial Equivalence to Evoked Response Stimulators	Do
Guidance Document for the Preparation of Premarket Notification Applications for Electromyograph Needle Electrodes	Do

TITLE/TOPIC OF GUIDANCE	CONTACT
Guidance on the Content and Organization of a Premarket Notification for a Medical Laser	Do
Guidance for the Preparation of a Premarket Notification for Extended Laparoscopy Devices	Do
Class II Special Controls Guidance Document: Knee Joint Patellofemorotibial and Femorotibial Metal/Polymer Porous-Coated Uncemented Prostheses; Guidance for Industry and FDA	Do
Class II Special Controls Guidance Document: Polymethylmethacrylate Bone Cement; Guidance for Industry and FDA	Do
Class II Special Controls Guidance Document: Hip Joint Metal/Polymer Constrained Cemented or Uncemented Prosthesis	Theodore R. Stevens, Center for Devices and Radiological Health (HFZ–410), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1296
Class II Special Controls Guidance: Shoulder Joint Metal/Polymer/Metal Nonconstrained or Semiconstrained Porous-Coated Uncemented Prosthesis Guidance for Spinal System Premarket Notifications	Do
Guidance Document for the Preparation of Investigational Device Exemptions for Spinal Systems	Do
ORDB Premarket Notification Sterility Review Guidance	Do
Reviewers Guidance Checklist for Intramedullary Rods	Do
Reviewers Guidance Checklist for Orthopedic External Fixation Devices	Do
Premarket Notification Information Needed for Hydroxyapatite Coated Orthopedic Implants	Do
Guidance Document for Testing Biodegradable Polymer Implant Devices	Do
Guidance Document for Testing Bone Anchor Devices	Do
Guidance Document for Testing Non-Articulating, 'Mechanically Locked', Modular Implant Components	Do
Guidance Document for the Preparation of Premarket Notification for Ceramic Ball Hip Systems	Do
Guidance Document for Testing Orthopedic Implants With Modified Metallic Surfaces Apposing Bone or Bone Cement	Do
Guidance Document for the Preparation of Investigational Device Exemption and Premarket Approval Applications for Intra-Articular Prosthetic Knee Ligament Devices	Do
Class II Special Controls Guidance Document: Surgical Sutures; Guidance for Industry and FDA	Evertte T. Bears, Center for Devices and Radiological Health (HFZ–460), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2018
Guidance for Saline, Silicone Gel, and Alternative Breast Implants; Guidance for Industry and FDA	Do
Class II Special Controls Guidance Document: Human Dura Mater; Guidance for Industry and FDA	Do
Guidance for Resorbable Adhesion Barrier Devices for Use in Abdominal and/or Pelvic Surgery; Guidance for Industry	Do
Guidance Document for Dura Substitute Devices; Final Guidance for Industry	Do
Guidance for Neurological Embolization Devices	Do
Guidance for the Preparation of a Premarket Notification Application for Processed Human Dura Mater; Final	Do
Guidance for Dermabrasion Devices; Final	Do

TITLE/TOPIC OF GUIDANCE	CONTACT
Guidance for the Preparation of a Premarket Notification Application for a Surgical Mesh; Final	Do
Guidance for Content of Premarket Notifications for Esophageal and Tracheal Prostheses; Final	Eric A. Mann, Center for Devices and Radiological Health (HFZ–460), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2080
Guidance for Testing Magnetic Resonance Interaction With Aneurysm Clips	Do
Class II Special Controls Guidance Document: Resorbable Calcium Salt Bone Void Filler Device; Guidance for Industry and FDA	Do
Cyanoacrylate Tissue Adhesive for the Topical Approzimation of Ski—Premarket Approval Applications—Guidance for Industry and FDA Staff	Do
Saline, Silicone Gel, and Alternative Breast Implants—Draft Guidance for Industry	Kesia Alexander, Center for Devices and Radiological Health (HFZ–460), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2053
Guidance Document for Powered Muscle Stimulator Premarket Notifications; Final	
Guidance Document for the Preparation of Premarket Notification Applications for Therapeutic Massagers and Vibrators	Do
Guidance Document for the Preparation of Premarket Notification Applications for Beds	Do
Guidance Document for the Preparation of Premarket Notification Applications for Communications Systems (Powered and Nonpowered) and Powered Environmental Control Systems	Do
Guidance Document for the Preparation of Premarket Notification Applications for Exercise Equipment	Do
Guidance Document for the Preparation of Premarket Notification Applications for Heating and Cooling Devices	Do
Guidance Document for the Preparation of Premarket Notification Applications for Immersion Hydrobaths	Do
Guidance Document for the Preparation of Premarket Notification Applications for Powered Tables and Multifunctional Physical Therapy Tables	Carolyn Y. Neuland, Center for Devices and Radiological Health (HFZ–470), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1220
Guidance Document for the Preparation of Premarket Notification Applications for Submerged (Underwater) Exercise Equipment	Do
Guidance Document for the Preparation of Premarket Notification Applications for Mechanical and Powered Wheelchairs, and Motorized Three-Wheeled Vehicles	Do
Guidance for Studies for Pain Therapy Devices—General Consideration in the Design of Clinical Studies for Pain-Alleviating Devices	Do
Guidance Document for Nonprescription Sunglasses; Final Ophthalmoscope Guidance	Do
Retinoscope Guidance; Final	Do
Slit Lamp Guidance; Final	Do
Third Party Review Guidance for Phacofragmentation System Device Premarket Notification	Do
Third Party Review Guidance for Vitreous Aspiration and Cutting Device Premarket Notification	Collin M. Pollard, Center for Devices and Radiological Health (HFZ–470), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1180
Checklist of Information Usually Submitted in an Investigational Device Exemptions Application for Refractive Surgery Lasers (Excimer)	Do
Implantable Middle Ear Hearing Device; Guidance for Industry and FDA	Do

TITLE/TOPIC OF GUIDANCE	CONTACT
Guidance for Manufacturers Seeking Marketing Clearance of Ear, Nose, and Throat Endoscope Sheaths Used as Protective Barriers; Final	Do
Tympanostomy Tubes, Submission Guidance for a Premarket Notification; Final	Do
Guidance For The Arrangement and Content of a Premarket Approval Application For A Cochlear Implant in Children Ages 2 to 17 Years	Do
Guideline for the Arragement and Content of a Premarket Approval Application for a Cochlear Implant in Adults at Least 18 Years of Age	Do
Guideline for the Arrangement and Content of a Premarket Approval Application for a Cochlear Implant in Adults at Least 18 Years of Age	Do
Guidance on Submissions for Keratoprostheses; Final	Do
Aqueous Shunts—Premarket Notification Submissions; Final	Do
FDA Guidelines for Multifocal Intraocular Lens Investigational Device Exemptions Studies and Premarket Approval Applications	Do
Important Information About Rophae Intraocular Lenses	Do
Guidance for Premarket Submissions of Orthokeratology Rigid Gas Permeable Contact Lenses; Final	Do
Revised Procedures for Adding Lens Finishing Laboratories to Approved Premarket Approval Applications for Class III Rigid Gas Permeable Contact Lenses for Extended Wear; Final	Do
Premarket Notification Guidance for Contact Lens Care Products	Do
Premarket Notification Guidance Document for Class II Daily Wear Contact Lenses	Do
New FDA Recommendations and Results of Contact Lens Study (7-Day Letter)	Do
Class II Special Controls Guidance Document; Ingestible Telemetric Gastrointestinal Capsule Imaging System; Final Guidance for Industry and FDA	Do
Class II Special Controls Guidance Document: Tissue Culture Media for Human Ex Vivo Tissue and Cell Culture Processing Applications; Final Guidance for Industry and FDA Reviewers	Janine M. Morris, Center for Devices and Radiological Health (HFZ–470), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2194
Guidance for Investigational Device Exemptions for Solutions for Hypothermic Flushing, Transport, and Storage of Organs for Transplantation; Final Guidance for Industry and FDA Reviewers	Do
Guidance for Industry and the Center for Devices and Radiological Health Reviewers on the Content of Premarket Notifications for Hemodialysis Delivery Systems; Final	Do
Guidance for the Content of Premarket Notification for Conventional and High Permeability Hemodialyzers; Final	Do
Guidance for the Content of Premarket Notifications for Metal Expandable Biliary Stents; Final	Do
Guidance for the Content of Premarket Notifications for Water Purification Components and Systems for Hemodialysis	Do
Class II Special Controls Guidance Document: Breast Lesion Documentation System—Guidance for Industry and FDA Staff	Do
Class II Special Controls Guidance for Home Uterine Activity Monitors; Final Guidance for Industry and FDA Reviewers	Do
Class II Special Controls Guidance Document for Clitoral Engorgement Devices	Do
Latex Condoms for Men—Information for Premarket Notifications: Use of Consensus Standards for Abbreviated Submissions	Do
Uniform Contraceptive Labeling; Final	Do
Letter to Manufacturers of Prescription Home Monitors for Non-Stress Tests	Do

TITLE/TOPIC OF GUIDANCE	CONTACT
Letter to Manufacturers of Falloposcopes	Do
Thermal Endometrial Ablation Devices (Submission Guidance for an Investigational Device Exemption)	Do
Hysteroscopes and Gynecology Laparoscopes—Submission Guidance for a Premarket Notification	Do
Premarket Applications for Digital Mammography Systems; Final Guidance for Industry and FDA	Do
Guidance for the Submission of Premarket Notifications for Photon-Emitting Brachytherapy Sources	Do
Guidance for the Submission of Premarket Notifications for Medical Image Management Devices	Do
Guidance for the Submission of Premarket Notification for Solid State X-Ray Imaging Devices; Final	Do
Guidance for the Submission of Premarket Notifications for Emission Computed Tomography Devices and Accessories and Nuclear Tomography Systems; Final	Do
Guidance for the Submission of Premarket Notifications for Radionuclide Dose Calibrators; Final	Do
Harmonic Imaging With/Without Contrast—Premarket Notification; Final	Do
Guidance for the Submission of Premarket Notifications for Magnetic Resonance Diagnostic Devices; Final	Do
Information for Manufacturers Seeking Marketing Clearance of Diagnostic Ultrasound Systems and Transducers	Do
Letter: Notice to Manufacturers of Bone Mineral Densitometers	Do
Simplified Premarket Notification Procedures for Certain Radiology Devices: December 21, 1993, Letter From L Yin, Office of Device Evaluation, Division of Reproduction, Abdominal, and Radiological Devices, to National Electrical Manufacturers Association	Avis T. Danishefsky, Center for Devices and Radiological Health (HFZ–440), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1243
Reviewer Guidance for Automatic X-Ray Film.Processor Premarket Notification	Do
Guidance for the Content of Premarket Notifications for Extracorporeal Shock Wave Lithotripters Indicated for the Fragmentation of Kidney and Ureteral Calculi	Do
Guidance for the Content of Premarket Notifications for Penile Rigidity Implants; Final	Do
Guidance for the Content of Premarket Notifications for Intracorporeal Lithotripters; Final	Do
Center for Devices and Radiological Health Interim Regulatory Policy for External Penile Rigidity Devices	Do
Checklist for Mechanical Lithotripters and Stone Dislodgers Used in Gastroenterology and Urology	Do
Premarket Notification Checklist for Sterile Lubricating Jelly Used With Transurethral Surgical Instruments	Do
Guidance for the Content of Premarket Notifications for Conventional and Antimicrobial Foley Catheters	Do
Guidance for the Content of Premarket Notifications for Urodynamic/Uroflowmetry Systems	Do
Guidance for the Content of Premarket Notifications for Urine Drainage Bags	Do
Guidance for the Content of Premarket Notifications for Biopsy Devices Used in Gastroenterology and Urology	Do
Guidance for the Content of Premarket Notifications for Ureteral Stents	Do
Perspectives on Clinical Studies for Medical Device Submissions (Statistical)	Do

TITLE/TOPIC OF GUIDANCE	CONTACT
Premarket Approval Application Review Statistical Checklist	Do
Statistical Guidance for Clinical Trials of Nondiagnostic Medical Devices	Do
Medical Device Reporting Guidance Document: Remedial Action Exemption; Final	Do
Guidance on Adverse Event Reporting for Hospitals That Reprocess Devices Intended by the Original Equipment Manufacturer for Single Use	Do
Medical Device Reporting Guidance Document No. 1—Intraocular lenses—E1996004; Final	Do
Common Problems: Baseline Reports and Medwatch Form 3500A	Do
Medical Device Reporting: An Overview; Final	Do
Instructions for Completing FDA Form 3500A With Coding Manual for Form 3500A (MEDWATCH) (Medical Device Reporting); Final	Do
MEDWATCH FDA Form 3500A For Use By User Facilities, Distributors and Manufacturers for Mandatory Reporting (Medical Device Reporting); Final	Do
Variance from Manufacturer Report Number Format (Medical Device Reporting Letter); Final	Do
Instructions for Completing Form 3417: Medical Device Reporting Baseline Report (Medical Device Reporting); Final	Do
Medical Device Reporting—Alternative Summary Reporting Program; Guidance for Industry	Do
Addendum to the Instructions for Completing FDA Form 3500A With Coding Manual (MEDWATCH) (Medical Device Reporting); Final	Do
Needlesticks—Medical Device Reporting Guidance	Do
Guidance on Criteria and Approaches for Postmarket Surveillance	Do
Guidance on Procedures to Determine Application of Postmarket Surveillance Strategies (Food and Drug Administration Modernization Act); Final	Do
Guidance on Procedures for Review of Postmarket Surveillance Submissions (Food and Drug Administration Modernization Act); Final	Do
Guidance for Industry and FDA Staff—Safe Medical Devices Act to Food and Drug Administration Modernization Act: Guidance on FDA's Transition Plan for Existing Postmarket Surveillance Protocols (Food and Drug Administration Modernization Act); Final	Do
Guidance for Industry on the Testing of Metallic Plasma Sprayed Coatings on Orthopedic Implants to Support Reconsideration of Postmarket	Do
Office of In Vitro Diagnostic Device Evaluation and Safety (OIVD)	
Analyte Specific Reagents; Small Entity Compliance Guidance; Guidance for Industry	Do
Assessing the Safety/Effectiveness of Home-Use In Vitro Diagnostic Devices: Draft Points to Consider Regarding Labeling and Premarket Submissions	Do
Data for Commercialization of Original Equipment Manufacturer, Secondary and Generic Reagents for Automated Analyzers	Do
Determination of Intended Use for Premarket Notification Devices; Guidance for the Center for Devices and Radiological Health Staff	Do
Guidance for Administrative Procedures for Clinical Laboratory Improvement Amendments of 1988 Categorization	Do
Guidance for Clinical Laboratory Improvement Amendments of 1988 Criteria for Waiver; Draft Guidance for Industry and FDA	Do
Guidance for Industry—Abbreviated Premarket Notification Submissions for In Vitro Diagnostic Calibrators; Final	Do

TITLE/TOPIC OF GUIDANCE	CONTACT
Letter to In-Vitro Device Manufacturers on Streamlined Premarket Approval Applications; Final	Do
Points to Consider for Collection of Data in Support of In-Vitro Device Submissions for Premarket Notification Clearance	Do
Points to Consider for Review of Calibration and Quality Control Labeling for In Vitro Diagnostic Devices/Cover Letter Dated March 14, 1996	Do
Points to Consider Guidance Document on Assayed and Unassayed Quality Control Material; Draft	Do
Premarket Approval Application Filing Review—Guidance for Industry and FDA Staff	Do
Breath Nitric Oxide Test System—Class II Special Controls Guidance Document	Do
Class II Special Control Guidance Document for B-Type Natriuretic Peptide Premarket Notifications; Final Guidance for Industry and FDA Reviewers	Do
Class II Special Controls Guidance Document: Cyclosporine and Tacrolimus Assays; Guidance for Industry and FDA	Do
Draft Guidance for Prescription Use of Drugs of Abuse Assays Premarket Notifications	Do
Draft Guidance on the Labeling for Over-the-Counter Sample Collection Systems for Drugs of Abuse Testing	Do
Guidance for Premarket Notifications on Cholesterol Tests for Clinical Laboratory, Physicians' Office Laboratory, and Home Use	Do
Guidance for Industry In Vitro Diagnostic Bicarbonate/Carbon Dioxide Test System; Final	Do
Guidance for Industry In Vitro Diagnostic Chloride Test System; Final	Do
Guidance for Industry In Vitro Diagnostic Creatinine Test System; Final	Do
Guidance for Industry In Vitro Diagnostic Glucose Test System; Final	Do
Guidance for Industry In Vitro Diagnostic Potassium Test System; Final	Do
Guidance for Industry In Vitro Diagnostic Sodium Test System; Final	Do
Guidance for Industry In Vitro Diagnostic Urea Nitrogen Test System; Final	Do
Guidance for Industry-In Vitro Diagnostic C-Reactive Protein Immunological Test System	Do
Guidance for Over-the-Counter Human Chorionic Gonadotropin Premarket Notifications	Do
Guidance for Over-the-Counter Ovulation Predictor Premarket Notifications	Do
Over the Counter Screening Tests for Drugs of Abuse: Guidance for Premarket Notifications	Do
Points to Consider for Portable Blood Glucose Monitoring Devices Intended for Bedside Use in the Neonate Nursery	Do
Review Criteria for Assessment of In Vitro Diagnostic Devices for Drugs of Abuse Assays Using Various Methodologies	Do
Review Criteria for Assessment of Portable Blood Glucose In Vitro Diagnostic Devices Using Glucose Oxidase, Dehydrogenase, or Hexokinase Methodology	Do
Review Criteria for Assessment of Professional Use Human Chorionic Gonadotropin In Vitro Diagnostic Devices	Laura A. Alonge, Center for Devices and Radiological Health (HFZ–510), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–0648
Premarket Notification Submissions for Coagulation Instruments—Guidance for Industry and FDA Staff	Do
Class II Special Control Guidance Document for Anti-Saccharomyces Cerevisia (S. cerevisiae) Antibody Premarket Notifications	Do

TITLE/TOPIC OF GUIDANCE	CONTACT
Class II Special Controls Guidance Document: Premarket Notifications for Automated Differential Cell Counters for Immature or Abnormal Blood Cells; Final Guidance for Industry and FDA	Do
Document for Special Controls for Erythropoietin Assay Premarket Notifications; Final	Do
Draft Guidance Document for Premarket Notification Submission of Fecal Occult Blood Tests	Do
Draft Guidance Document for Premarket Notification Submission of Glycohemoglobin (Glycated or Glycosylated) Hemoglobin for In Vitro Diagnostic Devices	Do
Draft Guidance Document for Premarket Notification Submission of Immunoglobulins A,G,M,D and E Immunoglobulin System In-Vitro Devices	Do
Draft Guidance for Premarket Notification Submission of Lymphocyte Immunophenotyping In Vitro Diagnostic Devices Using Monoclonal Antibodies	Do
Draft Guidance for Premarketing Approval Review Criteria for Premarket Approval of Estrogen or Progesterone Receptors In Vitro Diagnostic Devices Using Steroid Hormone Binding With Dextran-Coated Charcoal Separation, Histochemical Receptor Bind	Do
Guidance Document for the Submission of Tumor Associated Antigen Premarket Notification to FDA	Do
Guidance for Submission of Immunohistochemistry Applications to FDA; Final	Do
In Vitro Diagnostic Fibrin Monomer Paracoagulation Test; Final	Do
Multiplex Tests for Heritable Deoxyribonucleic Acid Markers, Mutations and Expression Patterns; Draft Guidance for Industry and FDA Reviewers	Do
Points to Consider for Cervical Cytology Devices	Do
Points to Consider for Hematology Quality Control Materials	Do
Radioallergosorbent Test Methods for Allergen-Specific Immunoglobulin E (IgE) Premarket Notifications; Final Guidance for Industry and FDA	Do
Review Criteria for Assessment of Alpha-Fetoprotein In Vitro Diagnostic Devices for Fetal Open Neural Tube Defects Using Immunological Test Methodologies	Do
Review Criteria for Assessment of Cytogenetic Analysis Using Automated and Semi-automated Chromosome Analyzers	Do
Review Criteria for Assessment of Rheumatoid Factor In Vitro Diagnostic Devices Using Engzyme-Linked Immunoassay, Enzyme Linked Immunosorbent Assay, Particle Agglutination Tests, and Laser and Rate Nephelometry	Casper E. Uldriks, Center for Devices and Radiological Health (HFZ–300), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–4692
Review Criteria for Blood Culture Systems	Do
Review Criteria for In Vitro Diagnostic Devices for Detection of Immunoglobulin Class M Antibodies to Viral Agents	Do
Review Criteria for In Vitro Diagnostic Devices for the Assessment of Thyroid Autoantibodies Using Indirect Immunofluorescence Assay, Indirect Hemagglutination Assay, Radioimmunoasay, and Enzyme Linked Immunosorbent Assay	Do
Review Criteria for In Vitro Diagnostic Devices that Utilize Cytogenetic In Situ Hybridization Technology for the Detection of Human Genetic Mutations (Germ Line and Somatic)	Do
Review Criteria for the Assessment of Anti-Nuclear Antibodies In-Vitro Diagnostic Devices Using Class II Special Controls Guidance Document: Antimicrobial Susceptibility Test Systems; Guidance for Industry and FDA	Do
Draft Review Criteria for Nucleic Acid Amplification Based In Vitro Diagnostic Devices for Direct Detection of Infectious Microorganisms	Do
Premarket Approval Applications for In Vitro Diagnostic Devices Pertaining to Hepatitis C Viruses	Do

TITLE/TOPIC OF GUIDANCE	CONTACT
Assays Intended for Diagnosis, Prognosis, or Monitoring of Hepatitis C Virus Infection, Hepatitis C, or Other Hepatitis C-Associated Disease; Draft Guidance for Industry FDA	Do
Review Criteria for Assessment of Antimicrobial Susceptibility Test Discs	Do
Review Criteria for Assessment of In Vitro Diagnostic Devices for Direct Detection of Chlamydiae in Clinical Specimens	Do
Review Criteria for Assessment of In Vitro Diagnostic Devices for Direct Detection of Mycobacterium spp. (Tuberculosis)	Do
Review Criteria for Assessment of Laboratory Tests for the Detection of Antibodies to *Helicobacter Pylori*	Do
Review Criteria for Devices Assisting in the Diagnosis of *Clostriduim Difficile* Associated Diseases	Do
Review Criteria for Devices Intended for the Detection of Hepatitis B 'e' Antigen and Antibody to Hepatitis B 'e'	Do
Review Criteria For Premarket Approval of In Vitro Diagnostic Devices for Detection of Antibodies to Parvovirus B19	Do
Office of Surveillance and Biometrics	
Perspectives on Clinical Studies for Medical Device Submissions (Statistical)	Do
Premarket Approval Application Review Statistical Checklist	Do
Statistical Aspects of Submissions to FDA: A Medical Device Perspective (Also Includes as Appendix the Article "Observed Uses and Abuses of Statistical Procedures in Medical Device Submissions")	Do
Statistical Guidance for Clinical Trials of Nondiagnostic Medical Devices	Do
Statistical Guidance on Reporting Results From Studies Evaluating Diagnostic Tests; Draft	Do
Medical Device Reporting Guidance Document: Remedial Action Exemption; Final	Do
Guidance on Adverse Event Reporting for Hospitals That Reprocess Devices Intended by the Original Equipment Manufacturer for Single Use	Do
Medical Device Reporting Guidance Document No. 1—Intraocular Lenses—E1996004; Final	Do
Common Problems: Baseline Reports and Medwatch Form 3500A	Do
Medical Device Reporting: An Overview; Final	Do
Instructions for Completing FDA Form 3500A With Coding Manual for Form 3500A (MEDWATCH) (Medical Device Reporting); Final	Do
MEDWATCH FDA Form 3500A For Use By User Facilities, Distributors and Manufacturers for Mandatory Reporting; Final	Do
Variance From Manufacturer Report Number Format (Medical Device Reporting Letter); Final	Do
Instructions for Completing Form 3417: Medical Device Reporting Baseline Report (Medical Device Reporting); Final	Do
Medical Device Reporting—Alternative Summary Reporting Program; Guidance for Industry	Do
Addendum to the Instructions for Completing FDA Form 3500A With Coding Manual (MEDWATCH) (Medical Device Reporting); Final	Do
Needlesticks—Medical Device Reporting Guidance	Do
Guidance to Sponsors on the Development of a Discretionary Postmarket Surveillance Study for Permanent Implantable Cardiac Pacemaker Electrodes (Leads)	Do

TITLE/TOPIC OF GUIDANCE	CONTACT
Guidance on Criteria and Approaches for Postmarket Surveillance	Do
Guidance on Procedures to Determine Application of Postmarket Surveillance Strategies (Food and Drug Administration Modernization Act); Final	Do
Guidance on Procedures for Review of Postmarket Surveillance Submissions (Food and Drug Administration Modernization Act); Final	Do
Guidance for Industry and FDA Staff— Safe Medical Devices Act of 1990 to Food and Drug Administration Modernization Act: Guidance on FDA's Transition Plan for Existing Postmarket Surveillance Protocols (Food and Drug Administration Modernization Act); Final	Do
Amendment to Guidance on Discretionary Postmarket Surveillance on Pacemaker Leads; Final	Do
Guidance for Industry on the Testing of Metallic Plasma Sprayed Coatings on Orthopedic Implants to Support Reconsideration of Postmarket	Do
Office of Compliance	
Perspectives on Clinical Studies for Medical Device Submissions (Statistical)	Do
Commercial Distribution/Exhibit Letter	Do
FDA Guide for Validation of Biological Indicator Incubation Time	Do
Guide for Establishing and Maintaining a Calibration Constancy Intercomparison System for Microwave Oven Compliance Survey Instruments (FDA 88–8264)	Do
General Principles of Software Validation; Draft Guidance	Do
Guidance on Medical Device Tracking (Food and Drug Administration Modernization Act); Guidance for Industry and FDA Staff	Do
Compliance Program Guidance Manual: Inspection of Medical Devices; Draft	Do
Procedures for Laboratory Compliance Testing of Television Revivers—Part of Television Packet	Do
Guidance on Quality System Regulation Information for Various Premarket Submissions; Draft	Do
Surveillance and Detention without Physical Examination of Surgeons' and/or Patient Examination Gloves; Guidance for Industry	Do
Manufacturers/Assemblers of Diagnostic X-Ray Systems: Enforcement Policy for Positive-Beam Limitation Requirements in 21 CFR 1020.31 g)	Do
Guidance for the Submission of Initial Reports on Diagnostic X-Ray Systems and Their Major Components	Do
Exemption From Reporting and Recordkeeping Requirements for Certain Sunlamp Product Manufacturers	Do
Letter to Medical Device Industry on Endoscopy and Laparoscopy Accessories (Galdi)	Do
Clarification of Radiation Control Regulations for Diagnostic X-Ray Equipment (FDA 89–8221)	Do
Compliance Policy Guide 7133.19: Retention of Microwave Oven Test Record/Cover Letter: August 24, 1981, Retention of Records Required by 21 CFR Part 1002	Do
Guidance for the Submission of Abbreviated Radiation Safety Reports on Cephalometric X-Ray Devices: Defined as Dental Units With an Attachment for Mandible Work That Holds a Cassette and Beam Limiting Device	Do
A Guide for the Submission of an Abbreviated Radiation Safety Report on X-Ray Tables, Cradles, Film Changers or Cassette Holders Intended for Diagnostic Use	Do
A Guide for the Submission of Abbreviated Radiation Safety Reports on Image Receptor Support Devices for Mammography X-Ray Systems	Do

TITLE/TOPIC OF GUIDANCE	CONTACT
Compliance Program Guidance Manual: Field Compliance Testing of Diagnostic (Medical) X-Ray Equipment; Guidance for FDA Staff	Do
Information Disclosure by Manufacturers to Assemblers for Diagnostic X-Ray Systems; Final Guidance for Industry and FDA	Do
Guide for Submission of Information on Accelerators Intended to Emit X-Radiation Required Under 21 CFR 1002.10	Do
Abbreviated Report on Radiation Safety for Microwave Products (Other Than Microwave Ovens) (e.g., Microwave Heating, Microwave Diathermy, Rheumatoid Factor Sealers, Induction, Dielectric Heaters, Security Systems)	Do
Guide for Preparing Reports on Radiation Safety of Microwave Ovens	Do
Guide for Filing Annual Reports for X-Ray Components and Systems	Do
Reporting and Compliance Guide for Television Products Including Product Report, Supplemental Report, Radiation Safety Abbreviated Report, Annual Report, Information and Guidance	Do
Revised Guide for Preparing Annual Reports on Radiation Safety Testing of Laser and Laser Light Show Products (Replaces FDA 82–8127)	Do
Guide for Preparing Abbreviated Reports of Microwave and Rheumatoid Factor-Emitting Electronic Products Intended for Medical Use	Howard W. Cyr, Center for Devices and Radiological Health (HFZ–114), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–796–0297
Letter to Manufacturers and Importers of Microwave Ovens: Information Requirements for Cookbooks and User and Service Manuals	Do
Abbreviated Report on Radiation Safety of Non-Medical Ultrasonic Products	Do
Guide for Preparing Product Reports for Medical Ultrasound Products	Do
Letter to Manufacturers, Distributors and Importers of Condom Products	Do
Letter to Manufacturers, Importers, and Repackagers of Condoms for Contraception or Sexually-Transmitted Disease Prevention (Holt)	Do
Letter to Condom Manufacturers and Distributors	Do
Letter to Manufacturers/Repackers Using Cotton	Do
Guide for Preparing Product Reports for Lasers and Products Containing Lasers	Do
Compliance Guide for Laser Products (FDA 86–8260)	Do
Condoms: Inspection and Sampling at Domestic Manufacturers and of All Repackers; Sampling From All Importers (Damaska Memo to Field on April 8, 1987)	Do
Dental Hand Piece Sterilization (Dear Doctor Letter)	Do
Latex Labeling Letter (Johnson)	Do
Pesticide Regulation Notice 94–4:Interim Measures for the Registration of Antimicrobial Products/Liquid Chemical Germicides With Medical Device Use Claims Under the Memorandum of Understanding Between the Environmental Protection Agency and the Food and Drug Administration	Do
Guide for Preparing Product Reports for Lasers and Products Containing Lasers	
Letter to Industry, Powered Wheelchair Manufacturers From RM Johnson	Do
Hazards of Volume Ventilators and Heated Humidifiers	Do
Manufacturers and Initial Distributors of Sharps Containers and Destroyers Used by Health Care Professionals	Do
Ethylene Oxide; Ethylene Chlorohydrin; and EthyleneGlycol: Proposed Maximum Residue Limits and Maximum Levels of Exposure	Do
Letter to: Manufacturers and Users of Lasers for Refractive Surgery (Excimer)	Do

TITLE/TOPIC OF GUIDANCE	CONTACT
Shielded Trocars and Needles Used for Abdominal Access During Laparoscopy Surveillance and Detention Without Physical Examination of Condoms; Guidance for Industry; Draft	Do
All U.S. Condom Manufacturers, Importers and Repackagers	Do
Manufacturers and Initial Distributors of Hemodialyzers	Do
Laser Light Show Safety—Who's Responsible? (FDA 86–8262)	Do
Suggested State Regulations for Control of Radiation—Volume II Nonionizing Radiation—Lasers (FDA Publication No. 83–8220)	Do
Letter to All Foreign Manufacturers and Importers of Electronic Products for Which Applicable FDA Performance Standards Exist	Do
Guide for Submission of Information on Industrial X-Ray Equipment Required Under 21 CFR 1002.10	Do
Guidance for the Submission of Cabinet X-Ray System Reports Under 21 CFR 1020.40	Do
Guide for Preparing Annual Reports on Radiation Safety Testing of Electronic Products (General)	Do
Computerized Devices/Processes Guidance—Application of the Medical Device Good Manufacturing Practice to Computerized Devices and Manufacturing Processes	Do
Guide for Preparing Product Reports for Ultrasonic Therapy Products (Physical Therapy Only)	Do
Guide for Submission of Information on Industrial Radiofrequency Dielectric Heater and Sealer Equipment Unter 21 CFR 1002.10 and 1002.12 (FDA 81–8137)	Do
Guide for Preparing Annual Reports for Ultrasonic Therapy Products	Do
Guide for Preparing Annual Reports on Radiation Safety Testing of Sunlamps and Sunlamp Products (Replaces FDA 82–8127)	Do
Guide for Preparing Annual Reports on Radiation Safety Testing of Mercury Vapor (Replaces FDA 82–8127) Quality Control Guide for Sunlamp Products (FDA 88–8234)	Do
Guide for the Submission of Initial Reports on Computed Tomography X-Ray Systems	Do
Guide for Preparing Product Reports on Sunlamps and Sunlamp Products (21 CFR Part 1002)	Do
Letter: Policy on Maximum Timer Interval and Exposure Schedule for Sunlamp Products	Do
Reporting Guide for Product Reports on High Intensity Mercury Vapor Discharge Lamps (21 CFR Part 1002)	Do
Quality Control Practices for Compliance With the Federal Mercury Vapor Lamp Performance Standard	Do
Keeping Up With the Microwave Revolution (FDA Publication No. 91–4160)	Do
Quality Assurance Guidelines for Hemodialysis Devices	Do
Letter to Manufacturers and Importers of Microwave Ovens—Open Door Operation of Microwave Ovens as a Result of Oven Miswiring	Do
Reporting of New Model Numbers to Existing Model Families	Do
Import: Radiation-Producing Electronic Products (FDA 89–8008)	Do
Unsafe Patient Lead Wires and Cables	Do
Application of a Variance from 21 CFR 1040.11(c) for a Laser Light Show, Display, or Device (Form FDA 3147)	Do
Letter to Trade Association: Reuse of Single-Use or Disposable Medical Devices	Do

TITLE/TOPIC OF GUIDANCE	CONTACT
Design Control Guidance for Medical Device Manufacturers	Do
Keeping Medical Devices Safe From Electromagnetic Interference	Do
Safety of Electrically Powered Products: Letter to Medical Devices and Electronic Products Manufacturers From Lilliam Gill and Bruce H. Burlington Correction Memo	Do
Enforcement Priorities for Single-Use Deices Reprocessed by Third Parties and Hospitals: Guidance for Industry and for FDA Staff	Do
Labeling for Electronic Anti-Theft Systems; Guidance for Industry; Final	Do
Wireless Medical Telemetry Risks and Recommendations, Guidance for Industry; Final	Do
Policy on Warning Label Required on Sunlamp Products	Do
Policy on Lamp Compatibility (Sunlamps)	Do
Office of Science and Technology	
Perspectives on Clinical Studies for Medical Device Submissions (Statistical)	Do
Guidance on Frequently Asked Questions on Recognition of Consensus Standards (Food and Drug Administration Modernization Act)	Do
Guidance on the Recognition and Use of Consensus Standards/Appendix A (Food and Drug Administration Modernization Act)	Do
Center for Devices and Radiological Health Standard Operating Procedures for the Identification and Evaluation of Candidate Consensus Standard for Recognition	Do
Guidance for Industry and FDA Reviewers: Guidance on Immunotoxicity Testing	Do
IV. CENTER FOR DRUG EVALUATION AND RESEARCH (CDER)	
CATEGORY—ADVERTISING	
Promotion of Combination Oral Contraceptive Products	Nancy E. Derr, Center for Drug Evaluation and Research (HFD–5), Food and Drug Administration, 5515 Security Lane, Rockville, MD 20852, 301–594–5400
CATEGORY—CHEMISTRY	
Documentation for Antibiotics and Other Cellular Metabolites Produced by Microorganisms Modified Using Recombinant DNA Technology	Do
CATEGORY—CLINICAL/MEDICAL	
Acne Vulgaris	Do
Ankylosing Spondylitis	Do
Antifungal	Do
Chemoprevention of Sporadic Colorectal Adenomas	Do
Clinical Evaluation of Analgesic Drug Products	Do
Clinical Evaluation of Drugs for Neuropathic Pain	Do
Clinical Evaluation of Drugs for Neuropathy	Do
Clinical Evaluation of Opiate Analgesic Drug Products	Do
Clinical Trial Design for the Treatment of Allergic Conjunctivitis	Do
Clinical Trial Design for the Treatment of Bacterial Blepharitis	Do
Clinical Trial Design for the Treatment of Bacterial Conjunctivitis	Do
Clinical Trial Design for the Treatment of Choroidal Neovascularization	Do
Clinical Trial Design for the Treatment of Diabetic Macular Edema	Do

TITLE/TOPIC OF GUIDANCE	CONTACT
Clinical Trial Design for the Treatment of Diabetic Retinopathy	Do
Clinical Trial Design for the Treatment of Dry Eye	Do
Clinical Trial Design for the Treatment of Elevated Intraocular Pressure	Do
Clinical Trail Design for the Treatment of Iritis	Do
Clinical Trail Design for the Treatment of Macular Edema (Secondary to Inflammation)	Do
Clinical Trail Design for the Treatment of Macular Edema (Secondary to a Vascular Event)	Do
Clinical Trail Design for the Treatment of Post-Cataract Inflammation	Do
Clinical Trail Design for the Treatment of Posterior Uveitis	Do
Clinical Trial Design for the Treatment of Superficial Punctate Keratitis	Do
Chemistry, Manufacturing, and Control, Preclinical, and Clinical Development of Decorporation Agents for the Treatment of Internal Radioactive Contamination	Do
Corticosteroid Induced Adrenal Suppression	Do
Development of Drugs for Chronic Obstructive Pulmonary Disease	Do
Developing Antiviral Drugs for the Treatment of Smallpox	Do
Drug-Coated Cardiovascular Stents	Do
Evaluation of New Treatments for Diabetes Mellitus	Do
Gingivitis	Do
Intraocular Pressure Lowering	Do
Oral Mucositis	Do
Patient Reported Outcomes	Do
Periodontitis	Do
Psoriasis	Do
Safety Review of Clinical Data	Do
System Lupus Erythematosus	Do
Premarketing Risk Assessment	Do
Development and Use of Risk Minimization Action Plans	Do
Good Pharmacovigilance Practices and Pharmacoepidemiologic Assessment	Do
Coronary Drug-Eluting Stents	Do
Pharmacogenomic Combination Products	Do
42. Centralized Institutional Review Boards in Multi-Center Trials	Do
CATEGORY—CLINICAL/PHARMACOLOGY	
Clinical Lactation Studies—Study Design, Data Analysis, and Recommendations for Labeling	Do
Immediate Release to Modified Release Dosage Forms	Do
In Vitro Drug Metabolism/Drug Interaction—Guidance for Reviewers	Do
Pharmacokinetics in Pregnancy—Study Design, Data Analysis, and Impact on Dosing and Labeling	Do
CATEGORY—COMPLIANCE	

TITLE/TOPIC OF GUIDANCE	CONTACT
Describing How Positron Emission Tomography Drug Products May Comply With New Current Good Manufacturing Practice Requirements	Do
Expiration Dating of Unit-Dose Repackaged Drugs	Do
Maintaining Adequate and Accurate Records During Clinical Investigations	Do
Current Good Manufacturing Practice For Investigational New Drug and Biological Products—Phase I Testing	Do
CATEGORY—ELECTRONIC SUBMISSIONS	
Standards for Clinical Data Submissions	Do
CATEGORY—GENERICS	
Abbreviated New Drug Applications Suitability Petitions	Do
Bioequivalence Studies with Clinical Endpoints for Vaginal Antifungal Drug Products	Do
Defining the Term "Listed Drug" With Respect to Amendments and Supplements to Abbreviated New Drug Applications and Section 505(b)(2) Applications	Do
Abbreviated New Drug Applications: Pharmaceutical Solid Polymorphism	Do
CATEGORY—GOOD REVIEW PRACTICES	
General Clinical Review Template	Do
CATEGORY—INVESTIGATIONAL NEW DRUG APPLICATION	
Consumer Product Safety Commission—Tamper Resistant Packaging for Investigational New Drugs	Do
End of Phase 2 Meetings	Do
Pediatric Safety and Efficacy Data in Investigational New Drugs	Do
Exploratory Investigational New Drugs: Preclinical and Clinical Considerations	Do
CATEGORY—LABELING	
Content and Format of the Clinical Pharmacology Section	Do
Content and Format of the Dosage and Administration Section of the Prescription Drug Labeling	Do
Content and Format of the Warnings and Precautions, Contraindications, and Boxed Warning Sections of Prescription Drug Labeling	Do
Drug Names and Dosage Forms	Do
Implementing the New Content and Format Requirements for Prescription Drug Labeling	Do
Labeling Dietary Supplements for Women Who Are or Could Be Pregnant	Do
Pregnancy Labeling Revisions	Do
Submitting Proprietary Names for Evaluation	Do
CATEGORY—OVER-THE-COUNTER	
Actual Use Trials	Do
Labeling Comprehension Studies for Over-the-Counter Drug Products	Do
Labeling for Over-the-Counter Human Drug Products	Do
Labeling of Over-the-Counter Skin Protectant Products	Do
Labeling Over-the-Counter Human Drug Products; Questions and Answers	Do
CATEGORY—PHARMACOLOGY/TOXICOLOGY	

TITLE/TOPIC OF GUIDANCE	CONTACT
Drug-Induced Vascular Injury	Do
CATEGORY—PROCEDURAL	
Assessment of Abuse Potential of Drugs	Do
Development of a Drug and Pharmacogenetic Test	Do
Dispute Resolution Involving Pediatric Labeling	Do
Exocrine Pancreatic Insufficiency Drug Products—Submitting New Drug Applications	Do
How to Comply With the Pediatric Research Equity Act	Do
How to Determine if Human Research With a Radioactive Drug Can Be Conducted Under a Radioactive Drug Research Committee	Do
Process for Contracts and Written Requests Under the Best Pharmaceutical for Children Act	Do
Qualifying for Pediatric Exclusivity Under Section 505A of the Federal Food, Drug, and Cosmetic Act	Do
V. Center for Food Safety and Applied Nutrition (CFSAN)	
CATEGORY—DIETARY SUPPLEMENTS	
Labeling Dietary Supplements for Women Who Are or Could Be Pregnant	Linda Pellicore, Center for Food Safety and Applied Nutrition (HFS–810), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1448, FAX 301–436–2636, *Linda.Pellicore@cfsan.fda.gov*
Dietary Supplements: 75-Day Premarket Notifications for New Dietary Ingredients	Do
Substantiation Health Claims Guidance	Do
CATEGORY—FOOD ADDITIVE SAFETY	
Final Guidance on Electronic Submissions of Food and Color Additive Petitions (Level 1)	George Pauli, Center for Food Safety and Applied Nutrition (HFS–200), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740
Presence of Unintended Varieties of Bioengineered Plant Foods in the Food Supply (Level 1)	Do
Chloropropanols Compliance Policy Guides Guidance	Do
CATEGORY—CONSTITUENT OPERATIONS	
Equivalence Level 1 Guidance	Cathy Carneval, Center for Food Safety and Applied Nutrition (HFS–550), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740
CATEGORY—OFFICE OF COMPLIANCE	
Prior Notice of Imported Food Products—Questions and Answers	May Nelson, Center for Food Safety and Applied Nutrition (HFS–22), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740
VI. CENTER FOR VETERINARY MEDICINE (CVM)	
CATEGORY—NEW ANIMAL DRUG APPLICATIONS	
Administrative New Animal Drug Application Process (#132)	Gail Schmerfeld, Center for Veterinary Medicine (HFV–100), Food and Drug Administration, 7500 Standish Pl., rm. 384, Metropark North II, Rockville, MD 20855, 301–827–1796, *gschmer1@cvm.fda.gov*

TITLE/TOPIC OF GUIDANCE	CONTACT
Waivers of *In Vivo* Demonstration of Bioequivalence of Certain Animal Drugs in Soluble Powder Oral Dosage Form Products and Type A Medicated Articles (#171)	Marilyn Martinez, Center for Veterinary Medicine (HFV–130), Food and Drug Administration, 7500 Standish Pl., rm. 332, Metropark North II, Rockville, MD 20855, 301–827–7577, *mmartin1@cvm.fda.gov*
CATEGORY—LABELING	
Manufacture and Labeling of Raw Meat Diets for Consumption by Dogs, Cats, and Captive Noncompanion Animal Carnivores and Omnivores (#122)	William Burkholder, Center for Veterinary Medicine (HFV–228), Food and Drug Administration, 7500 Standish Pl., rm. 413, Metropark North II, Rockville, MD 20855, 301–827–0179, *bburkhol@cvm.fda.gov*
Content and Format for Labeling of New Animal Drug Products (#134)	Douglass Oeller, Center for Veterinary Medicine (HFV–112), Food and Drug Administration, 7500 Standish Pl., rm. 324, Metropark North II, Rockville, MD 20855, 301–827–0131, *doeller@cvm.fda.gov*
CATEGORY—STATUTORY REQUIREMENTS	
Dispute Resolution—FDA Modernization Act (#79)	Marcia Larkins, Center for Veterinary Medicine (HFV–1), Food and Drug Administration, 7519 Standish Pl., rm. 165, Metropark North IV, Rockville, MD 20855, 301–827–4535, *mlarkins@cvm.fda.gov*
Animal Drug Sponsor Fees Under the Animal Drug User Fee Act (#173)	David Newkirk, Center for Veterinary Medicine (HFV–100), Food and Drug Administration, 7500 Standish Pl., rm. 390, Metropark North II, Rockville, MD 20855, 301–827–6967, *dnewkirk@cvm.fda.gov*
Chemistry, Manufacturing, and Control Changes to an Approved New Animal Drug Application or Abbreviated New Drug Applications (#83)	Dennis Bensley, Center for Veterinary Medicine (HFV–143), Food and Drug Administration, 7500 Standish Pl., rm. 320, Metropark North II, Rockville, MD 20855, 301–827–6956, *dbensley@cvm.fda.gov*
CATEGORY—INTERNATIONAL HARMONIZATION	
GL–27: Preapproval Information for Registration of New Veterinary Medicinal Products for Food-Producing Animals With Respect to Antimicrobial Resistance (#144)	William T. Flynn, Center for Veterinary Medicine (HFV–2), Food and Drug Administration, 7519 Standish Pl., rm. 173, Metropark North IV, Rockville, MD 20855, 301–827–4514, *wflynn@cvm.fda.gov*
GL–28: Studies to Evaluate the Safety of Residues of Veterinary Drugs in Human Food: Carcinogenicity Testing (#141)	Thomas Mulligan, Center for Veterinary Medicine (HFV–153), Food and Drug Administration, rm. E375, Metropark North II, 7500 Standish Pl., Rockville, MD 20855, 301–827–6984, *tmulliga@cvm.fda.gov*
GL–33: Studies to Evaluate the Safety of Residues of Veterinary Drugs in Human Food: General Approach to Testing (#149)	Do
GL–36: Studies to Evaluate the Safety of Residues of Veterinary Drugs in Human Food: General Approach to Establish a Microbiological Acceptable Daily Intake (#159)	Do
GL–37 Studies to Evaluate the Safety of Residues of Veterinary Drugs in Human Food: Repeat-Dose (Chronic) Toxicity Testing (#160)	Do
GL–38 Environmental Impact Assessments for Veterinary Medicinal Products—Phase II (#166)	Charles Eirkson, Center for Veterinary Medicine (HFV–103), Food and Drug Administration, rm. 137, Metropark North IV, 7500 Standish Pl., Rockville, MD 20855, 301–827–8561, *ceirkson@cvm.fda.gov*
CATEGORY—TARGET ANIMAL SAFETY AND EFFECTIVENESS	

TITLE/TOPIC OF GUIDANCE	CONTACT
Development of Target Animal Safety and Effectiveness Data to Support Approval of Non-Steroidal Anti-Inflammatory Drugs for Use in Animals (#123)	Linda Wilmot, Center for Veterinary Medicine (HFV–114), Food and Drug Administration, 7500 Standish Pl., rm. N316, Metropark North II, Rockville, MD 20855, 301–827–0135, *lwilmot@cvm.fda.gov*
CATEGORY—HUMAN FOOD SAFETY	
Dioxin in Minerals Used in Animal Feed (#161)	Gloria Dunnavan, Center for Veterinary Medicine (HFV–230), Food and Drug Administration, 7500 Standish Pl., rm. E480, Metropark North II, Rockville, MD 20855, 301–827–1168, *gdunnava@cvm.fda.gov*
Salmonella Contamination of Feeds Compliance Policy Guide	Henry Ekperigin, Center for Veterinary Medicine (HFV–222), Food and Drug Administration, 7500 Standish Pl., rm. E417, Metropark North II, Rockville, MD 20855, 301–827–0174, *hekperig@cvm.fda.gov*
Bovine Spongiform Encephalopathies Compliance Program	Neal Bataller, Center for Veterinary Medicine (HFV–230), Food and Drug Administration, 7500 Standish Pl., rm. E441, Metropark North II, Rockville, MD 20855, 301–827–0163, *nbatalle@cvm.fda.gov*
Validation of Analytical Procedures for Type C Medicated Feed (#135)	Mary G. Leadbetter, Center for Veterinary Medicine (HFV–141), Food and Drug Administration, 7500 Standish Pl., rm. E307, Metropark North II, Rockville, MD 20855, 301–827–6964, *mleadbet@cvm.fda.gov*
VII. OFICE OF REGULATORY AFFAIRS (ORA)	
CATEGORY—COMPLIANCE AND INSPECTION	
Guidance for Investigators: Investigations Operations Manual	Michael Rogers, Division of Field Investigations (HFC–130), Food and Drug Administration, 5600 Fishers Lane, rm. 13–74, Rockville, MD 20857, 301–827–5653
CATEGORY—REGULATORY	
Guidance for Food and Drug Administration Staff: Regulatory Information Assurance; Good Practices in Converting From Paper to Electronic Processes	Paul Motise, Division of Compliance Information and Quality Assurance (HFC–240), Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850, 301–827–0383
CATEGORY—COMPLIANCE AND INSPECTIONS	
Concept Paper on Bioterrorism Act Proposed Guidance to Records Access	Rudaina Alrefai, Division of Compliance Information and Quality Assurance (HFC–240), Food and Drug Administration, 1350 Piccard Dr., rm. 400L, Rockville, MD 20850, 301–827–0413
CATEGORY—GUIDANCE FOR INDUSTRY AND FOOD AND DRUG ADMINISTRATION STAFF	
21 CFR Part 58: Good Laboratory Practice, Questions and Answers	James McCormack, Division of Compliance Policy (HFC–230), Food and Drug Administration, 1350 Piccard Dr., rm. 400Z, Rockville, MD 20850, 301–827–0425
21 CFR Part 58: Closure of Nonclinical Laboratories	Rodney Allnutt, Division of Compliance Policy (HFC–230), Food and Drug Administration, 1350 Piccard Dr., rm. 400Y, Rockville, MD 20850, 301–827–8860
21 CFR Part 58: Comparison of the Food and Drug Administration, Environmental Protection Agency, and the Organisation for Economic and Cooperative Development Good Laboratory Practices	James McCormack, Division of Compliance Policy (HFC–230), Food and Drug Administration, 1350 Piccard Dr., rm. 400Z, Rockville MD 20850, 301–827–0425.
CATEGORY—GUIDANCE FOR INDUSTRY AND FOOD AND DRUG ADMINISTRATION INVESTIGATORS	

TITLE/TOPIC OF GUIDANCE	CONTACT
Auditing Nonclinical Laboratory Studies	Do
CATEGORY—GUIDANCE FOR FOOD AND DRUG ADMINISTRATION INVESTIGATORS	
Necropsy, Tissue Preparation, and Histology in Nonclinical Laboratory Studies	Do
CATEGORY—COMPLIANCE POLICY GUIDE	
Section 394.500, Importation of Television Products, Microwave Ovens, and Inherent Class I Laser Products for Investigation and Evaluation during Design Development (CPG 7133.22)	Jeffrey Governale, Division of Compliance Policy (HFC–230), Food and Drug Administration, 1350 Piccard Dr., rm. 410A, Rockville, MD 20850, 301–827–0411
Section 300.500, Reprocessing and Reuse of Single Use Devices (CPG 7124.16)	Do
Section 310.210, Blood Pressure Measurement Devices (Sphygmomanometers)—Accuracy (CPG 7124.23)	Do
CATEGORY—REGULATORY POLICY MANUAL	
Subchapter, Disqualification of Clinical Investigators	James McCormack, Division of Compliance Policy (HFC–230), Food and Drug Administration, 1350 Piccard Dr., rm. 400Z, Rockville, MD 20850, 301–827–0425
CATEGORY—REGULATORY POLICY MANUAL SUBCHAPTER OR STAFF MANUAL GUIDE	
Untrue Statements of Material Facts	Sharon Sheehan, Division of Compliance Policy (HFC–230), Food and Drug Administration, 1350 Piccard Dr., rm. 450, Rockville, MD 20850, 301–827–0412
CATEGORY—REGULATORY POLICY MANUAL SUBCHAPTER	
Application Integrity Policy	Do
CATEGORY—REGULATORY PROCEDURES MANUAL	
Chapter 9 Imports	Carl Nielsen, Division of Import Operations (HFC–170), Food and Drug Administration, 5600 Fishers Lane, rm. 12–38, Rockville, MD 20857, 301–443–6553
VIII. OFFICE OF THE COMMISSIONER (OC)	
CATEGORY—COMPLIANCE	
Guidance for Industry Information Sheets for Institutional Review Boards and Clinical Investigators	David Lepay, Good Clinical Practice Program (HF–34), Office of Science and Health Coordination, Food and Drug Administration, 5600 Fishers Lane, rm. 9C24, Rockville, MD 20857
Guidance for Industry Computerized Systems Used in Clinical Trials	Do
CATEGORY—INSPECTION	
Guidance for FDA Staff Compliance Program 7348.811, Inspection of Clinical Investigators and Sponsor Investigators	Do

Dated: June 30, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–15660 Filed 7–8–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Fiscal Year 2004 Competitive Application Cycle for the Healthy Communities; Access Program Demonstration Project (HCAPDP), CFDA Number 93.890; HRSA 04–107

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Notice of availability of funds.

SUMMARY: The Health Resources and Services Administration (HRSA) announces the availability of up to $5,400,000 to support 6–8 HCAP Demonstration Projects to eligible entities for the purpose of: (1) Developing patient-based research infrastructure at historically black health professional schools, which have an affiliation, or affiliations, with any of the providers identified in section 340(j) of the Public Health Service Act, subsection (b)(1)(B); (2) establishment of joint and collaborative programs of medical research and data collection between historically black health professional schools and such providers, whose goal is to improve the health status of medically underserved populations; or (3) supporting the research-related costs of patient care, data collection, and academic training resulting from such affiliations.

For purposes of this demonstration, a HBHPS is defined as any Historically Black College or University (HBCU) that has a school of medicine, dentistry, nursing and/or behavioral health.

Authorizing Legislation: The Healthy Communities Access Program (HCAP) Demonstration Project is authorized under section 340(j) of the Public Health Service Act, as amended (Health Care Safety Net Amendments of 2002, Public Law 107–251, 42 U.S.C. 256).

DATES: The intended timelines for application submission, review and award are as follows:

Application Deadline: August 20, 2004.

Grant Awards Announced: September 15, 2004.

Applications will be considered as meeting the deadline if they are: (1) Received on or before the established date and received in time for the Independent Committee Review; or (2) E-marked on or before the deadline date given in the **Federal Register** Notice. Late applications will be returned to the applicant. Applicants should obtain a legibly dated receipt from a commercial carrier or the U.S. Postal Service or request a legibly dated U.S. Service postmark. Private metered postmarks shall not be accepted as proof of timely mailing. Applicants sent to any address other than that specified below are subject to being returned.

Application Requests: To receive a complete application kit (*i.e.*, application instructions, necessary forms, and application review criteria), contact the HRSA Grants Application Center at: The HRSA Grants Application Center, The Legin Group, Inc., Attn: HCAP Demonstration Project, Program Announcement No: HRSA 04–107, CFDA No. 93.890, 901 Russell Avenue, Suite 450, Gaithersburg, Maryland 20879, telephone: (877)–477–2123, fax: (877)–477–2345, e-mail: *hrsagac@hrsa.gov.*

When contacting the HRSA Grants Application Center (GAC) please use the following program announcement when requesting application materials: HRSA 04–107.

Eligible Applicants: For an entity to be eligible to compete for a HCAP Demonstration Project, the applicant entity must:

- Be a Historically Black Professions School [defined as any HBCU that has a school of medicine, dentistry, nursing, and/or behavioral health]; and
- Have an affiliation, or affiliations, with the providers identified in subsection (b)(1)(B) of section 340 of the Public Health Act. This includes the following:
- A Federally Qualified Health Center (as defined in section 1861(aa) of the Social Security Act (42 U.S.C. 1395x(aa));
- A hospital with a low-income utilization rate (as defined in section 1923(b)(3) of the Social Security Act (42 U.S.C. 1396r–4(b)(3)), that is greater than 25 percent;
- A public health department; or
- An interested public or private sector health care provider or an organization that has traditionally served the medically uninsured and underserved.

Application Review and Funding Criteria

The following criteria will be used by the Independent Review Committee (IRC) to assess each HCAP application. The HCAP Demonstration Project has 6 review criteria:

Criteria #1—Introduction—10 Points

- Does the applicant describe the purpose of the proposed HCAP Demonstration?
- Is there evidence that the Demonstration addresses one or more of the purposes of the HCAP Demonstration Project?
- Does the applicant propose 2–4 projects that collectively contribute to the overall Demonstration?
- Is the HCAP provider partnering to conduct the Demonstration clearly identified?
- Does the applicant explain how the findings of the Demonstration will advance and sustain a patient-based research infrastructure by establishing joint and collaborative programs of health research and data collection between community-based primary health care HCAP provider(s) and HBHPS to improve health status of medically underserved populations?
- Is there a description of existing partnerships with other research-intensive institutions such as the National Institute of Health (NIH-Project EXPORT Center of Excellence grants), Agency for Healthcare Research and Quality (AHRQ—Minority Research Infrastructure Support Program), and National Institute of Nursing Research (NINR—Nursing Partnership Centers on Health Disparities)?

Criteria #2—Response—30 Points

a. Project Narrative and Focus Area

- Does the applicant propose 2–4 projects that focus on one or more of the infrastructure-building components of the HCAP Demonstration Project (Primary Care Research, Faculty Development, and/or Clinical Information Systems)?
- Does the applicant clearly demonstrate the feasibility and scope of each proposed project?
- Is the Demonstration Project interdisciplinary? Does it focus on patient-based, primary care research in community-based settings?
- Are the conceptual framework, design, methods, and analyses adequately developed, well integrated, and appropriate to the aims of each project of the Demonstration?
- Does the applicant acknowledge potential problem areas and consider alternative tactics?
- Does the applicant present details of project implementation and descriptions of how each project will develop/strengthen one or more of the three-specific infrastructure building components outlined in the Project Narrative (Primary Care Research,

Faculty Development, and Clinical Information Systems)?

• Is each individual project within the Demonstration thematic, highly focused, and interrelated so that they collectively contribute to the goals of the Demonstration Project to a greater extent than if the projects undertaken as individual components were pursued separately?

• Does the applicant provide a clear description of each proposed project, including major goals and objectives as well as how it integrates with the other project components in relation to the overall Demonstration Project?

• Does the applicant enhance the plan by describing existing partnerships with other research-intensive institutions such as the National Institutes of Health (NIH-Project EXPORT Center of Excellence grants), Agency for Healthcare Research and Quality (AHRQ—Minority Research Infrastructure Support Program), and National Institute of Nursing Research (NINR—Nursing Partnership Centers on Health Disparities)?

• Does the applicant propose any pilot projects? If so, does the applicant provide specific information that enables adequate scientific evaluation by the objective review committee?

b. Project Work Plan

• Does the applicant provide a project work plan that depicts the relationship between activities (including MIS-related activities if applicable), goals, objectives, responsible organization(s), timelines and measures of success for each project described in the Project Narrative?

• Does the project work plan summarize project activities, its related goals, objectives, responsible member(s) (*i.e.*, HCAP provider, HBHPS, or other project member), action steps and timeline proposed to complete each project described in the Project Narrative?

• Are the proposed objectives for each project specific, measurable, achievable and tied to realistic steps and time-lines?

• Are the proposed measures of success for each project appropriate for the specified goals and objectives?

• In reviewing the specific "responsible member(s)" listed for each project of the Demonstration, do the assigned tasks provide evidence of input and involvement from all members of the stated HCAP Demonstration?

• Do the activities, goals and objectives of each project appear aligned with and appropriate for the proposed budget and the applicant's resources and capabilities?

c. Management Information Systems

• Are the applicant's total MIS-related expenses greater than $100,000 of the total HCAP Federal funds requested? If so, did the applicant submit a completed MIS Specific Budget form?

• Does the applicant only propose "enhancements" of an existing MIS, and not the "development" of a new MIS?

• For enhancements of an existing MIS only, does the applicant adequately:

i. Describe the functionality of the MIS component and how it will address the overall goals and needs of the HCAP Demonstration Project?

ii. List the number and type of HCAP demonstration project members that will be users of the planned or enhanced MIS system?

iii. Provide a description of (if existing) the current MIS and proposed enhancements, specifically discussing:

• Plans to manage data, including how the enhanced system will complement other systems in the organizations?

• Plans to create or purchase software?

• Compliance with Health Insurance Portability and Accountability Act (HIPAA) requirements for patient privacy and confidentiality, and security plans?

• Connectivity: *i.e.*, use of wide area networks, web-based access, smart cards and expanded connections to existing mainframe systems?

Criteria #3—Evaluate Measures—20 Points

• Is there an appropriate plan in place for evaluating the projects carried out under the Demonstration?

• Are the goals and objectives of each project within the Demonstration clear, concise and appropriate?

• Are the objectives of each project time-framed and measurable?

• Are the proposed activities of each project capable of attaining goals and objectives?

• Does the applicant present a plan for collecting input from all collaborators of the Demonstration (HBHPS and HCAP providers) to monitor the progress of achieving goals and measurable objectives of each project?

• Does the applicant present a sound evaluation plan for each project and the overall Demonstration?

• Is it clear how the applicant will make changes to the Demonstration based on evaluation findings?

Criteria #4—Impact—10 Points

Does the applicant address the extent and effectiveness of plans for dissemination of the Demonstration results and/or the extent to which the Demonstration results may be regional or national in scope and/or the degree to which the projects of the Demonstration are replicable? Specifically, does the applicant:

• Provide a publication and dissemination plan for each project of the Demonstration?

• Describe how the Demonstration findings will be applicable to more than one situation?

Criteria #5—Resources/Capabilities—20 Points

• Does the applicant describe the extent to which personnel are qualified by training and/or experience to implement and carry out the Demonstration to assure that all proposed projects of the Demonstration would function optimally and in an interactive, synergistic manner?

• Does the applicant describe the capabilities of the HCAP provider in carrying out the Demonstration?

• Is the work proposed for the Demonstration appropriate to the experience level of the personnel?

• Is there documentation of the capabilities of the applicant organization and the quality and availability of facilities and personnel to fulfill the needs and requirements of the Demonstration?

• Has the applicant designated an institutional official to serve as the Principal Investigator for the Demonstration?

• Has the applicant designated a lead coordinator for each project of the Demonstration?

• Are the plans of the project staff to manage the overall planning activities adequate?

• Is there appropriate justification for the project staff, including the duplication of existing resources or services and anticipated future use of project staff?

• Are the provisions for day-to-day oversight, coordination, support and logistical services sufficient for each project to yield success?

• Is there evidence that the Principal Investigator and key staff of the partnering HCAP providers are working closely together to develop the application?

• Does the project have a Coordinating Council, and if so, have the composition and function been adequately described?

• Are there plans for developmental activities, including recruitment and

expansion, insofar as the proposed projects of the Demonstration and/or training?

• Are there letters of support/commitment from a HCAP consortium supporting the planning activities?

Criteria #6—Support Requested—10 Points

Assess the reasonableness of the proposed budget and the requested period of support in relation to the objectives, the complexity of the proposed projects of the Demonstration, and anticipated results.

• The extent to which costs, as outlined in the budget and required resources sections are reasonable given the scope of work.

• The extent of to which the budget line items are well described and justified in the Budget Justification.

• The extent to which key personnel have adequate time devoted to each project to achieve project activities.

• Does the applicant budget travel of 3 Demonstration personnel for 1–2 HCAP Demonstration Project grantee meetings?

Estimated Amount of Available Funds: Up to $ 5,400,000 will be available in fiscal year 2004 for this program.

Estimated Project Period: Up to 3 years.

Estimated Number of Awards: It is estimated that 6–8 awards will be issued.

Cost Sharing/Matching: There is no cost sharing/matching requirement.

FOR FURTHER INFORMATION CONTACT: Cicely Nelson, Public Health Analyst, Division of Health Center Development, Attn: Healthy Communities Access Program, Bureau of Primary Health Care, HRSA, 4350 East West Highway, 3rd floor, Bethesda, Maryland 20814, telephone: (301) 594–4496, fax: (301) 594–4997, e-mail: *Cnelson@hrsa.gov.*

Executive Order 12372: This program has been determined to be subject to provisions of Executive Order 12372, as implemented by 45 CFR part 100. Executive Order 12372 allows States the option of setting up a system for reviewing applications from within their States for assistance under certain Federal programs. The Form PHS 5161 contains a listing of States that have set up a review system and will provide a State Point of Contact (SPOC) in the State for the review. A list of SPOC contacts is also available at *http://www.whitehouse.gov/omb/grants/spoc.html.* Applicants (other than federally-recognized Indian tribal governments) should contact their SPOCs as early as possible to alert them to the prospective applications and receive any necessary instructions on the State process. For proposed projects servicing more than on State, the applicant is advised to contact the SPOC of each affected State. The due date for State process recommendations is 60 days after the application deadline for new and competing awards. The granting agency does not guarantee to "accommodate or explain" for State process recommendations it receives after that date. (*See* part 148, Intergovernmental Review of Public Health Service Programs under Executive Order 12372 and 45 CFR part 100 for a description of the review process and requirements.)

Dated: July 2, 2004.

Stephen R. Smith,

Senior Advisor to the Administrator.

[FR Doc. 04–15606 Filed 7–6–04; 3:44 pm]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Fiscal Year (FY) 2004 Funding Opportunity

AGENCY: Center for Substance Abuse Treatment, Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice of intent to award a single source grant to the National Association of State Alcohol and Drug Abuse Directors (NASADAD).

SUMMARY: This notice is to inform the public that the Substance Abuse and Mental Health Services Administration (SAMHSA), Center for Substance Abuse Treatment (CSAT), intends to award approximately $500,000 per year for up to three years to the National Association of State Alcohol and Drug Abuse Directors (NASADAD). This is not a formal request for applications. Assistance will be provided only to NASADAD based on the receipt of a satisfactory application that is approved by an independent review group.

Funding Opportunity Title: TI 04–006.

Catalog of Federal Domestic Assistance (CFDA) Number: 93.243.

Authority: Section 1935 of the Public Health Service Act, as amended.

Justification: SAMHSA's Center for Substance Abuse Treatment (CSAT) intends to award a single source grant to the National Association of State Alcohol and Drug Abuse Directors (NASADAD) to facilitate collaborative activities between SAMHSA and the State substance abuse authorities (SSAs). SSAs are the recipients of SAMHSA's (SAPT) Block Grant funds. In order to support SSAs/States to respond to the changes brought about by the transformation of the SAPT Block Grant to a performance and outcomes focus, SAMHSA is seeking to award a single source grant to NASADAD to facilitate the supportive activities. NASADAD is in the unique position to facilitate these activities because:

• NASADAD is the sole and unique organization with a direct official relationship with the SSAs. SSAs, which form the membership of NASADAD, are the only entities that may directly apply for and administer SAMHSA's SAPT Block Grant funds.

• The activities required under this grant program will require NASADAD and its members (SSAs) to provide the necessary State perspective regarding needs and potential changes to the State substance abuse treatment system.

• NASADAD is the sole organization that has been utilizing, in support of CSAT, a Web-based process on performance measurements and an issue identification mechanism.

• NASADAD has a repository of knowledge on State issues related to substance abuse treatment indicators, and accountability for performance in the SAPT Block Grant. This knowledge is critical to the grant project.

• NASADAD has a Data Subcommittee that is essential to the required grant activities. In addition, NASADAD is uniquely qualified to conduct the required activities because of its relationship with the SSAs and its history of collaboration with the Federal government and other organizations that represent issues of importance to State government.

Contact: Hal Krause, SAMHSA/CSAT, 5600 Fishers Lane, Rockwall II, 8th Floor, Rockville, MD 20857; telephone: (301) 443–0488; e-mail: *hkrause@samhsa.gov.*

Dated: July 2, 2004.

Daryl Kade,

Director, Office of Policy, Planning and Budget, Substance Abuse and Mental Health Services Administration.

[FR Doc. 04–15571 Filed 7–8–04; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Information Analysis and Infrastructure Protection Directorate; National Security Telecommunications Advisory Committee

AGENCY: Department of Homeland Security.

ACTION: Notice of closed meeting.

SUMMARY: A Meeting of the NATIONAL SECURITY TELECOMMUNICATIONS ADVISORY COMMITTEE (NSTAC) will be held via conference call on Thursday, July 15, 2004, from 3:30 p.m. to 4:30 p.m. the NSTAC advises the President of the United States on Issues and Problems Related to Implementing National Security and Emergency Preparedness (NS/EP) Communications Policy. At this meeting, the committee will discuss telecommunications assurance and security issues related to planning for National Security Special Events (NSSES). This meeting will be closed to the public.

Basis for Waiver of 15-Day Notice. Due to critical mission and schedule requirements, There is insufficient time to provide the full 15 calendar days notice in the **Federal Register** prior to advisory committee meetings, pursuant to the final rule on Federal advisory committee management codified at 41 CFR 102–3.150.

Basis for Closure. The NSSE planning discussion will concern matters sensitive to homeland security within the meaning of 5 U.S.C. 552b(C)(7) and (C)(9)(B). In addition, it is likely to reveal company proprietary information within the meaning of 5 U.S.C. 552b(C)(4). Accordingly, the department has issued a determination that this meeting will be closed.

FOR FURTHER INFORMATION CONTACT: Call Ms. Kiesha Gebreyes, (703) 607–6134, or write the manager, National Communications System, 701 South Court House Road, Arlington, Virginia 22204–2198.

Peter M. Fonash,

Federal Register Certifying Officer, National Communications System, Department of Homeland Security.

[FR Doc. 04–15587 Filed 7ndash;8–04; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOMELAND SECURITY

Customs and Border Protection

Undertakings of the Department of Homeland Security Bureau of Customs and Border Protection Regarding the Handling of Passenger Name Record Data

AGENCY: Customs and Border Protection; Department of Homeland Security.

ACTION: General notice.

SUMMARY: On May 11, 2004, the Department of Homeland Security (DHS), Customs and Border Protection (CBP) issued to the European Union (EU) a document containing a set of representations regarding the manner in which CBP will handle certain Passenger Name Record (PNR) data relating to flights between the United States and EU member states. The document provides the framework within which the EU was able to approve several measures which the EU requires to permit the transfer of such PNR data to CBP, consistent with EU law. On May 17, 2004, the European Commission announced that it had issued an "adequacy finding" for the transfer of such PNR data to CBP, and a related international agreement was also approved for execution by the European Council. DHS wishes to provide the public with notice of the issuance of the document upon which the EU has based these very important decisions.

FOR FURTHER INFORMATION CONTACT: Erik Shoberg, Office of Field Operations, (202) 927–0530.

SUPPLEMENTARY INFORMATION:

Background

On May 11, 2004, the Department of Homeland Security (DHS), Customs and Border Protection (CBP) issued to the European Union (EU) the document set forth below (the "Undertakings"). These Undertakings contain a set of representations regarding the manner in which CBP will handle certain Passenger Name Record (PNR) data relating to flights between the United States and EU member states, access to which is required under U.S. law (49 U.S.C. 44909) and the implementing regulations (19 CFR 122.49b). These Undertakings provide the framework within which the EU was able to approve several measures which the EU requires to permit the transfer of such PNR data to CBP, consistent with EU law. On May 17, 2004, the European Commission announced that it had issued an "adequacy finding" for the transfer of such PNR data to CBP, and a related international agreement was also approved for execution by the European Council. DHS wishes to provide the public with notice of the issuance of this document upon which the EU has based these very important decisions.

Dated: July 6, 2004.

Tom Ridge,

Secretary, Department of Homeland Security.

Undertakings of the Department of Homeland Security Bureau of Customs and Border Protection (CBP)

In support of the plan of the European Commission (Commission) to exercise the powers conferred on it by Article 25(6) of Directive 95/46/EC (the Directive) and to adopt a decision recognizing the Department of Homeland Security Bureau of Customs and Border Protection (CBP) as providing adequate protection for the purposes of air carrier transfers of Passenger [1] Name Record (PNR) data which may fall within the scope of the Directive, CBP undertakes as follows:

Legal Authority To Obtain PNR

(1) By legal statute (title 49, United States Code, section 44909(c)(3)) and its implementing (interim) regulations (title 19, Code of Federal Regulations, § 122.49b), each air carrier operating passenger flights in foreign air transportation to or from the United States, must provide CBP (formerly, the U.S. Customs Service) with electronic access to PNR data to the extent it is collected and contained in the air carrier's automated reservation/departure control systems ("reservation systems").

Use of PNR Data by CBP

(2) Most data elements contained in PNR data can be obtained by CBP upon examining a data subject's airline ticket and other travel documents pursuant to its normal border control authority, but the ability to receive this data electronically will significantly enhance CBP's ability to facilitate *bona fide* travel and conduct efficient and effective advance risk assessment of passengers.

(3) PNR data is used by CBP strictly for purposes of preventing and combating: (1) Terrorism and related crimes; (2) other serious crimes, including organized crime, that are transnational in nature; and (3) flight from warrants or custody for the crimes described above. Use of PNR data for these purposes permits CBP to focus its resources on high risk concerns, thereby facilitating and safeguarding *bona fide* travel.

Data Requirements

(4) Data elements which CBP requires are listed herein at Attachment "A".

[1] For the purposes of these Undertakings, the terms "passenger" and "passengers" shall include crew members.

(Such identified elements are hereinafter referred to as "PNR" for purposes of these Undertakings). Although CBP requires access to each of those thirty-four (34) data elements listed in Attachment "A", CBP believes that it will be rare that an individual PNR will include a full set of the identified data. In those instances where the PNR does not include a full set of the identified data, CBP will not seek direct access from the air carrier's reservation system to other PNR data which are not listed on Attachment "A".

(5) With respect to the data elements identified as "OSI" and "SSI/SSR" (commonly referred to as general remarks and open fields), CBP's automated system will search those fields for any of the other data elements identified in Attachment "A". CBP personnel will not be authorized to manually review the full OSI and SSI/SSR fields unless the individual that is the subject of a PNR has been identified by CBP as high risk in relation to any of the purposes identified in paragraph 3 hereof.

(6) Additional personal information sought as a direct result of PNR data will be obtained from sources outside the government only through lawful channels, including through the use of mutual legal assistance channels where appropriate, and only for the purposes set forth in paragraph 3 hereof. For example, if a credit card number is listed in a PNR, transaction information linked to that account may be sought, pursuant to lawful process, such as a subpoena issued by a grand jury or a court order, or as otherwise authorized by law. In addition, access to records related to e-mail accounts derived from a PNR will follow U.S. statutory requirements for subpoenas, court orders, warrants, and other processes as authorized by law, depending on the type of information being sought.

(7) CBP will consult with the European Commission regarding revision of the required PNR data elements (Attachment "A"), prior to effecting any such revision, if CBP becomes aware of additional PNR fields that airlines may add to their systems which would significantly enhance CBP's ability to conduct passenger risk assessments or if circumstances indicate that a previously non-required PNR field will be needed to fulfill the limited purposes referred to in paragraph 3 of these Undertakings.

(8) CBP may transfer PNRs on a bulk basis to the Transportation Security Administration (TSA) for purposes of TSA's testing of its Computer Assisted Passenger Prescreening System II (CAPPS II). Such transfers will not be made until PNR data from U.S. domestic flights has first been authorized for testing. PNR data transferred under this provision will not be retained by TSA or any other parties directly involved in the tests beyond the period necessary for testing purposes, or be transferred to any other third party[2]. The purpose of the processing is strictly limited to testing the CAPPS II system and interfaces, and, except in emergency situations involving the positive identification of a known terrorist or individual with established connections to terrorism, is not to have any operational consequences. Under the provision requiring an automated filtering method described in paragraph 10, CBP will have filtered and deleted "sensitive" data before transferring any PNRs to TSA on a bulk basis under this paragraph.

Treatment of "Sensitive" Data

(9) CBP will not use "sensitive" data (*i.e.*, personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning the health or sex life of the individual) from the PNR, as described below.

(10) CBP will implement, with the least possible delay, an automated system which filters and deletes certain "sensitive" PNR codes and terms which CBP has identified in consultation with the European Commission.

(11) Until such automated filters can be implemented CBP represents that it does not and will not use "sensitive" PNR data and will undertake to delete "sensitive" data from any discretionary disclosure of PNR under paragraphs 28–34.[3]

Method of Accessing PNR Data

(12) With regard to the PNR data which CBP accesses (or receives) directly from the air carrier's reservation systems for purposes of identifying potential subjects for border examination, CBP personnel will only access (or receive) and use PNR data concerning persons whose travel includes a flight into or out of[4] the United States.

(13) CBP will "pull" passenger information from air carrier reservation systems until such time as air carriers are able to implement a system to "push" the data to CBP.

(14) CBP will pull PNR data associated with a particular flight no earlier than 72 hours prior to the departure of that flight, and will re-check the systems no more than three (3) times between the initial pull, the departure of the flight from a foreign point and the flight's arrival in the United States, or between the initial pull and the departure of the flight from the United States, as applicable, to identify any changes in the information. In the event that the air carriers obtain the ability to "push" PNR data, CBP will need to receive the data 72 hours prior to departure of the flight, provided that all changes to the PNR data which are made between that point and the time of the flight's arrival in or departure from the U.S., are also pushed to CBP.[5] In the unusual event that CBP obtains advance information that person(s) of specific concern may be travelling on a flight to, from or through the U.S., CBP may pull (or request a particular push) of PNR data prior to 72 hours before departure of the flight to ensure proper enforcement action may be taken when essential to prevent or combat an offense enumerated in paragraph 3 hereof. To the extent practicable, in such instances where PNR data must be accessed by CBP prior to 72 hours before the departure of the flight, CBP will utilize customary law enforcement channels.

Storage of PNR Data

(15) Subject to the approval of the National Archives and Records Administration (44 U.S.C. 2101, *et seq.*), CBP will limit on-line access to PNR data to authorized CBP users[6] for a period of seven (7) days, after which the number of officers authorized to access the PNR data will be even further limited for a period of three years and

[2] For purposes of this provision, CBP is not considered a party directly involved in the CAPPS II testing or a "third party."

[3] Prior to CBP's implementation of automated filters (as referenced in paragraph 10 hereof), if "sensitive" data exists in a PNR which is the subject of a non-discretionary disclosure by CBP as described in paragraph 35 hereof, CBP will make every effort to limit the release of "sensitive" PNR data, consistent with U.S. law.

[4] This would include persons transiting through the United States.

[5] In the event that the air carriers agree to push the PNR data to CBP, the agency will engage in discussions with the air carriers regarding the possibility of pushing PNR data at periodic intervals between 72 hours before departure of the flight from a foreign point and the flight's arrival in the United States, or within 72 hours before the departure of the flight from the United States, as applicable. CBP seeks to utilize a method of pushing the necessary PNR data that meets the agency's needs for effective risk assessment, while minimizing the economic impact upon air carriers.

[6] These authorized CBP users would include employees assigned to analytical units in the field offices, as well as employees assigned to the National Targeting Center. As indicated previously, persons charged with maintaining, developing or auditing the CBP database will also have access to such data for those limited purposes.

6 months (3.5 years) from the date the data is accessed (or received) from the air carrier's reservation system. After 3.5 years, PNR data that has not been manually accessed during that period of time, will be destroyed. PNR data that has been manually accessed during the initial 3.5 year period will be transferred by CBP to a deleted record file,[7] where it will remain for a period of eight (8) years before it is destroyed. This schedule, however, would not apply to PNR data that is linked to a specific enforcement record (such data would remain accessible until the enforcement record is archived). With respect to PNR which CBP accesses (or receives) directly from air carrier reservation systems during the effective dates of these Undertakings, CBP will abide by the retention policies set forth in the present paragraph, notwithstanding the possible expiration of the Undertakings pursuant to paragraph 46 herein.

CBP Computer System Security

(16) Authorized CBP personnel obtain access to PNR through the closed CBP intranet system which is encrypted end-to-end and the connection is controlled by the Customs Data Center. PNR data stored in the CBP database is limited to "read only" access by authorized personnel, meaning that the substance of the data may be programmatically reformatted, but will not be substantively altered in any manner by CBP once accessed from an air carrier's reservation system.

(17) No other foreign, Federal, State or local agency has direct electronic access to PNR data through CBP databases (including through the Interagency Border Inspection System (IBIS)).

(18) Details regarding access to information in CBP databases (such as who, where, when (date and time) and any revisions to the data) are automatically recorded and routinely audited by the Office of Internal Affairs to prevent unauthorized use of the system.

(19) Only certain CBP officers, employees or information technology contractors[8] (under CBP supervision) who have successfully completed a background investigation, have an active, password-protected account in the CBP computer system, and have a recognized official purpose for reviewing PNR data, may access PNR data.

(20) CBP officers, employees and contractors are required to complete security and data privacy training, including passage of a test, on a biennial basis. CBP system auditing is used to monitor and ensure compliance with all privacy and data security requirements.

(21) Unauthorized access by CBP personnel to air carrier reservation systems or the CBP computerized system which stores PNR is subject to strict disciplinary action (which may include termination of employment) and may result in criminal sanctions being imposed (fines, imprisonment of up to one year, or both) (*see* title 18, United States Code, section 1030).

(22) CBP policy and regulations also provide for stringent disciplinary action (which may include termination of employment) to be taken against any CBP employee who discloses information from CBP's computerized systems without official authorization (title 19, Code of Federal Regulations, § 103.34).

(23) Criminal penalties (including fines, imprisonment of up to one year, or both) may be assessed against any officer or employee of the United States for disclosing PNR data obtained in the course of his employment, where such disclosure is not authorized by law (*see* title 18, United States Code, sections 641, 1030, 1905).

CBP Treatment and Protection of PNR Data

(24) CBP treats PNR information regarding persons of any nationality or country of residence as law enforcement sensitive, confidential personal information of the data subject, and confidential commercial information of the air carrier, and, therefore, would not make disclosures of such data to the public, except as in accordance with these Undertakings or as otherwise required by law.

(25) Public disclosure of PNR data is generally governed by the Freedom of Information Act (FOIA) (title 5, United States Code, section 552) which permits any person (regardless of nationality or country of residence) access to a U.S. Federal agency's records, except to the extent such records (or a portion thereof) are protected from public disclosure by an applicable exemption under the FOIA. Among its exemptions, the FOIA permits an agency to withhold a record (or a portion thereof) from disclosure where the information is confidential commercial information, where disclosure of the information would constitute a clearly unwarranted invasion of personal privacy, or where the information is compiled for law enforcement purposes, to the extent that disclosure may reasonably be expected to constitute an unwarranted invasion of personal privacy (title 5, United States Code, sections 552(b)(4), (6), (7)(C)).

(26) CBP regulations (title 19, Code of Federal Regulations, §103.12), which govern the processing of requests for information (such as PNR data) pursuant to the FOIA, specifically provide that (subject to certain limited exceptions in the case of requests by the data subject) the disclosure requirements of the FOIA are not applicable to CBP records relating to: (1) Confidential commercial information; (2) material involving personal privacy where the disclosure would constitute a clearly unwarranted invasion of personal privacy; and (3) information compiled for law enforcement purposes, where disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy.[9]

(27) CBP will take the position in connection with any administrative or judicial proceeding arising out of a FOIA request for PNR information accessed from air carriers, that such records are exempt from disclosure under the FOIA.

Transfer of PNR Data to Other Government Authorities

(28) With the exception of transfers between CBP and TSA pursuant to paragraph 8 herein, Department of Homeland Security (DHS) components will be treated as "third agencies", subject to the same rules and conditions for sharing of PNR data as other government authorities outside DHS.

(29) CBP, in its discretion, will only provide PNR data to other government authorities, including foreign government authorities, with counter-terrorism or law enforcement functions, on a case-by-case basis, for purposes of preventing and combating offenses identified in paragraph 3 herein. (Authorities with whom CBP may share such data shall hereinafter be referred to as the "Designated Authorities").

(30) CBP will judiciously exercise its discretion to transfer PNR data for the stated purposes. CBP will first determine if the reason for disclosing the PNR data to another Designated Authority fits within the stated purpose

[7] Although the PNR record is not technically deleted when it is transferred to the Deleted Record File, it is stored as raw data (not a readily searchable form and, therefore, of no use for "traditional" law enforcement investigations) and is only available to authorized personnel in the Office of Internal Affairs for CBP (and in some cases the Office of the Inspector General in connection with audits) and personnel responsible for maintaining the database in CBP's Office of Information Technology, on a "need to know" basis.

[8] Access by "contractors" to any PNR data contained in the CBP computer systems would be confined to persons under contract with CBP to assist in the maintenance or development of CBP's computer system.

[9] CBP would invoke these exemptions uniformly, without regard to the nationality or country of residence of the subject of the data.

(see paragraph 29 herein). If so, CBP will determine whether that Designated Authority is responsible for preventing, investigating or prosecuting the violations of, or enforcing or implementing, a statute or regulation related to that purpose, where CBP is aware of an indication of a violation or potential violation of law. The merits of disclosure will need to be reviewed in light of all the circumstances presented.

(31) For purposes of regulating the dissemination of PNR data which may be shared with other Designated Authorities, CBP is considered the "owner" of the data and such Designated Authorities are obligated by the express terms of disclosure to: (1) Use the PNR data only for the purposes set forth in paragraph 29 or 34 herein, as applicable; (2) ensure the orderly disposal of PNR information that has been received, consistent with the Designated Authority's record retention procedures; and (3) obtain CBP's express authorization for any further dissemination. Failure to respect the conditions for transfer may be investigated and reported by the DHS Chief Privacy Officer and may make the Designated Authority ineligible to receive subsequent transfers of PNR data from CBP.

(32) Each disclosure of PNR data by CBP will be conditioned upon the receiving agency's treatment of this data as confidential commercial information and law enforcement sensitive, confidential personal information of the data subject, as identified in paragraphs 25 and 26 hereof, which should be treated as exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552). Further, the recipient agency will be advised that further disclosure of such information is not permitted without the express prior approval of CBP. CBP will not authorize any further transfer of PNR data for purposes other than those identified in paragraphs 29, 34 or 35 herein.

(33) Persons employed by such Designated Authorities who without appropriate authorization disclose PNR data, may be liable for criminal sanctions (title 18, United States Code, sections 641, 1030, 1905).

(34) No statement herein shall impede the use or disclosure of PNR data to relevant government authorities, where such disclosure is necessary for the protection of the vital interests of the data subject or of other persons, in particular as regards significant health risks. Disclosures for these purposes will be subject to the same conditions for transfers set forth in paragraphs 31 and 32 of these Undertakings.

(35) No statement in these Undertakings shall impede the use or disclosure of PNR data in any criminal judicial proceedings or as otherwise required by law. CBP will advise the European Commission regarding the passage of any U.S. legislation which materially affects the statements made in these Undertakings.

Notice, Access and Opportunities for Redress for PNR Data Subjects

(36) CBP will provide information to the traveling public regarding the PNR requirement and the issues associated with its use (*i.e.*, general information regarding the authority under which the data is collected, the purpose for the collection, protection of the data, data sharing, the identity of the responsible official, procedures available for redress and contact information for persons with questions or concerns, *etc.*, for posting on CBP's Web site, in travel pamphlets, *etc.*).

(37) Requests by the data subject (also known as "first party requesters") to receive a copy of PNR data contained in CBP databases regarding the data subject are processed under the Freedom of Information Act (FOIA). Such requests may be addressed to: Freedom of Information Act (FOIA) Request, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Washington, DC 20229, if by mail; or such request may be delivered to the Disclosure Law Officer, U.S. Customs and Border Protection, Headquarters, Washington, DC. For further information regarding the procedures for making FOIA requests are contained in § 103.5 of title 19 of the U.S. Code of Federal Regulations. In the case of a first-party request, the fact that CBP otherwise considers PNR data to be confidential personal information of the data subject and confidential commercial information of the air carrier will not be used by CBP as a basis under FOIA for withholding PNR data from the data subject.

(38) In certain exceptional circumstances, CBP may exercise its authority under FOIA to deny or postpone disclosure of all (or, more likely, part) of the PNR record to a first party requester, pursuant to title 5, United States Code, section 552(b) (*e.g.*, if disclosure under FOIA "could reasonably be expected to interfere with enforcement proceedings" or "would disclose techniques and procedures for law enforcement investigations * * * [which] could reasonably be expected to risk circumvention of the law"). Under FOIA, any requester has the authority to administratively and judicially challenge CBP's decision to withhold information (*see* 5 U.S.C. 552(a)(4)(B); 19 CFR 103.7–103.9).

(39) CBP will undertake to rectify [10] data at the request of passengers and crewmembers, air carriers or Data Protection Authorities (DPAs) in the EU Member States (to the extent specifically authorized by the data subject), where CBP determines that such data is contained in its database and a correction is justified and properly supported. CBP will inform any Designated Authority which has received such PNR data of any material rectification of that PNR data.

(40) Requests for rectification of PNR data contained in CBP's database and complaints by individuals about CBP's handling of their PNR data may be made, either directly or via the relevant DPA (to the extent specifically authorized by the data subject) to the Assistant Commissioner, Office of Field Operations, U.S. Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Washington, DC 20229.

(41) In the event that a complaint cannot be resolved by CBP, the complaint may be directed, in writing, to the Chief Privacy Officer, Department of Homeland Security, Washington, DC 20528, who will review the situation and endeavor to resolve the complaint.[11]

(42) Additionally, the DHS Privacy Office will address on an expedited basis complaints referred to it by DPAs in the European Union (EU) Member States on behalf of an EU resident to the extent such resident has authorized the DPA to act on his or her behalf and believes that his or her data protection complaint regarding PNR has not been satisfactorily dealt with by CBP (as set out in paragraphs 37–41 of these Undertakings) or the DHS Privacy Office. The Privacy Office will report its conclusions and advise the DPA or DPAs concerned regarding actions taken, if any. The DHS Chief Privacy Officer will include in her report to Congress issues regarding the number, the substance and the resolution of complaints regarding the handling of personal data, such as PNR.[12]

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[10] By "rectify", CBP wishes to make clear that it will not be authorized to revise the data within the PNR record that it accesses from the air carriers. Rather, a separate record linked to the PNR record will be created to note that the data was determined to be inaccurate and the proper correction. Specifically, CBP will annotate the passenger's secondary examination record to reflect that certain data in the PNR may be or is inaccurate.

[11] The DHS Chief Privacy Officer is independent of any directorate within the Department of Homeland Security. She is statutorily obligated to ensure that personal information is used in a manner that complies

[12] Pursuant to section 222 of the Homeland Security Act of 2002 (the "Act") (Public Law 107–

Compliance Issues

(43) CBP, in conjunction with DHS, undertakes to conduct once a year, or more often if agreed by the parties, a joint review with the European Commission assisted as appropriate by representatives of European law enforcement authorities and/or authorities of the Member States of the European Union,[13] on the implementation of these Undertakings, with a view to mutually contributing to the effective operation of the processes described in these Undertakings.

(44) CBP will issue regulations, directives or other policy documents incorporating the statements herein, to ensure compliance with these Undertakings by CBP officers, employees and contractors. As indicated herein, failure of CBP officers, employees and contractors to abide by CBP's policies incorporated therein may result in strict disciplinary measures being taken, and criminal sanctions, as applicable.

Reciprocity

(45) In the event that an airline passenger identification system is implemented in the European Union which requires air carriers to provide authorities with access to PNR data for persons whose current travel itinerary includes a flight to or from the European Union, CBP shall, strictly on the basis of reciprocity, encourage U.S.-based airlines to cooperate.

296, dated November 25, 2002), the Privacy Officer for DHS is charged with conducting a "privacy impact assessment" of proposed rules of the Department on "on the privacy of personal information, including the type of personal information collected and the number of people affected" and must report to Congress on an annual basis regarding the "activities of the Department that affect privacy. * * *" Section 222(5) of the Act also expressly directs the DHS Privacy Officer to hear and report to Congress regarding all "complaints of privacy violations."

[13] The composition of the teams on both sides will be notified to each other in advance and may include appropriate authorities concerned with privacy/data protection, customs control and other forms of law enforcement, border security and/or aviation security. Participating authorities will be required to obtain any necessary security clearances and will adhere to the confidentiality of the discussions and documentation to which they may be given access. Confidentiality will not however be an obstacle to each side making an appropriate report on the results of the joint review to their respective competent authorities, including the U.S. Congress and the European Parliament. However, under no circumstances may participating authorities disclose any personal data of a data subject; nor may participating authorities disclose any non-public information derived from documents to which they are given access, or any operational or internal agency information they obtain during the joint review. The two sides will mutually determine the detailed modalities of the joint review.

Review and Termination of Undertakings

(46) These Undertakings shall apply for a term of three years and six months (3.5 years), beginning on the date upon which an agreement enters into force between the United States and the European Community, authorizing the processing of PNR data by air carriers for purposes of transferring such data to CBP, in accordance with the Directive. After these Undertakings have been in effect for two years and six months (2.5 years), CBP, in conjunction with DHS, will initiate discussions with the Commission with the goal of extending the Undertakings and any supporting arrangements, upon mutually acceptable terms. If no mutually acceptable arrangement can be concluded prior to the expiration date of these Undertakings, the Undertakings will cease to be in effect.

No Private Right or Precedent Created

(47) These Undertakings do not create or confer any right or benefit on any person or party, private or public.

(48) The provisions of these Undertakings shall not constitute a precedent for any future discussions with the European Commission, the European Union, any related entity, or any third State regarding the transfer of any form of data.

Dated: May 11, 2004.

Attachment "A"—PNR Data Elements Required by CBP From Air Carriers

1. PNR record locator code.
2. Date of reservation.
3. Date(s) of intended travel.
4. Name.
5. Other names on PNR.
6. Address.
7. All forms of payment information.
8. Billing address.
9. Contact telephone numbers.
10. All travel itinerary for specific PNR.
11. Frequent flyer information (limited to miles flown and address(es)).
12. Travel agency.
13. Travel agent.
14. Code share PNR information.
15. Travel status of passenger.
16. Split/Divided PNR information.
17. E-mail address.
18. Ticketing field information.
19. General remarks.
20. Ticket number.
21. Seat number.
22. Date of ticket issuance.
23. No show history.
24. Bag tag numbers.
25. Go show information.
26. OSI information.
27. SSI/SSR information.
28. Received from information.
29. All historical changes to the PNR.
30. Number of travelers on PNR.
31. Seat information.
32. One-way tickets.
33. Any collected APIS information.
34. ATFQ fields.

[FR Doc. 04–15642 Filed 7–6–04; 4:31 pm]

BILLING CODE 4820–02–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4901–N–28]

Federal Property Suitable as Facilities to Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

DATES: Effective Date: July 9, 2004.

FOR FURTHER INFORMATION CONTACT: Kathy Burruss, Department of Housing and Urban Development, Room 7262, 451 Seventh Street, SW., Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565, (these telephone numbers are not toll-free), or call the toll-free Title V information line at 1–800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988, court order in *National Coalition for the Homeless* v. *Veterans Administration*, No. 88–2503–OG (D.D.C.) HUD publishes a notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless.

Today's notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: July 1, 2004.

Mark R. Johnston,

Director, Office of Special Needs Assistance Programs.

[FR Doc. 04–15445 Filed 7–8–04; 8:45 am]

BILLING CODE 4210–29–M

DEPARTMENT OF INTERIOR

National Park Service

60-Day Notice of Intention To Request Clearance of Collection of Information; Opportunity for Public Comment

AGENCY: National Park Service, the Department of Interior.

ACTION: Notice and request for comments.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507 *et seq.*) and 5 CFR part 1320, the National Park Service (NPS) invites public comments on a submitted request to the Office of Management and Budget (OMB) to approve a revision of a currently approved collection (OMB# 1024–0038) associated with 36 CFR part 61, "Procedures for State, Tribal, and Local Government Historic Preservation Programs." NPS intends to request a separate control number for those information collections associated with information collections related to Historic Preservation Fund grants to States. In addition, revision is needed because some information collections had not been recognized as such during preparation for earlier OMB approvals. Section 101(b) of the National Historic Preservation Act, as amended, (16 U.S.C. 470a(b)) specifies the role of States in the national historic preservation partnership program. Section 101(c), section 103(c), and section 301 of the Act (16 U.S.C. 470a(c), 16 U.S.C. 470c(c), and 16 U.S.C. 470w) specify the role of local governments in the national historic preservation partnership program. Section 101(d) of the Act (16 U.S.C. 470a(d)) specifies the role of tribes in the national historic preservation partnership program. All 59 States, territories, and the District of Columbia participate in the national historic preservation partnership program. More than 1,400 local governments have become Certified Local Governments (CLGs) in order to participate in the national historic preservation partnership program. Approximately 59 local governments become CLGs each year. NPS developed the information collections associated with 36 CFR part 61 in consultation with State, Tribal, and local government partners. The requirements/information collections are unchanged since the last approval by OMB.

DATES: To assure that the NPS considers your comments on this notice, NPS must receive the comments on or before September 7, 2004.

Send Comments To: John W. Renaud, Project Coordinator, State, Tribal and Local Programs, Heritage Preservation Services, National Center for Cultural Resources, National Park Service, 1849 C St., NW., Org. Code 2255, Washington, DC 20240–0001, via fax at 202–371–1961, or via e-mail *at John_Renaud@nps.gov.*

FOR FURTHER INFORMATION CONTACT: John W. Renaud, Project Coordinator, State, Tribal and Local Programs, Heritage Preservation Services, National Center for Cultural Resources, National Park Service, 1849 C St., NW., Org. Code 2255, Washington, DC 20240–0001, via fax at 202–371–1961, via e-mail at *John_Renaud@nps.gov*, or via telephone at (202) 354–2066.

SUPPLEMENTARY INFORMATION:

Title: 36 CFR Part 61, Procedures for State, Tribal, and Local Government Historic Preservation Programs.

OMB Number: 1024–0038.

Expiration Date of Approval: July 31, 2004.

Type of Request: Revision of a currently approved collection.

Abstract: This information collection has an impact on State, tribal, and local governments that wish to participate formally in the national historic preservation. The National Park Service uses the information collections to ensure compliance with the National Historic Preservation Act, as amended (16 U.S.C. 470 *et seq.*). This information collection also will produce performance data that NPS uses to assess its progress in meeting goals set in Departmental and NPS strategic plans created pursuant to the 1993 Government Performance and Results Act, as amended. This request for OMB approval includes local government burden for information collections associated with various aspects of the Certified Local Government (CLG) program. This request for OMB approval includes State government burden for information collections related to the CLG program, maintenance of a State inventory of historic and prehistoric properties, tracking State Historic Preservation Office historic preservation consultation with Federal agencies, and the State role in the State Program Review Process.

Respondents: State and local governments.

Estimate of Burden: NPS estimates that the total public (State plus local) burden for the Certified Local Government (CLG) program averages 40.8 hours per CLG for the certification, monitoring, and evaluation process. NPS estimates that the burden averages 0.5 hours per inventory record, 0.8 hours per Federal agency project tracked, and 90 hours per State Program Review. The combined total public burden for the 36 CFR Part 61-related information collections would average 132 hours per partner. These estimates of burden include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and reviewing the collection of information.

Estimated Number of Respondents/ Record Keepers: NPS estimates that there are 34,136 responses per year. This is the gross number of responses for all of the elements included in this information collection. The net numbers of partners participating in this information collection annually are 59 States and more than 1,400 CLGs. The frequency of response varies depending upon the activity. In the CLG program, States and local governments participate once for the certification process, once per year for the monitoring of each CLG, and once every four years for the evaluation of each CLG. Each State adds property records to its inventory and tracks the progress of consultation with Federal agencies as the information becomes available. The National Historic Preservation Act requires that each State undergo a State Program Review every four years.

Estimated average number of State and local CLG responses per State/CLG: 39 annually.

Estimated average gross number State and local CLG responses for all States/ CLGs: 3,624 annually.

Estimated average minimum number of State inventory responses per State: 159 annually.

Estimated average gross minimum number of State inventory responses for all States: 8,904 annually.

Estimated average minimum number of State consultation on Federal projects responses per State: 366 annually.

Estimated average gross minimum number of State consultation of Federal projects responses for all States: 21,594 annually.

Estimated average minimum number of State Program Reviews per State: 1 annually.

Estimated average gross minimum number of State Program Reviews for all States: 14 annually.

Estimated average gross number of responses all collections: 34,136 annually.

Estimated average burden hours in the CLG program per response: 6.8 hours.

Estimated average burden hours in the State inventory program per response: 0.5 hours.

Estimated average burden hours in the Federal agency consultation tracking program per response: 0.8 hours.

Estimated average burden hours in the State Program Review program per response: 90 hours.

Estimated average annual burden hours per partner for all responses: 14.7 hours.

Estimated Annual Burden on all Respondents: 47,943 hours.

NPS is soliciting comments regarding:

(1) Whether the collection of information is necessary for the proper performance of the functions of NPS, including whether the information will have practical utility;

(2) The accuracy of the burden estimate including the validity of the method and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected;

(4) Ways to minimize the burden of collecting the information, including through the use of appropriate automated, electronic, mechanical, or other forms of information technology; or,

(5) Any other aspect of this collection of information.

NPS will summarize and include in the request for OMB approval all responses to this notice. All comments will also become a matter of public record. You can obtain copies of the information collection from John W. Renaud, Project Coordinator, State, Tribal and Local Programs, Heritage Preservation Services, National Center for Cultural Resources, National Park Service, 1849 C St., NW., Org. Code 2255, Washington, DC 20240–0001

Dated: May 20, 2004.

Leonard E. Stowe,

Acting, Information Collection Clearance Officer, National Park Service, WAPC.

[FR Doc. 04–15576 Filed 7–8–04; 8:45 am]

BILLING CODE 4312–52–M

DEPARTMENT OF THE INTERIOR

National Park Service

General Management Plan, Final Environmental Impact Statement, Big Bend National Park, TX

AGENCY: National Park Service, Department of Interior.

ACTION: Notice of availability of the Final Environmental Impact Statement for the General Management Plan, Big Bend National Park.

SUMMARY: Pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(C), the National Park Service announces the availability of a Final Environmental Impact Statement for the General Management Plan, Big Bend National Park, Texas.

DATES: The National Park Service will execute a Record of Decision (ROD) no sooner than 30 days following publication by the Environmental Protection Agency of the notice of availability of the Final Environmental Impact Statement.

ADDRESSES: Information will be available for public inspection in the office of John H. King, Superintendent, Big Bend National Park, Park Headquarters, Panther Junction, P.O. Box 129, Big Bend National Park, Texas, 79834, telephone: (432) 477–1101.

FOR FURTHER INFORMATION CONTACT: John Paige, National Park Service, Denver Service Center, Planning Division, 12795 West Alameda Parkway, P.O. Box 25287, Denver, CO 80225–0287, telephone: (303) 969–2356

Dated: April 29, 2004.

Michael D. Snyder,

Deputy Director, Intermountain Region, National Park Service.

[FR Doc. 04–15577 Filed 7–8–04; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–04–018]

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: July 13, 2004, at 11 a.m.

PLACE: Room 101, 500 E Street SW., Washington, DC 20436, telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda for future meetings: None.
2. Minutes.
3. Ratification List.
4. Inv. Nos. 731–TA–1043–1045 (Final) (Polyethylene Retail Carrier Bags from China, Malaysia, and Thailand)—briefing and vote. (The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before July 23, 2004.)
5. Outstanding action jackets: None.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

Issued: July 6, 2004.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–15749 Filed 7–7–04; 2:09 pm]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–04–019]

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: July 15, 2004, at 11 a.m.

PLACE: Room 101, 500 E Street SW., Washington, DC 20436, telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda for future meetings: None.
2. Minutes.
3. Ratification List.
4. Inv. No. 731–TA–1046 (Final) (Tetrahydrofurfuryl Alcohol from China)—briefing and vote. (The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before July 26, 2004.)
5. Inv. No. 731–TA–1047 (Final) (Ironing Tables and Certain Parts Thereof from China)—briefing and vote. (The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before July 28, 2004.)
6. Outstanding action jackets: None.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

Issued: July 6, 2004.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–15750 Filed 7–7–04; 2:09 pm]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Public Meeting Concerning Heavy Duty Diesel Engine Consent Decrees

The Department of Justice and the Environmental Protection Agency will hold a public meeting on Wednesday, August 4, 2004, at 10 a.m. at the Department of Justice, 1425 New York Avenue, NW., Washington, DC, 13th Floor Conference Room. The subject of

the meeting will be the status of the implementation of the provisions of the seven consent decrees signed by the United States and diesel engine manufacturers and entered by the United States District Court for the District of Columbia on July 1, 1999, (*United States* v. *Catepillar*, Case No. 1:98CV02544; *United States* v. *Navistar International Transportation Corporation*, Case No. 1:98CV02545; *United States* v. *Cummings Engine Company*, Case No. 1:98CV02546; *United States* v. *Detroit Diesel Corporation*, Case No. 1:98CV02548; *United States* v. *Volvo Truck Corporation*, Case No. 1:98CV2547; *United States* v. *Renault Vehicles Industries, S.A.*, Case No. 1:98CV02543). In supporting entry by the court of the decrees, the United States committed to meet with States, industry groups, environmental groups, and concerned citizens to discuss consent decree implementation issues.

Future meetings will be announced here and on EPA's Diesel Engine Settlement Web site at: *http://www.epa.gov/compliance/civil/programs/caa/diesel/index.html.*

Interested parties may contact the Environmental Protection Agency prior to the meeting at the address listed below with questions or suggestions for topics of discussion.

Agenda (Times are approximate).

1. Panel Remarks 10 a.m.

Remarks by DOJ and EPA regarding implementation of the provisions of the diesel engine consent decrees.

2. Public comments and questions.

Adjourn 12 p.m.

For further information, please contact: Anne Wick, EPA Diesel Engine Consent Decree Coordinator, U.S. Environmental Protection Agency (Mail Code 2242A), 1200 Pennsylvania Avenue, NW., Washington, DC 20470, e-mail: *wick.anne@epa.gov*.

Karen S. Dworkin,

Assistant Chief, Environment and Natural Resources Division, Environmental Enforcement Section.

[FR Doc. 04–15575 Filed 7–8–04; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of a Consent Decree Under the Comprehensive Environmental Response, Compensation and Liability Act

Under 28 CFR 50.7, notice is hereby given that on June 18, 2004, a proposed Consent Decree in *United States* v. *Mallinckrodt, Inc.* et al., Civil Action No. 4:02CV1488 was lodged with the United States District Court for the Eastern District of Missouri.

In this action the United States sought response costs relating to response actions by the Environmental Protection Agency ("EPA") at the Great Lakes Container Corporation Superfund Site in St. Louis, Missouri. The Site is a former drum reclamation facility contaminated primarily with lead and polychlorinated biphenyls ("PCBs"). The settling defendants, Croda Inks Corporation, Engineered Lubricants Co., Gardner Denver, Inc., Jesco Resources, Inc., and the Defense Logistics Agency, sent drums to the facility and thereby contributed small or unknown amounts of lead to the Site. In the proposed consent decree, the settling defendants have agreed to reimburse EPA a total of $24,197.20 in past response costs. In return, the United States covenants not to sue those parties for their liability related to lead contamination at the Site.

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. *Mallinckrodt, Inc.* et al., Consent Decree, D.J. Ref. 90–11–3–07280.

The Consent Decree may be examined at the Office of the United States Attorney, Eastern District of Missouri, 111 10th Street, St. Louis, Mo 63102 and at U.S. EPA Region VII, U.S. EPA, Region VII, 901 N. 5th Street, Kansas City, KS 66101, (913) 551–7559. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site, *http://www.usdog.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@usdog.gov*), fax number (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 $6.25 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Robert E. Maher, Jr.,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 04–15574 Filed 7–8–04; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF LABOR

Employment Standards Administration

Wage and Hour Division; Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR part 1, appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedeas decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29

CFR parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts," shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department.

Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., Room S–3014, Washington, DC 20210.

Modification to General Wage Determination Decisions

The number of the decisions listed to the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts" being modified are listed by Volume and State. Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

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NONE

General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage determinations Issued Under the Davis-Bacon and Related Acts". This publication is available at each of the 50 Regional Government Depository

Libraries and many of the 1,400 Government Depository Libraries across the country.

General wage determinations issued under the Davis-Bacon and related Acts are available electronically at no cost on the Government Printing Office site at *http://www.access.gpo.gov/davisbacon.* They are also available electronically by subscription to the Davis-Bacon Online Service (*http:davisbacon.fedworld.gov.*) of the National Technical Information Service (NTIS) of the U.S. Department of Commerce at 1–800–363–2068. This subscription offers value-added features such as electronic delivery of modified wage decisions directly to the user's desktop, the ability to access prior wage decisions issued during the year, extensive Help desk Support, etc.

Hard-copy subscriptions may be purchased from: Superintendent of Document, U.S. Government Printing Office, Washington, DC 20402, (202) 512–1800.

When ordering hard-copy subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the six separate Volumes, arranged by State. Subscriptions include an annual edition (issued in January or February) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed at Washington, DC, this 1st day of July, 2004.

Terry Sullivan,

Acting Chief, Branch of Construction Wage Determinations.

[FR Doc. 04–15441 Filed 7–8–04; 8:45 am]

BILLING CODE 4510–27–M

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

Notice of Reinstatement, BFI Waste Services, L.L.C.

AGENCY: Office of Federal Contract Compliance Programs, U.S.Department of Labor.

SUMMARY: This notice advises that pursuant to 41 CFR 60–1.31, BFI Waste Services, L.L.C.'s 260 West Dickman Street, Baltimore, Maryland Facility (Division #50) has been reinstated as an eligible bidder on Federal contracts and subcontracts. For further information, contact Charles E. James, Sr., Deputy Assistant Secretary for Federal Contract Compliance, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C–3325, Washington, DC 20210 (202) 693–0101.

SUPPLEMENTARY INFORMATION: BFI Waste Services, L.L.C.'s 260 West Dickman Street, Baltimore, Maryland Facility (Division #50), is as of this date, reinstated as an eligible bidder on Federal and federally assisted and contracts and subcontracts.

Dated: June 30, 2004, Washington, DC.

Charles E. James, Sr.,

Deputy Assistant Secretary for Federal Contract Compliance.

[FR Doc. 04–15595 Filed 7–8–04; 8:45 am]

BILLING CODE 4510–CH–M

LOCAL TELEVISION LOAN GUARANTEE BOARD

LOCAL Television Loan Guarantee Program

AGENCY: LOCAL Television Loan Guarantee Board.

ACTION: Notice of applications received.

SUMMARY: The LOCAL Television Loan Guarantee Board (Board) reports on applications received in response to the application window that closed April 21, 2004.

FOR FURTHER INFORMATION CONTACT: Richard J. Anderson, Program Director, LOCAL Television Loan Guarantee Board, STOP 1590, Room 5151, 1400 Independence Avenue, SW., Washington, DC 20250–1590. Telephone: (202) 720–8818, fax: (202) 720–0810, email: *richardj.anderson@usda.gov.*

SUPPLEMENTARY INFORMATION: On December 23, 2003, the Board published a Notice of application filing deadline (Notice) in the **Federal Register** at 68 FR 74434 announcing a 120-day application window for the LOCAL Television Loan Guarantee Program (Program). The application window closed on April 21, 2004. The Board received one application, but it lacked essential components required by the Program's regulations. Since the application was incomplete, it was returned without action.

Dated: July 1, 2004.

Jacqueline Rosier,

Secretary, LOCAL Television Loan Guarantee Board.

[FR Doc. 04–15631 Filed 7–8–04; 8:45 am]

BILLING CODE 3410–15–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–254 and 50–265]

Exelon Generation Company, LLC, Quad Cities Nuclear Power Station, Units 1 and 2; Notice of Availability of the Final Supplement 16 To Generic Environmental Impact Statement for the License Renewal of Quad Cities Nuclear Power Station, Units 1 and 2

Notice is hereby given that the U.S. Nuclear Regulatory Commission (the Commission) has published a final plant-specific supplement to the Generic Environmental Impact Statement (GEIS), NUREG–1437, regarding the renewal of operating licenses DPR–29 and DPR–30 for an additional 20 years of operation at Quad Cities Nuclear Power Station (QCNPS). QCNPS is located in Rock Island County, Illinois, approximately 4 miles north of Cordova, Illinois. Possible alternatives to the proposed action (license renewal) include no action and reasonable alternative energy sources.

It is stated in Section 9.3 of the report: Based on (1) The analysis and findings in the GEIS (NRC 1996; 1999); (2) the ER [Environmental Report] submitted by Exelon (Exelon 2003b); (3) consultation with Federal, State, and local agencies; (4) the staff's own independent review; and (5) the staff's consideration of the public comments, the recommendation of the staff is that the Commission determine that the adverse environmental impacts of license renewal for Quad Cities Units 1 and 2 are not so great that preserving the option of license renewal for energy-planning decisionmakers would be unreasonable.

The final Supplement 16 to the GEIS is available for public inspection in the NRC Public Document Room (PDR) located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, or from the Publicly Available Records (PARS) component of NRC's Agencywide Documents Access and Management System (ADAMS). ADAMS is accessible from the NRC Web site at *http://www.nrc.gov/reading-rm/adams.html* (the Public Electronic Reading Room). Persons who do not have access to ADAMS, or who encounter problems in accessing the documents located in ADAMS, should contact the PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to pdr@nrc.gov. In addition, the Cordova District Library, 402 Main Avenue, Cordova, Illinois; the River Valley Library, 214 South Main Street, Port Byron, Illinois; and the Davenport Public Library, 321 Main Street,

Davenport, Iowa, have agreed to make the final plant-specific supplement to the GEIS available for public inspection.

FOR FURTHER INFORMATION CONTACT: Dr. Michael T. Masnik, License Renewal and Environmental Impacts Program, Division of Regulatory Improvement Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Dr. Masnik may be contacted at 301–415–1191 or *MTM2@nrc.gov*.

Dated in Rockville, Maryland, this 2nd day of July, 2004.

For the Nuclear Regulatory Commission.

Samson Lee,

Acting Program Director, License Renewal and Environmental Impacts Program, Division of Regulatory Improvement Programs, Office of Nuclear Reactor Regulation.

[FR Doc. 04–15593 Filed 7–8–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–335 and 50–389]

Florida Power and Light Company, et al., St. Lucie Plant, Unit Nos. 1 and 2; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of amendments to Facility Operating License Nos. DPR–67 and NPF–16, issued to Florida Power and Light Company, *et al.* (the licensee), for operation of the St. Lucie Plant, Unit Nos. 1 and 2, respectively, located in St. Lucie County, Florida. Therefore, as required by 10 CFR 51.21, the NRC is issuing this environmental assessment and finding of no significant impact.

Environmental Assessment

Identification of the Proposed Action

The proposed action would increase the wet storage capacity of fuel assemblies at the St. Lucie Plant, Units 1 and 2. A freestanding fuel storage rack module would be installed in the cask pit in each unit's fuel-handling building. The Unit 1 rack is being designed to augment storage capacity from 1706 fuel assemblies to 1849 fuel assemblies, an increase of 143 fuel assemblies. The Unit 2 rack design has closer assembly-to-assembly spacing than the Unit 1 rack and is capable of storing 225 fuel assemblies. The storage capacity of Unit 2 will increase from 1360 fuel assemblies to 1585 fuel assemblies, an increase of 225 fuel assemblies. The cask pit fuel storage racks will use Boral as a neutron absorbing poison.

The proposed action is in accordance with the licensee's application for amendments dated October 23, 2002, as supplemented August 28 and December 11, 2003, and February 3 and March 25, 2004.

The Need for the Proposed Action

The St. Lucie nuclear plant has two pressurized-water reactors. Unit 1 commenced operation in 1976 and Unit 2 in 1983. Based on the current licensed capacity, current spent fuel inventory, and the projected discharges of spent fuel, Unit 1 will lose the capability to fully offload the reactor core by the year 2005. Unit 2 will lose the capability to fully offload the reactor core by the year 2007. To extend this capability beyond the above dates, the licensee has proposed license amendments to install a freestanding fuel storage rack module in the cask pit of each unit's fuel-handling building.

The additional storage capacity provided by the cask pit racks will be used to store spent fuel to allow refueling outage fuel offloads and non-outage fuel shuffles. In addition, the Unit 1 cask pit rack will be used to temporarily store new fuel before an outage, prior to loading into the reactor core. The capability to remove, clean, and store the cask pit racks in an alternate location prior to any spent fuel cask loading operations will be maintained, because the cask pits will eventually be needed for loading fuel into transfer casks.

Environmental Impacts of the Proposed Action

The NRC has completed its evaluation and concludes, as set forth below, that there are no significant environmental impacts associated with the proposed amendments. The details of the staff's safety evaluation will be provided in the license amendments when they are issued by the NRC.

During refueling outages, there may be a slight increase in the amount of heat that has to be removed from the combination of the spent fuel pool and the cask pit. The peak increase will be less than one percent, and the heat load from spent fuel storage is very small compared to the heat load from normal plant operations. Therefore, the overall increase in the amount of heat released will be quite small and insignificant.

Even though additional boron poison will be introduced by the Boral panels in the storage racks in the cask pit, no significant increase in tritium production from the neutron capture by boron-10 is expected.

The proposed action will not significantly increase the probability or consequences of accidents, no changes are being made in the types of effluents that may be released off site, and there is no significant increase in occupational or public radiation exposure. Therefore, there are no significant radiological environmental impacts associated with the proposed action.

With regard to potential nonradiological impacts, the proposed action does not have a potential to affect any historic sites, It does not affect nonradiological plant effluents and has no other environmental impact. Therefore, there are no significant nonradiological environmental impacts associated with the proposed action.

Accordingly, the NRC concludes that there are no significant environmental impacts associated with the proposed action.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the staff considered denial of the proposed action (*i.e.*, the "no-action" alternative). Denial of the application would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

Alternative Use of Resources

The action does not involve the use of any different resources than those previously considered in the Final Environmental Statement related to the St. Lucie Plant Unit 1, dated June 1973; the Final Environmental Statement related to the operation of St. Lucie Plant, Unit No. 2 (NUREG–0842), dated April 1982; and Supplement 11 to NUREG–1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding St. Lucie, Units 1 and 2," dated May 2003.

Agencies and Persons Consulted

On May 19, 2004, the staff consulted with the Florida State official, William Passetti of the Department of Health, Bureau of Radiation Control, regarding the environmental impact of the proposed action. The State official had no comments.

Finding of No Significant Impact

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated October 23, 2002, as supplemented by letters dated August 28 and December 11, 2003, and February 3 and March 25, 2004. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff at 1–800–397–4209, or 301–415–4737, or send an e-mail to pdr@nrc.gov.

Dated in Rockville, Maryland, this 2nd day of July 2004.

For the Nuclear Regulatory Commission.

Brendan T. Moroney,

Project Manager, Section 2, Project Directorate II, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 04–15594 Filed 7–8–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 030–34881]

Notice of Availability of Environmental Assessment and Finding of No Significant Impact for License Amendment for Fujirebio Diagnostics, Inc.'s Facility In Malvern, PA

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of Availability of Environmental Assessment and Finding of No Significant Impact.

FOR FURTHER INFORMATION CONTACT: Jenny M. Johansen, Nuclear Materials Safety Branch 2, Division of Nuclear Materials Safety, Region I, 475 Allendale Road, King of Prussia, Pennsylvania, 19406, telephone (610) 337–5071, fax (610) 337–5269; or by e-mail: *jmj@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Nuclear Regulatory Commission (NRC) is considering the issuance of a license amendment to Fujirebio Diagnostics, Inc. for Materials License No. 37–30487–01, to authorize release of its facility in Malvern, Pennsylvania for unrestricted use. NRC has prepared an Environmental Assessment (EA) in support of this action in accordance with the requirements of 10 CFR part 51. Based on the EA, the NRC has concluded that a Finding of No Significant Impact (FONSI) is appropriate. The amendment will be issued following the publication of this notice.

II. EA Summary

The purpose of the proposed action is to authorize the release of the licensee's Malvern, Pennsylvania facility for unrestricted use. Fujirebio Diagnostics, Inc. was authorized by NRC from December 30,1998, to use radioactive materials for research and development, manufacturing and distribution, and calibration purposes at the site. On April 19, 2004, Fujirebio Diagnostics, Inc. requested that NRC release the facility for unrestricted use. Fujirebio Diagnostics, Inc. has conducted surveys of the facility and determined that the facility meets the license termination criteria in subpart E of 10 CFR part 20. The NRC staff has prepared an EA.

III. Finding of No Significant Impact

The staff has prepared the EA (summarized above) in support of the proposed license amendment to release the facility for unrestricted use. The NRC staff has evaluated Fujirebio Diagnostics, Inc.'s request and the results of the surveys and has concluded that the completed action complies with the criteria in subpart E of 10 CFR part 20. The staff has found that the environmental impacts from the proposed action are bounded by the impacts evaluated by the "Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination of NRC-Licensed Facilities" (NUREG–1496). The staff has also found the non-radiological impacts are not significant. On the basis of the EA, the NRC has concluded that the environmental impacts from the proposed action are expected to be insignificant and has determined not to prepare an environmental impact statement for the proposed action.

IV. Further Information

The EA and the documents related to this proposed action, including the application for the license amendment and supporting documentation, are available for inspection at NRC's Public Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html* (ADAMS Accession Nos. ML041250426, ML041470132 and ML041830049). The PDR reproduction contractor will copy documents for a fee. These documents are also available for inspection and copying for a fee at the Region I Office, 475 Allendale Road, King of Prussia, Pennsylvania, 19406. Persons who do not have access to ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209 or (301) 415–4737, of by e-mail to *pdr@nrc.gov*.

Dated in King of Prussia, Pennsylvania this 1st day of July, 2004.

For the Nuclear Regulatory Commission.

John D. Kinneman,

Chief, Nuclear Materials Safety Branch 2, Division of Nuclear Materials Safety, Region I.

[FR Doc. 04–15592 Filed 7–8–04; 8:45 am]

BILLING CODE 7590–01–P

RAILROAD RETIREMENT BOARD

Agency Forms Submitted for OMB Review

Summary: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the Railroad Retirement Board (RRB) has submitted the following proposal(s) for the collection of information to the Office of Management and Budget for review and approval.

Summary of Proposal(s):

(1) *Collection title:* Placement Service.

(2) *Form(s) submitted:* ES–2, ES–21, ES–21c, UI–35, and Job Vacancies Reports.

(3) *OMB Number:* 3220–0057.

(4) *Expiration date of current OMB clearance:* 10/31/2004.

(5) *Type of request:* Revision of a currently approved collection.

(6) *Respondents:* Individuals or households, business or other for-profit, State, local or tribal government.

(7) *Estimated annual number of respondents:* 9,500.

(8) *Total annual responses:* 23,000.

(9) *Total annual reporting hours:* 1,452.

(10) *Collection description:* Under the RUIA, the Railroad Retirement Board provides job placement assistance for unemployed railroad workers. The collection obtains information from job applicants, railroad employers and State Employment Service offices for use in placement, for providing referrals for job openings, reports of referral results and for verifying and monitoring claimant eligibility.

Additional Information or Comments: Copies of the forms and supporting documents can be obtained from Charles Mierzwa, the agency clearance officer (312–751–3363) or *Charles.Mierzwa@rrb.gov*.

Comments regarding the information collection should be addressed to Ronald J. Hodapp, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois, 60611–2092 or *Ronald.Hodapp@rrb.gov* and to the OMB Desk Officer for the RRB, at the Office of Management and Budget, Room 10230, New Executive Office Building, Washington, DC 20503.

Charles Mierzwa,

Clearance Officer.

[FR Doc. 04–15626 Filed 7–8–04; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49955; File No. SR–BSE–2004–23]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Boston Stock Exchange, Inc. to Amend Chapter XXVII, Section 10 of the Rules of the Board of Governors By Adding Requirements Concerning Corporate Governance Standards of Exchange-Listed Companies

July 1, 2004.

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 June 4, 2004, the Boston Stock Exchange, Inc. ("BSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the BSE. On June 30, 2004, the BSE filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is approving the proposal on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The BSE proposes to amend Chapter XXVII, Listed Securities, Section 10, Corporate Governance, of the Rules of the Board of Governors of the Boston Stock Exchange ("BSE Rules") by adding requirements relating to the corporate governance of Exchange-listed companies. The text of the proposed rule filing is set forth below. Additions are in italics; deletions are in brackets.

* * * * *

Chapter XXVII—Listed Securities—Requirements

Sec. 1–9. no change

Sec. 10. Corporate Governance

A. no change

[B. (Reserved for Future Rules Relating to Corporate Governance Standards)]

B.1. Definitions

(a) For purposes of this Section 10.B., unless the context requires otherwise:

(1) "Family Member" means a person's spouse, parents, children and siblings, whether by blood, marriage or adoption, or anyone residing in such person's home.

(2) "Independent director" means a person other than an officer or employee of the company or its subsidiaries or any other individual having a relationship, which, in the opinion of the company's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. The following persons shall not be considered independent:

(A) a director who is, or at any time during the past three years was, employed by the company or by any parent or subsidiary of the company;

(B) a director who accepted or who has a Family Member who accepted any payments from the company or any parent or subsidiary of the company in excess of $60,000 during the current or any of the past three fiscal years, other than the following:

(i) compensation for board or board committee service;

(ii) payments arising solely from investments in the company's securities;

(iii) compensation paid to a Family Member who is a non-executive employee of the company or a parent or subsidiary of the company;

(iv) benefits under a tax-qualified retirement plan, or non-discretionary compensation; or

(v) loans permitted under Section 13(k) of the Act. Provided, however, that audit committee members are subject to additional, more stringent requirements under paragraph 2(c) of this Section 10.B.

(C) a director who is a Family Member of an individual who is, or at any time during the past three years was, employed by the company or by any parent or subsidiary of the company as an executive officer;

(D) a director who is, or has a Family Member who is, a partner in, or a controlling shareholder or an executive officer of, any organization to which the company made, or from which the company received, payments for property or services in the current or any of the past three fiscal years that exceed 5% of the recipient's consolidated gross revenues for that year, or $200,000 ($1 million if the listed company is also listed on the New York Stock Exchange), whichever is more, other than the following:

(i) payments arising solely from investments in the company's securities; or

(ii) payments under non-discretionary charitable contribution matching programs.

(E) a director of the listed company who is, or has a Family Member who is, employed as an executive officer of another entity where at any time during the past three years any of the executive officers of the listed company serve on the compensation committee of such other entity; or

(F) a director who is, or has a Family Member who is, a current partner of the company's outside auditor, or was a partner or employee of the company's outside auditor who worked on the company's audit at any time during any of the past three years.

(G) In the case of an investment company, in lieu of paragraphs (A)–(F), a director who is an "interested person" of the company as defined in section 2(a)(19) of the Investment Company Act of 1940, other than in his or her capacity as a member of the board of directors or any board committee.

Interpretive Material

It is important for investors to have confidence that individuals serving as independent directors do not have a relationship with the listed company that would impair their independence. The board has a responsibility to make an affirmative determination that no such relationships exist through the application of Section 10.B.1. Section 10.B.1. also provides a list of certain relationships that preclude a board finding of independence. These objective measures provide transparency to investors and companies, facilitate uniform application of the rules, and ease administration. Because the Exchange does not believe that ownership of company stock by itself would preclude a board finding of independence, it is not included in the aforementioned objective factors. It should be noted that

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Letter from John Boese, Vice President, Legal and Compliance, BSE, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated June 30, 2004 ("Amendment No. 1"). Amendment No. 1 was a technical amendment and is not subject to notice and comment.

there are additional, more stringent requirements that apply to directors serving on audit committees, as specified in Section 10.B.2 (c).

The rule's reference to a "parent or subsidiary" is intended to cover entities the issuer controls and consolidates with the issuer's financial statements as filed with the U.S. Securities and Exchange Commission (but not if the issuer reflects such entity solely as an investment in its financial statements). The reference to executive officer means those officers covered in Rule 16a–1(f) under the Act. In the context of the definition of Family Member under Section 10.B.1(a)(1), the reference to marriage is intended to capture relationships specified in the rule (parents, children and siblings) that arise as a result of marriage, such as "in-law" relationships.

The three year look-back periods referenced in paragraphs (A), (C), (E) and (F) of the rule commence on the date the relationship ceases. For example, a director employed by the company is not independent until three years after such employment terminates.

Paragraph (B) of the rule is generally intended to capture situations where a payment is made directly to (or for the benefit of) the director or a family member of the director. For example, consulting or personal service contracts with a director or family member of the director or political contributions to the campaign of a director or a family member of the director would be considered under paragraph (B) of the rule.

Paragraph (D) of the rule is generally intended to capture payments to an entity with which the director or Family Member of the director is affiliated by serving as a partner, controlling shareholder or executive officer of such entity. Under exceptional circumstances, such as where a director has direct, significant business holdings, it may be appropriate to apply the corporate measurements in paragraph (D), rather than the individual measurements of paragraph (B). Issuers should contact the Exchange if they wish to apply the rule in this manner. The reference to a partner in paragraph (D) is not intended to include limited partners. It should be noted that the independence requirements of paragraph (D) of the rule are broader than Rule 10A–3(e)(8) under the Act.

Under paragraph (D), a director who is, or who has a Family Member who is, an executive officer of a charitable organization may not be considered independent if the company makes payments to the charity in excess of the greater of the greater of 5% of the charity's revenues or $200,000. However, the Exchange encourages companies to consider other situations where a director or their Family Member and the company each have a relationship with the same charity when assessing director independence.

For purposes of determining whether a lawyer is eligible to serve on an audit committee, Rule 10A–3 under the Act generally provides that any partner in a law firm that receives payments from the issuer is ineligible to serve on that issuer's audit committee. In determining whether a director may be considered independent for purposes other than the audit committee, payments to a law firm would generally be considered under Section 10.B.1(a)(2)(D), which looks to whether the payment exceeds the greater of 5% of the recipients gross revenues or $200,000; however, if the firm is a sole proprietorship, Section 10.B.1(a)(2)(B), which looks to whether the payment exceeds $60,000, applies.

Paragraph (G) of the rule provides a different measurement for independence for investment companies in order to harmonize with the Investment Company Act of 1940. In particular, in lieu of paragraphs (A)–(F), a director who is an "interested person" of the company as defined in section 2(a)(19) of the Investment Company Act of 1940, other than in his or her capacity as a member of the board of directors or any board committee, would not be considered to be independent.

2. Qualitative Listing Requirements for all Exchange Listed Securities.

The Exchange shall review the issuer's past corporate governance activities. This review may include activities taking place while the issuer is listed on the Exchange or an exchange that imposes corporate governance requirements, as well as activities taking place after a formerly listed issuer is no longer listed on the BSE or an exchange that imposes corporate governance requirements. Based on such review, the BSE may take any appropriate action, including placing of restrictions on or additional requirements for listing, or the denial of listing of a security if the Exchange determines that there have been violations or evasions of such corporate governance standards. Such determinations shall be made on a case-by-case basis as necessary to protect investors and the public interest.

(a) Applicability.

(1) Foreign Private Issuers. The Exchange shall have the ability to provide exemptions from this Section 10.B. to a foreign private issuer when provisions of this Section are contrary to a law, rule or regulation of any public authority exercising jurisdiction over such issuer or contrary to generally accepted business practices in the issuer's country of domicile, except to the extent that such exemptions would be contrary to the federal securities laws, including without limitation those rules required by Section 10A(m) of the Act and Rule 10A–3 thereunder. A foreign issuer that receives an exemption under this subsection shall disclose in its annual reports filed with the Commission each requirement from which it is exempted and describe the home country practice, if any, followed by the issuer in lieu of such requirements. In addition, a foreign issuer making its initial public offering or first U.S. listing on the BSE shall disclose any such exemptions in its registration statement.

(2) Management Investment Companies. Management investment companies (including business development companies) are subject to all the requirements of this Section 10.B., except that management investment companies registered under the Investment Company Act of 1940 are exempt from the requirements of Section 10.B.2. (b) and (f).

(3) Asset-backed Issuers and Other Passive Issuers. The following are exempt from the requirements of Section 10.B.2(b), (c) and (f): (a) asset-backed issuers; and (b) issuers, such as unit investment trusts, that are organized as trusts or other unincorporated associations that do not have a board of directors or persons acting in a similar capacity and whose activities are limited to passively owning or holding (as well as administering and distributing amounts in respect of) securities, rights, collateral or other assets on behalf of or for the benefit of the holders of the listed securities.

(4) Cooperatives. Cooperative entities, such as agricultural cooperatives, that are structured to comply with relevant state law and federal tax law and that do not have a publicly traded class of common stock are exempt from Section 10. B. 2 (b). However, such entities must comply with all federal securities laws, including without limitation those rules required by Section 10A(m) of the Act and Rule 10A–3 thereunder.

(5) Effective Dates/Transition. In order to allow companies to make necessary adjustments in the course of their regular annual meeting schedule, and consistent with Exchange Act Rule 10A–3, the requirements of this Section 10.B. are effective as set out in this subsection. During the transition period between the date of Commission approval of this Section 10.B and the effective date of Section 10.B.,

companies that have not brought themselves into compliance with Section 10.B. must continue to comply with Section 10.A.

The provisions of Section 10.B.1 and Section 10.B.2(b), (c) and (e) regarding director independence, independent committees, and notification of noncompliance shall be implemented by the following dates:

July 31, 2005 for foreign private issuers and small business issuers (as defined in Rule 12b–2); and

For all other listed issuers, by the earlier of: (1) the listed issuer's first annual shareholders meeting after July 31, 2004; or (2) October 31, 2004.

In the case of an issuer with a staggered board, with the exception of the audit committee requirements, the issuer shall have until their second annual meeting after January 15, 2004, but not later than December 31, 2005, to implement all new requirements relating to board composition, if the issuer would be required to change a director who would not normally stand for election at an earlier annual meeting. Such issuers shall comply with the audit committee requirements pursuant to the implementation schedule bulleted above.

Issuers that have listed or shall be listed in conjunction with their initial public offering shall be afforded exemptions from all board composition requirements consistent with the exemptions afforded in Rule 10A–3(b)(1)(iv)(A) under the Act. That is, for each committee that the company adopts, the company shall have one independent member at the time of listing, a majority of independent members within 90 days of listing and all independent members within one year.

It should be noted, however, that investment companies are not afforded these exemptions under Rule 10A–3. Issuers may choose not to adopt a compensation or nomination committee and may instead rely upon a majority of the independent directors to discharge responsibilities under the rules. These issuers shall be required to meet the majority independent board requirement within one year of listing.

Companies transferring from other markets with a substantially similar requirement shall be afforded the balance of any grace period afforded by the other market. Companies transferring from other listed markets that do not have a substantially similar requirement shall be afforded one year from the date of listing on the Exchange. This transition period is not intended to supplant any applicable requirements of Rule 10A–3 under the Act.

The limitations on corporate governance exemptions to foreign private issuers shall be effective July 31, 2005. However, the requirement that a foreign issuer disclose the receipt of a corporate governance exemption from the Exchange shall be effective for new listings and filings made after July 31, 2004.

Section 10.B.2(f), requiring issuers to adopt a code of conduct, shall be effective July 31, 2004.

Section 10.B.2(d), requiring audit committee approval of related party transactions, shall be effective July 31, 2004.

The remainder of Section 10.B.2(a) is effective July 31, 2004.

(b) Independent Directors

(1) A majority of the board of directors must be comprised of independent directors as defined in this Section 10 (subject to the exception set forth in paragraph (g) with respect to small business issuers). The company must disclose in its annual proxy (or, if the issuer does not file a proxy, in its Form 10–K or 20–F) those directors that the board of directors has determined to be independent. If an issuer fails to comply with this requirement due to one vacancy, or one director ceases to be independent due to circumstances beyond their reasonable control, the issuer shall regain compliance with the requirement by the earlier of its next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply with this requirement. An issuer relying on this provision shall provide notice to the Exchange immediately upon learning of the event or circumstance that caused the non-compliance.

(2) Independent directors must have regularly scheduled meetings at which only independent directors are present ("executive sessions").

(3) Compensation of Officers.

(A) Compensation of the chief executive officer of the company must be determined, or recommended to the Board for determination, either by:

(i) a majority of the independent directors, or

(ii) a compensation committee comprised solely of independent directors.

The chief executive officer may not be present during voting or deliberations.

(B) Compensation of all other executive officers must be determined, or recommended to the Board for determination, either by:

(i) a majority of the independent directors, or

(ii) a compensation committee comprised solely of independent directors.

(C) Notwithstanding paragraphs (3)(A)(ii) and (3)(B)(ii) above, if the compensation committee is comprised of at least three members, one director who is not independent and is not a current officer or employee or a Family Member of an officer or employee, may be appointed to the compensation committee if the board, under exceptional and limited circumstances, determines that such individual's membership on the committee is required by the best interests of the company and its shareholders, and the board discloses, in the proxy statement for the next annual meeting subsequent to such determination (or, if the issuer does not file a proxy, in its Form 10–K or 20–F), the nature of the relationship and the reasons for the determination. A member appointed under this exception may not serve longer than two years.

(4) Nomination of Directors.

(A) Director nominees must either be selected, or recommended for the Board's selection, either by:

(i) a majority of the independent directors, or

(ii) a nominations committee comprised solely of independent directors.

(B) Each issuer must certify that it has adopted a formal written charter or board resolution, as applicable, addressing the nominations process and such related matters as may be required under the federal securities laws.

(C) Notwithstanding paragraph (4)(A)(ii) above, if the nominations committee is comprised of at least three members, one director, who is not independent and is not a current officer or employee or a Family Member of an officer or employee, may be appointed to the nominations committee if the board, under exceptional and limited circumstances, determines that such individual's membership on the committee is required by the best interests of the company and its shareholders, and the board discloses, in the proxy statement for next annual meeting subsequent to such determination (or, if the issuer does not file a proxy, in its Form 10–K or 20–F), the nature of the relationship and the reasons for the determination. A member appointed under this exception may not serve longer than two years.

(D) Independent director oversight of director nominations shall not apply in cases where the right to nominate a director legally belongs to a third party. However, this does not relieve a company's obligation to comply with

the committee composition requirements under Section 10.B.2 (b) and (c).

(E) This Section 10.B.2 (b)(4) is not applicable to a company if the company is subject to a binding obligation that requires a director nomination structure inconsistent with this rule and such obligation pre-dates the approval date of this rule.

(5) A Controlled Company is exempt from the requirements of this Section 10.B.2 (b), except for the requirements of subsection (b)(2) which pertain to executive sessions of independent directors. A Controlled Company is a company of which more than 50% of the voting power is held by an individual, a group or another company. A Controlled Company relying upon this exemption must disclose in its annual meeting proxy statement (or, if the issuer does not file a proxy, in its Form 10–K or 20–F) that it is a Controlled Company and the basis for that determination.

(c) Audit Committee

(1) Audit Committee Charter

Each issuer must certify that it has adopted a formal written audit committee charter and that the audit committee has reviewed and reassessed the adequacy of the formal written charter on an annual basis. The charter must specify:

(A) the scope of the audit committee's responsibilities, and how it carries out those responsibilities, including structure, processes, and membership requirements;

(B) the audit committee's responsibility for ensuring its receipt from the outside auditors of a formal written statement delineating all relationships between the auditor and the company, consistent with Independence Standards Board Standard 1, and the audit committee's responsibility for actively engaging in a dialogue with the auditor with respect to any disclosed relationships or services that may impact the objectivity and independence of the auditor and for taking, or recommending that the full board take, appropriate action to oversee the independence of the outside auditor; and

(C) the committee's purpose of overseeing the accounting and financial reporting processes of the issuer and the audits of the financial statements of the issuer;

(D) the specific audit committee responsibilities and authority set forth in Section 10.B.2(c)(3).

(2) Audit Committee Composition

(A) Each issuer must have, and certify that it has and will continue to have, an audit committee of at least three members (subject to the exception set forth in paragraph (g) with respect to small business issuers), each of whom must: (i) Be independent; (ii) meet the criteria for independence set forth in Rule 10A–3(b)(1) under the Act (subject to the exemptions provided in Rule 10A–3(c)); (iii) not have participated in the preparation of the financial statements of the company or any current subsidiary of the company at any time during the past three years; and (iv) be able to read and understand fundamental financial statements, including a company's balance sheet, income statement, and cash flow statement. Additionally, each issuer must certify that it has, and will continue to have, at least one member of the audit committee who has past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background which results in the individual's financial sophistication, including being or having been a chief executive officer, chief financial officer or other senior officer with financial oversight responsibilities.

(B) Notwithstanding paragraph (2)(A)(i), one director who: (i) Is not independent; (ii) meets the criteria set forth in Section 10A(m)(3) under the Act and the rules thereunder; and (iii) is not a current officer or employee or a Family Member of such officer or employee, may be appointed to the audit committee, if the board, under exceptional and limited circumstances, determines that membership on the committee by the individual is required by the best interests of the company and its shareholders, and the board discloses, in the next annual proxy statement subsequent to such determination (or, if the issuer does not file a proxy, in its Form 10–K or 20–F), the nature of the relationship and the reasons for that determination. A member appointed under this exception may not serve longer than two years and may not chair the audit committee.

(3) Audit Committee Responsibilities and Authority

The audit committee must have the specific audit committee responsibilities and authority necessary to comply with Rule 10A–3(b)(2), (3), (4) and (5) under the Act (subject to the exemptions provided in Rule 10A–3(c)), concerning responsibilities relating to: (i) Registered public accounting firms, (ii) complaints relating to accounting, internal accounting controls or auditing matters, (iii) authority to engage advisors, and (iv) funding as determined by the audit committee. Audit committees for investment companies must also establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting or auditing matters by employees of the investment adviser, administrator, principal underwriter, or any other provider of accounting related services for the investment company, as well as employees of the investment company.

(4) Cure Periods

(A) If an issuer fails to comply with the audit committee composition requirement under Rule 10A–3(b)(1) under the Act and Section 10.B.2 (c)(2) because an audit committee member ceases to be independent for reasons outside the member's reasonable control, the audit committee member may remain on the audit committee until the earlier of its next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply with this requirement. An issuer relying on this provision must provide notice to the Exchange immediately upon learning of the event or circumstance that caused the non-compliance.

(B) If an issuer fails to comply with the audit committee composition requirement under Section 10.B.2 (c)(2)(A) due to one vacancy on the audit committee, and the cure period in paragraph (A) is not otherwise being relied upon for another member, the issuer will have until the earlier of the next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply with this requirement. An issuer relying on this provision must provide notice to the Exchange immediately upon learning of the event or circumstance that caused the non-compliance.

(d) Conflicts of Interest

Each issuer shall conduct an appropriate review of all related party transactions for potential conflict of interest situations on an ongoing basis and all such transactions must be approved by the company's audit committee or another independent body of the board of directors. For purposes of this rule, the term "related party transaction" shall refer to transactions required to be disclosed pursuant to SEC Regulation S–K, Item 404.

(e) Notification of Material Noncompliance

An issuer must provide the Exchange with prompt notification after an executive officer of the issuer becomes aware of any material noncompliance by the issuer with the requirements of Section 10.B.2.

(f) Code of Conduct

Each issuer shall adopt a code of conduct applicable to all directors, officers and employees, which shall be publicly available. A code of conduct satisfying this rule must comply with the definition of a "code of ethics" set out in Section 406(c) of the Sarbanes-Oxley Act of 2002 ("the Sarbanes-Oxley Act") and any regulations promulgated thereunder by the Commission. See 17 CFR 228.406 and 17 CFR 229.406. In addition, the code must provide for an enforcement mechanism. Any waivers of the code for directors or executive officers must be approved by the Board. Domestic issuers shall disclose such waivers in a Form 8–K within five business days. Foreign private issuers shall disclose such waivers either in a Form 6–K or in the next Form 20–F.

(g) Small Business Issuers "Small business issuers (as defined in Rule 12b-2 under the Securities Exchange Act of 1934) are subject to all requirements specified in this Section, except that such issuers are only required to maintain a Board of Directors comprised of at least 50% independent directors, and an Audit Committee of at least two members, comprised solely of independent directors who also meet the requirements of Rule 10A–3 under the Securities Exchange Act of 1934.

* * * * *

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 Exchange 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 III below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.[4]

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The BSE proposes to amend Chapter XXVII, Listed Securities, Section 10, Corporate Governance, of the BSE Rules by adding requirements relating to the corporate governance of Exchange-listed companies. Under the proposal, a majority of the directors on the board of a BSE-listed company would be required to be independent directors,[5] defined in the proposed rule as "a person other than an officer or employee of the company or its subsidiaries or any other individual having a relationship, which, in the opinion of the company's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director." The Exchange also proposes to require each listed company to disclose in its annual proxy (or, if the issuer does not file a proxy, in its Form 10–K or 20–F) those directors that the board has determined to be independent.

Within the proposed rule, the Exchange proposes to provide a list of relationships that would preclude a board finding of independence. First, a director who is, or at any time during the past three years was, employed by the company or by any parent or subsidiary of the company, would not be deemed independent. Second, a director who accepts or has a family member (as defined within the proposed rule) who accepts any payments from the company, or any parent or subsidiary of the company, in excess of $60,000 during the current fiscal year or any of the past three fiscal years, other than certain permitted payments, would not be deemed independent. Permitted payments would include compensation for board or board committee service; payments arising solely from investments in the company's securities; compensation paid to a family member who is a non-executive employee of the company or a parent or subsidiary of the company; benefits under a tax-qualified retirement plan, or non-discretionary compensation; and loans permitted under Section 13(k) of the Act.

Furthermore, the proposed rule would set forth that a director who is a family member of an individual who is, or at any time during the past three years was, employed by the company or by any parent or subsidiary of the company as an executive officer, would not be deemed independent. Also, a director who is, or has a family member who is, a partner in, or a controlling shareholder or an executive officer of, any organization to which the company made, or from which the company received, payments for property or services in the current or any of the past three fiscal years that exceed 5% of the recipient's consolidated gross revenues for that year, or $200,000 ($1 million if the listed company is also listed on the New York Stock Exchange), whichever is more, other than certain permitted payments, would not be deemed independent. Permitted payments would include payments arising solely from investments in the company's securities, and payments under non-discretionary charitable contribution matching programs.

Moreover, a director of the listed company who is, or has a family member who is, employed as an executive officer of another entity where at any time during the past three years any of the executive officers of the listed company served on the compensation committee of such other entity, would not be deemed independent. Also, a director who is, or has a family member who is, a current partner of the company's outside auditor, or was a partner or employee of the company's outside auditor, and worked on the company's audit, at any time during the past three years, would not be deemed independent. Finally, the Exchange proposes that, in the case of an investment company, a director would not be considered independent if the director is an "interested person" of the company as defined in Section 2(a)(19) of the Investment Company Act, other than in his or her capacity as a member of the board of directors or any board committee. This provision would be in lieu of the other tests for independence specified in the rule.

The Exchange further proposes to require the compensation of the chief executive officer of a listed company to be determined or recommended to the board for determination either by a majority of the independent directors, or by a compensation committee comprised solely of independent directors.[6] In addition, the compensation of all other officers would be required to be determined or recommended to the board for determination either by a majority of the independent directors, or a

[4] The Commission has revised and clarified some aspects of these statements with the Exchange's consent. Telephone conversation between John Boese, Vice President, Legal and Compliance, BSE, and Ira Brandriss, Assistant Director, Division, Commission, on June 23, 2004.

[5] *See infra* note and accompanying text regarding small business issuers. *See also* proposed BSE Rule 10.B.2(a) regarding entities excepted from these requirements.

[6] *See* proposed BSE Rule 10.B.2(a) regarding entities excepted from the requirements relating to compensation.

compensation committee comprised solely of independent directors. Under the proposal, if the compensation committee was comprised of at least three members, one director who is not independent and is not a current officer or employee or a family member of such person would be permitted to be appointed to the committee if the board, under exceptional and limited circumstances, determines that such individual's membership on the committee is required by the best interests of the company and its shareholders, and the board discloses, in the next annual meeting proxy statement subsequent to such determination (or, if the issuer does not file a proxy, in its Form 10–K or 20–F), the nature of the relationship and the reasons for the determination. A member appointed under such exception would not be permitted to serve longer than two years.

The Exchange also proposes to require director nominees to either be selected or recommended for the board's selection either by a majority of independent directors, or by a nominations committee comprised solely of independent directors.[7] If the nominations committee is comprised of at least three members, one director, who is not independent and is not a current officer or employee or a family member of such person, would be permitted to be appointed to the committee if the board, under exceptional and limited circumstances, determines that such individual's membership on the committee is required by the best interests of the company and its shareholders, and the board discloses, in the next annual meeting proxy statement subsequent to such determination (or, if the issuer does not file a proxy, in its Form 10–K or 20–F), the nature of the relationship and the reasons for the determination. A member appointed under such exception would not be permitted to serve longer than two years.

Further, the Exchange proposes to require each issuer to certify that it has adopted a formal written charter or board resolution, as applicable, addressing the nominations process and such related matters as may be required under the federal securities laws. The BSE also proposes that the nomination provision would not apply in cases where either the right to nominate a director legally belongs to a third party, or the company is subject to a binding obligation that requires a director nomination structure inconsistent with this provision, and such obligation predates the date the provision is approved.

Moreover, the Exchange proposes generally to exempt controlled companies from the requirement to have a majority of independent directors and from the compensation and nomination committee requirements discussed above. However, the independent directors would still be required to have regularly scheduled meetings at which only independent directors are present. A controlled company would be defined as a company of which more than 50% of the voting power is held by an individual, a group, or another company. A company relying upon the exemption would be required to disclose in its annual proxy statement (or, if the issuer does not file a proxy, in its Form 10–K or 20–F) that it is a controlled company and the basis for that determination.

In its proposed rules, the BSE would retain the requirement, set forth in Chapter XXVII, Section 10.A of the BSE Rules, to establish an independent audit committee that complies with the standards required by Rule 10A–3 under the Act. The proposal would further require each issuer to certify that it has adopted a formal audit committee charter with specified responsibilities and authority, and that the audit committee has reviewed and reassessed the adequacy of the charter on an annual basis. The proposal also would require that each listed issuer have, and certify that it has, an audit committee composed of at least three members,[8] each of whom would be required to: (1) Be independent as defined in the BSE's rules; (2) meet the criteria for independence set forth in Rule 10A–3 under the Act (subject to the exceptions provided in Rule 10A–3(c)); and (3) not have participated in the preparation of the financial statements of the company or any current subsidiary of the company at any time during the past three years, in addition to satisfying a requirement that the member be able to read and understand fundamental financial statements, including a company's balance sheet, income statement, and cash flow statement. In addition, the Exchange would require that at least one member of the audit committee have past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background which results in the individual's financial sophistication, including being or having been a chief executive officer, chief financial officer or other senior officer with financial oversight responsibilities.

One director who is not independent and meets the criteria set forth in Section 10A(m)(3) of the Act and the rules thereunder, and is not a current officer or employee of the company or a family member of such person, would be able to be appointed to the audit committee if the board, under exceptional and limited circumstances, determines that membership on the committee by the individual is required by the best interests of the company and its shareholders, and the board discloses, in the next annual proxy statement subsequent to such determination (or, if the issuer does not file a proxy, in its Form 10–K or 20–F), the nature of the relationship and the reasons for that determination. A member appointed under this exception would not be permitted to serve longer than two years and would not be permitted to chair the audit committee.

Furthermore, the BSE proposes to add a cure period provision, as follows: (1) if a listed issuer fails to comply with the audit committee composition requirement under Rule 10A–3 under the Act and the BSE Rule 10.B.2(c)(2) because an audit committee member ceases to be independent for reasons outside the member's reasonable control, the audit committee member could remain on the committee until the earlier of the issuer's next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply with the requirement; and (2) if an issuer fails to comply with the audit committee composition requirement of BSE Rule 10.B.2(c)(2)(A) due to one vacancy on the audit committee, and the aforementioned cure period is not otherwise being relied upon for another audit committee member, the issuer would have until the earlier of the next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply with this requirement. An issuer relying on either of these provisions would be required to provide notice to the Exchange immediately upon learning of the event or circumstance that caused the non-compliance.

The proposal would also include, among the specified responsibilities of audit committees, a requirement that audit committees of investment companies must establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting or auditing matters by employees of the investment adviser, administrator, principal underwriter, or any other provider of

[7] *See id.* regarding entities that would be excepted from the requirements relating to nominations.

[8] *See infra* note, regarding small business issuers.

accounting related services for the investment company, as well as employees of the investment company.

The Exchange further proposes to require that an issuer provide the Exchange with prompt notification after an executive officer of the issuer becomes aware of any material noncompliance by the issuer with the requirements of the BSE Rules relating to corporate governance.

The Exchange also proposes to require each listed company to adopt a code of conduct applicable to all directors, officers, and employees, and to make such code publicly available.[9] The code of conduct would be required to comply with the definition of a "code of ethics" set forth in Section 406(c) of the Sarbanes-Oxley Act and any regulations thereunder. In addition, the code would have to provide for an enforcement mechanism, which the Exchange states, would need to ensure prompt and consistent enforcement of the code, protection for persons reporting questionable behavior, clear and objective standards for compliance, and a fair process by which to determine violations. Moreover, any waivers of the code for directors or executive officers would have to be approved by the board and disclosed in a Form 8–K within five days for domestic issuers, or in a Form 6–K or the next Form 20–F for foreign private issuers.

Furthermore, the BSE proposes to specify that each issuer shall conduct an appropriate review of all related party transactions for potential conflict of interest situations on an ongoing basis. All such transactions would be required to be approved by the listed company's audit committee or another independent body of the board of directors. For purposes of the rule, "related party transactions" would refer to transactions required to be disclosed pursuant to SEC Regulation S–K, Item 404.

The proposal would also provide that small business issuers are subject to all the proposed new requirements, except that such issuers would only be required to maintain a board of directors comprised of at least 50% independent directors, and an audit committee of at least two members, comprised solely of independent directors who also meet the requirements of Rule 10A–3 under the Act.[10]

The BSE also proposes to provide that the Exchange would have the ability to grant exemptions to a foreign private issuer from the corporate governance standards when the provisions of these standards are contrary to a law, rule, or regulation of any public authority exercising jurisdiction over such issuer or are contrary to generally accepted business practices in the issuer's country of domicile, except to the extent that such exemptions would be contrary to the federal securities laws, including Section 10A(m) of the Act and Rule 10A–3 thereunder. The BSE also proposes to provide that a foreign issuer that receives an exemption from any of the corporate governance requirements would be required to disclose in its annual reports filed with the Commission each requirement from which it is exempted and to describe the home country practice, if any, followed by the issuer in lieu of these requirements. In addition, a foreign issuer making its initial public offering or first U.S. listing on the BSE would be required to disclose any such exemptions in its registration statement.

In addition, the Exchange proposes that management investment companies (including business development companies) would be subject to all of the requirements of the BSE Rules, except that management investment companies registered under the Investment Company Act would be exempt from the requirements which pertain to the number of independent directors on the board and the requirement that they meet in executive sessions, the role of independent directors in determining compensation of officers and nomination of directors, and codes of conduct. The Exchange proposes these exemptions in light of the fact that registered management investment companies are already subject to a pervasive system of federal regulation.

Finally, the Exchange proposes that cooperative entities, such as agricultural cooperatives that are structured to comply with relevant state law and federal tax law and that do not have a publicly traded class of common stock, would be exempt from the requirements of the BSE Rules regarding the number of independent directors on the board and the role of independent directors in determining compensation of officers and nomination of directors. However, such entities would be required to comply with all federal securities laws, including Section 10A(m) of the Act and Rule 10A–3 thereunder.

The Exchange proposes to establish the deadlines for compliance as listed below. During the transition period between the date of approval of the rule filing by the Commission and the deadline indicated for each rule change, companies that have not brought themselves into compliance with the new rules would be required to comply with the previously existing rules, as applicable.

Companies would be required to be in compliance with the new rules by the following dates:

The provisions regarding director independence, independent committees, and notification of noncompliance would be required to be implemented by July 31, 2005, for foreign private issuers and small business issuers; and for all other listed issuers, by the earlier of: (1) The listed issuer's first annual shareholders meeting after July 31, 2004; or (2) October 31, 2004.

In the case of an issuer with a staggered board, with the exception of the audit committee requirements, the issuer would have until its second annual meeting after January 15, 2004, but not later than December 31, 2005, to implement all new requirements relating to board composition, if the issuer would be required to change a director who would not normally stand for election at an earlier annual meeting. Such issuers would be required to comply with the audit committee requirements pursuant to the implementation schedule noted above.

Issuers that have listed or will be listed in conjunction with their initial public offering would be afforded exemptions from all board composition requirements consistent with the exemptions afforded in Rule 10A–3(b)(1)(iv)(A) under the Act. That is, for each committee that the company adopts, the company would be required to have one independent member at the time of listing, a majority of independent members within 90 days of listing, and all independent members within one year. However, the rule would note that investment companies would not be afforded the aforementioned exemptions in Rule 10A–3 of the Act. Issuers could choose not to adopt a compensation or nomination committee and could instead rely upon a majority of the independent directors to discharge responsibilities under the rules. These issuers would be required to meet the majority independent board requirement within one year of listing.

Companies transferring from other markets with a substantially similar requirement would be afforded the balance of any grace period afforded by the other market. Companies transferring from other listed markets that do not have a substantially similar requirement would be afforded one year from the date of listing on the Exchange. The rule would stipulate that this

[9] *See* proposed BSE Rule 10.B.2(a) regarding entities excepted from these requirements.

[10] *See* proposed BSE Rule 10.B.2(g).

transition period is not intended to supplant any applicable requirements of Rule 10A–3 under the Act.

The limitations on corporate governance exemptions to foreign private issuers would be effective by July 31, 2005. However, the requirement that a foreign issuer disclose the receipt of a corporate governance exemption from the Exchange would apply to new listings and filings made after July 31, 2004.

Compliance with the rules requiring issuers to adopt a code of conduct would be effective by July 31, 2004. The rules requiring audit committee approval of related party transactions would be effective on July 31, 2004. The remainder of the proposed rules would be effective on July 31, 2004.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act [11] in general, and furthers the objectives of Section 6(b)(5)[12] in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change will impose no 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

No written comments were solicited or received with respect to the proposed rule change.

III. 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–BSE–2004–23 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–BSE–2004–23. 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, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the BSE. 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–BSE–2004–23 and should be submitted on or before July 30, 2004.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[13] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act [14] in that it is designed, among other things, to facilitate transactions in securities, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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, and does not permit unfair discrimination among issuers.

In the Commission's view, the proposed rule change will foster greater transparency, accountability, and objectivity in the oversight by, and decision-making processes of, the boards and key committees of BSE-listed issuers. The proposal also will promote compliance with high standards of conduct by the issuers' directors and management. The Commission notes that the BSE has designed its proposal to harmonize it with rule changes recently approved by the Commission for other self-regulatory organizations ("SROs").[15]

The BSE has requested that the Commission grant accelerated approval to the proposed rule change. The Commission believes that the revisions proposed by the Exchange will significantly align the corporate governance standards proposed for companies listed on the BSE with the standards approved by the Commission for companies listed on other SROs. The Commission believes it is appropriate to accelerate approval of the proposed rule change so that the comprehensive set of strengthened corporate governance standards for companies listed on the BSE may be implemented on generally the same timetable (with some modification of certain deadlines) as that for similar standards adopted for issuers listed on other SROs. The Commission therefore finds good cause, consistent with Section 19(b)(2) of the Act,[16] to approve the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**.

V. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[17] that the proposed rule change (SR–BSE–2004–23) be, and hereby is, approved on an accelerated basis.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78f(b). In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[14] 15 U.S.C. 78f(b)(5).

[15] *See, e.g.*, Securities Exchange Act Release No. 48745 (November 4, 2003), 68 FR 64154 (November 12, 2003) (approving changes to the corporate governance listing standards of the Nasdaq Stock Market, Inc. and the New York Stock Exchange, Inc.).

[16] 15 U.S.C. 78s(b)(2).

[17] 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[18]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–15586 Filed 7–8–04; 8:45 am]

BILLING CODE 8010–01–P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #P040]

State of Arkansas

As a result of the President's major disaster declaration for Public Assistance on June 30, 2004, the U.S. Small Business Administration is activating its disaster loan program only for private non-profit organizations that provide essential services of a governmental nature. I find that Bradley, Calhoun, Clark, Columbia, Hempstead, Howard, Lafayette, Little River, Nevada, Ouachita, Pike, and Sevier Counties in the State of Arkansas constitute a disaster area due to damages caused by severe storms and flooding occurring on May 30, 2004, and continuing. Applications for loans for physical damage as a result of this disaster may be filed until the close of business on August 30, 2004, at the address listed below or other locally announced locations: U.S. Small Business Administration, Disaster Area 3 Office, 14925 Kingsport Road, Fort Worth, TX 76155–2243.

The interest rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations Without Credit Available Elsewhere	2.750
Non-Profit Organizations With Credit Available Elsewhere	4.875

The number assigned to this disaster for physical damage is P04006.

(Catalog of Federal Domestic Assistance Program Nos. 59008)

Dated: July 2, 2004.

Cheri L. Cannon,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 04–15632 Filed 7–8–04; 8:45 am]

BILLING CODE 8025–01–P

[18] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #P041]

State of California

As a result of the President's major disaster declaration for Public Assistance on June 30, 2004, the U.S. Small Business Administration is activating its disaster loan program only for private non-profit organizations that provide essential services of a governmental nature. I find that San Joaquin County in the State of California constitutes a disaster area due to damages caused by flooding as a result of a levee break occurring on June 3, 2004, and continuing. Applications for loans for physical damage as a result of this disaster may be filed until the close of business on August 30, 2004, at the address listed below or other locally announced locations: U.S. Small Business Administration, Disaster Area 4 Office, P.O. Box 419004, Sacramento, CA 95841–9004.

The interest rates are:

	Percent
For Physical Damage:	
Non-profit organizations without credit available elsewhere	2.750
Non-profit organizations with credit available elsewhere	4.875

The number assigned to this disaster for physical damage is P04106.

(Catalog of Federal Domestic Assistance Program Nos. 59008).

Dated: July 2, 2004.

Cheri L. Cannon,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 04–15633 Filed 7–8–04; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3595]

State of Michigan

As a result of the President's major disaster declaration on June 30, 2004, I find that Barry, Berrien, Cass, Genesee, Gladwin, Ingham, Ionia, Jackson, Kent, Livingston, Macomb, Mecosta, Oakland, Ottawa, Sanilac, Shiawassee, St. Clair, St. Joseph and Wayne Counties in the State of Michigan constitute a disaster area due to damages caused by severe storms, tornadoes, and flooding occurring on May 20 and continuing through May 24, 2004. Applications for loans for physical damage as a result of this disaster may be filed until the close of business on August 30, 2004, and for economic injury until the close of business on March 30, 2005, at the address listed below or other locally announced locations: U.S. Small Business Administration, Disaster Area 2 Office, One Baltimore Place, Suite 300, Atlanta, GA 30308.

In addition, applications for economic injury loans from small businesses located in the following contiguous counties may be filed until the specified date at the above location: Allegan, Arenac, Bay, Branch, Calhoun, Clare, Clinton, Eaton, Gratiot, Hillsdale, Huron, Isabella, Kalamazoo, Lake, Lenawee, Lapeer, Midland, Monroe, Montcalm, Muskegon, Newaygo, Ogemaw, Osceola, Roscommon, Saginaw, Tuscola, Van Buren and Washtenaw in the State of Michigan; and Elkhart, La Grange, La Porte and St. Joseph counties in the State of Indiana.

The interest rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	5.750
Homeowners Without Credit Available Elsewhere	2.875
Businesses With Credit Available Elsewhere	5.500
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	2.750
Others (Including Non-Profit Organizations) With Credit Available Elsewhere	4.875
For Economic Injury:	
Businesses and Small Agricultural Cooperatives Without Credit Available Elsewhere	2.750

The number assigned to this disaster for physical damage is 359512. For economic injury the number is 9ZK400 for Michigan; and 9ZK500 for Indiana.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: July 1, 2004.

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. 04–15572 Filed 7–8–04; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

Finding Regarding Foreign Social Insurance or Pension System of the Republic of Lithuania

AGENCY: Social Security Administration.

ACTION: Notice of finding regarding foreign social insurance or pension system of the Republic of Lithuania.

Finding: Section 202(t)(1) of the Social Security Act (42 U.S.C. 402(t)(1))

generally prohibits payment of monthly benefits to any individual who is not a United States (U.S.) citizen or national for any month after he or she has been outside the United States for more than six consecutive months. This prohibition does not apply to such an individual where one of the exceptions described in section 202(t)(2) through 202(t)(5) of the Social Security Act (42 U.S.C. 402(t)(2) through 402(t)(5)) affects his or her case.

Section 202(t)(2) of the Social Security Act provides that, subject to certain residency requirements of Section 202(t)(11), the prohibition against payment shall not apply to any individual who is a citizen of a country which the Commissioner of Social Security finds has in effect a social insurance or pension system which is of general application in such country and which:

(a) Pays periodic benefits, or the actuarial equivalent thereof, on account of old age, retirement, or death; and

(b) Permits individuals who are U.S. citizens, but not citizens of such country, and who qualify for such benefits to receive those benefits, or the actuarial equivalent thereof, while outside the foreign country, regardless of the duration of the absence.

The Commissioner of Social Security has approved a finding that Lithuania, beginning January 17, 2003, has a social insurance system of general application which:

(a) Pays periodic benefits, or the actuarial equivalent thereof, on account of old age, retirement, or death; and

(b) Permits U.S. citizens who are not citizens of Lithuania, and who qualify for the relevant benefits, to receive such benefits, or their actuarial equivalent, without qualification or restriction, while outside of Lithuania, regardless of the duration of the absence of these individuals from Lithuania.

Accordingly, it is hereby determined and found that Lithuania has in effect, beginning, January 17, 2003, a social insurance system which meets the requirements of section 202(t)(2) of the Social Security Act (42 U.S.C. 402(t)(2)).

Although the United States did not recognize the forced incorporation of Lithuania and the other Baltic countries into the Union of Soviet Socialist Republics (U.S.S.R.), the Soviet Union occupied these territories and enforced its laws there. Thus, prior to formal recognition of its independence by the United States in September 1991, Lithuania was considered part of the U.S.S.R. for U.S. Social Security purposes. It was found on August 21, 1970, that the social insurance system of the U.S.S.R., (including Estonia, Latvia and Lithuania), met the requirements of section 202(t)(2)(a), but not (b) of the Act, and this finding was published in the **Federal Register** on September 3, 1970 (35 FR 14021). Thus, U.S. Social Security benefits were not paid based on citizenship in Lithuania (nor were they paid based on citizenship in the U.S.S.R.).

For the period September 1991 through December 1994, the law governing old-age and survivors pensions in Lithuania remained the same as the former Soviet system, except for administrative changes involving funding/management of the budget and employer/employee contributions. On January 1, 1995, the Lithuanian Law on State Social Insurance Pensions of July 18, 1994, took effect.

On December 11, 1996, SSA made a determination that Lithuania's social insurance system met part (a) but not part (b) of section 202(t)(2) of the Act. This determination was effective September 1, 1991, the month the United States publicly recognized Lithuania as an independent nation.

However, effective January 17, 2003, the Republic of Lithuania has committed to provide for the payment of benefits, without restriction, to citizens of the United States who are otherwise qualified, but who are outside the paying country, without regard to the length of absence. The Republic of Lithuania also assures that claims for benefits may be filed from outside the paying country, that payment will be made for retirement or old age benefits, as well as for survivors' benefits, and that the benefits will be calculated using the same formula used for citizens of the paying country. Lithuania further assures that, if benefits are paid in Lithuanian currency, that currency is fully convertible into U.S. dollars.

FOR FURTHER INFORMATION CONTACT: Jerry Hibbitts, Room 1104, West High Rise Building, P.O. Box 17741, 6401 Security Boulevard, Baltimore, MD 21235, (410) 965–3451.

(Catalog of Federal Domestic Assistance: Program Nos. 96.001 Social Security—Disability Insurance; 96.002 Social Security—Retirement Insurance; 96.004 Social Security—Survivors Insurance)

Dated: July 1, 2004.

Jo Anne B. Barnhart,

Commissioner, Social Security Administration.

[FR Doc. 04–15611 Filed 7–8–04; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 4742]

Advisory Committee on International Economic Policy; Notice of Open Meeting

The Advisory Committee on International Economic Policy (ACIEP) will meet from 1:30 p.m. to 4:30 p.m. on Tuesday, July 20, 2004, in Room 1107, U.S. Department of State, 2201 C Street, NW., Washington, DC. The meeting will be hosted by Assistant Secretary of State for Economic and Business Affairs E. Anthony Wayne and Committee Chairman R. Michael Gadbaw. Topics for the July 20 meeting are U.S. economic relations with Iraq and the activities of the Millennium Challenge Corporation. The ACIEP serves the U.S. Government in a solely advisory capacity concerning issues and problems in international economic policy.

This meeting is open to the public as seating capacity allows. Entry to the building is controlled and will be facilitated by advance arrangements. Members of the public planning to attend should provide, by July 15, their name, professional affiliation, social security number (or other identification, such as driver's license), date of birth, and citizenship to Gwendolyn Jackson by fax (202) 647–5936, e-mail (*jacksongl@state.gov*), or telephone (202) 647–0847. Attendees should use the C Street entrance.

For further information about the meeting, please contact Eliza Koch, ACIEP Secretariat, Office of Economic Policy and Public Diplomacy, Bureau of Economic and Business Affairs, at (202) 647–1310 or *kochek@state.gov*.

Dated: July 1, 2004.

Eliza K. Koch,

ACIEP Secretariat, Office of Economic Policy and Public Diplomacy, Bureau of Economic and Business Affairs, Department of State.

[FR Doc. 04–15656 Filed 7–8–04; 8:45 am]

BILLING CODE 4710–07–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements Filed the Week Ending June 25, 2004

The following Agreements were filed with the Department of Transportation under the provisions of 49 U.S.C. 412 and 414. Answers may be filed within 21 days after the filing of the application.

Docket Number: OST–2004–18476.

Date Filed: June 22, 2004.

Parties: Members of the International Air Transport Association.

Subject: PTC31 SOUTH 0161 dated 4 June 2004; TC31 South Pacific (except between French Polynesia, New Caledonia, New Zealand and USA) Resolutions r1–r28; PTC31 SOUTH 0162 dated 4 June 2004; TC31 South Pacific Between French Polynesia, New Caledonia, New Zealand and USA Resolutions r29–r44; Minutes—PTC 31 SOUTH 0163 dated 18 June 2004; Tables—PTC31 SOUTH Fares 0038 dated 4 June 2004; Intended effective date: 1 October 2004.

Docket Number: OST–2004–18503.

Date Filed: June 24, 2004.

Parties: Members of the International Air Transport Association.

Subject: PTC2 EUR 0568 dated 25 June 2004; Mail Vote 393—Resolution 010k; TC2 Within Europe Special Passenger Amending Resolution; Intended effective date: 5 July 2004.

Docket Number: OST–2004–18504.

Date Filed: June 24, 2004.

Parties: Members of the International Air Transport Association.

Subject: PTC2 EUR 0567 dated 25 June 2004; Mail Vote 394—Resolution 010L; TC2 Within Europe Special Passenger Amending Resolution from Malta to Europe; Intended effective date: 10 July 2004.

Maria Gulczewski,

Supervisory Dockets Officer, Alternate Federal Register Liaison.

[FR Doc. 04–15640 Filed 7–8–04; 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 June 25, 2004

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–2004–18481.

Date Filed: June 22, 2004.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: July 13, 2004.

Description: Application of Domodedovo Airlines, requesting a foreign air carrier permit to engage in non-scheduled passenger and combination charter service between the Russian Federation and the U.S.

Docket Number: OST–2003–14296.

Date Filed: June 23, 2004.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: July 14, 2004.

Description: Application of Cayman Airways Limited, requesting to revise its previously filed application for amendment of its foreign air carrier permit to authorize CAL to serve Miami and Houston and five additional points selected by the U.K. government and notified to the U.S.

Maria Gulczewski,

Supervisory Dockets Officer, Alternate Federal Register Liaison.

[FR Doc. 04–15641 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Proposed Changes to Advisory Circular 27–1B, Certification of Normal Category Rotorcraft, and Advisory Circular 29–2C, Certification of Transport Category Rotorcraft

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of availability of proposed Advisory Circular (AC) changes and request for comments.

SUMMARY: This notice announces the availability of and requests comments on proposed revisions to AC 27–1B, Certification of Normal Category Rotorcraft, and AC 29–2C, Certification of Transport Category Rotorcraft. These proposed changes revise current AC paragraph MG 8, Substantiation of Composite Rotorcraft Structure. This notice is necessary to give all interested persons an opportunity to comment on the proposed AC change.

DATES: We must receive your comments by August 9, 2004.

ADDRESSES: Send all comments on the proposed AC changes to the Federal Aviation Administration, Attn: Richard Monschke, Rotorcraft Standards Staff, ASW–110, 2601 Meacham Boulevard, Fort Worth, TX 76193–0110; e-mail: *Richard.A.Monschke@faa.gov*, or fax (817) 222–5961. You may inspect comments at the above address between 7:30 a.m. and 4 p.m. weekdays, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Richard Monschke, telephone: (817) 222–5116; fax (817) 222–5961.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite all interested persons to comment on the proposed AC by submitting such written data, views, or arguments as they may desire. If you have comments, you should identify AC 27–1B and AC 29–2C, AC paragraph MG 8, and submit your comments, in duplicate, to the address specified above. We will consider all communications received by the closing date before issuing the final AC. You can get a copy of the proposed material by contacting the person named under the caption **FOR FURTHER INFORMATION CONTACT** or by downloading the proposed AC from the following Internet Web site: *http://www.airweb.faa.gov/rgl.*

Background

Although it was not an Aviation Rulemaking Advisory Committee (ARAC) working group, a harmonized working group developed these changes. Except for references, the text of the proposed material is the same in MG 8 for both AC 27–1B and AC 29–2C. When these AC changes are finalized, they will be posted on the Internet Web site as accepted, but will not be published at that time. They will be published in the next change to AC 27–1B and AC 29–2C.

Issued in Fort Worth, Texas, on June 30, 2004.

Mark Schilling,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 04–15644 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Proposed Change to Advisory Circular 29–2C, Certification of Transport Category Rotorcraft

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of availability of proposed advisory circular (AC) material and request for comments.

SUMMARY: This notice announces the availability of and requests comments on proposed new material to be added

to AC 29–2C, Certification of Transport Category Rotorcraft. This proposed material adds a new paragraph MG 17, Advanced Flight Controls. This notice is necessary to give all interested persons an opportunity to comment on the proposed AC material.

DATES: We must receive your comments by Augusut 9, 2004.

ADDRESSES: Send all comments on the proposed AC paragraph to the Federal Aviation Administration, Attention: Robert R. McCallister, Safety Management Group, ASW–112, 2601 Meacham Boulevard, Fort Worth, TX 76193–0112; e-mail: *Robert.R.McCallister@faa.gov* or fax: (817) 222–5961. You may inspect comments at the above address between 7:30 a.m. and 4 p.m. weekdays, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Robert R. McCallister, telephone (817) 222–5121; fax (817) 222–5961.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite all interested persons to comment on the proposed AC by submitting such written data, views, or arguments as they may desire. If you have comments, you should identify AC 29–2C, AC paragraph MG 17, and submit your comments, in duplicate, to the address specified above. We will consider all communications received by the closing date before issuing the final AC. You can get a copy of the proposed material by contacting the person named under the caption **FOR FURTHER INFORMATION CONTACT** or by downloading the proposed AC from the following Internet Web site: *http://www.airweb.faa.gov/rgl.*

Background

A harmonized working group developed this material for Advanced Flight Controls. When this AC paragraph is finalized, it will be posted on the Internet Web site as accepted, and it will be published in the next update to AC 29–2C. We anticipate that draft material for Advanced Flight Controls for AC 27–1B will be developed soon.

Issued in Fort Worth, Texas, on June 30, 2004.

Mark Schilling,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 04–15645 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Proposed Changes to Advisory Circular 27–1B, Certification of Normal Category Rotorcraft, and Advisory Circular 29–2C, Certification of Transport Category Rotorcraft

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of availability of proposed Advisory Circular (AC) material and request for comments.

SUMMARY: This notice announces the availability of and requests comments on proposed new material to be added to AC 27–1B, Certification of Normal Category Rotorcraft, and AC 29–2C, Certification of Transport Category Rotorcraft. This proposed material adds a new paragraph MG 18, Helicopter Terrain Awareness and Warning System (HTAWS). This notice is necessary to give all interested persons an opportunity to comment on the proposed AC change.

DATES: We must receive your comments by August 9, 2004.

ADDRESSES: Send all comments on the proposed AC paragraph to the Federal Aviation Administration, Attn: James R. Arnold, Regulations and Policy Group, ASW–111, 2601 Meacham Boulevard, Fort Worth, TX 76193–0111; e-mail: *James.R.Arnold@faa.gov*, or fax: 817–222–5961. You may inspect comments at the above address between 7:30 a.m. and 4 p.m. weekdays, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: James R. Arnold, telephone: (817) 222–5126; fax (817) 222–5961.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite all interested persons to comment on the proposed AC by submitting such written data, views, or arguments as they may desire. If you have comments, you should identify AC 27–1B and AC 29–2C, AC paragraph MG 18, and submit your comments, in duplicate, to the address specified above. We will consider all communications received by the closing date before issuing the final AC. You can get a copy of the proposed material by contacting the person named under the caption **FOR FURTHER INFORMATION CONTACT** or by downloading the proposed AC from the following Internet Web site: *http://www.airweb.faa.gov/rgl.*

Background

A harmonized team of FAA, other airworthiness authorities, and members of the rotorcraft industry developed this material. Except for references, the text is the same in MG 18 for both AC 27–1B and AC 29–2C. When these AC paragraphs are finalized, they will be posted on the Internet Web site as accepted, and they will be published in the next updates to AC 27–1B and AC 29–2C.

Issued in Fort Worth, Texas, on June 30, 2004.

Mark Schilling,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 04–15646 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Application 04–06–C–00–BTM to Impose and Use the Revenue from a Passenger Facility Charge (PFC) at Bert Mooney Airport, Submitted by the Bert Mooney Airport Authority, Bert Mooney Airport, Helena, MT

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use PFC revenue at Bert Mooney Airport under the provisions of 49 U.S.C. 40117 and part 158 of the Federal Aviation Regulations (14 CFR part 158).

DATES: Comments must be received on or before August 9, 2004.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: David S. Stelling, Manager, Helena Airports District Office, HLN–ADO, Federal Aviation Administration, FAA Building, Suite 2,2725 Skyway Drive, Helena, Montana 59602–1213.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Rick Griffith, Airport Manager: Bert Mooney Airport, 101 Airport Road, Butte, Montana 59701.

Air Carriers and foreign air carriers may submit copies of written comments previously provided to Bert Mooney Airport, under § 158.23 of part 158.

FOR FURTHER INFORMATION CONTACT: David S. Stelling, Manager, Helena Airports District Office, HLN–ADO,

Federal Aviation Administration, FAA Building, Suite 2,2725 Skyway Drive, Helena, Montana 59602–1213. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application 04–06–C–00–BTM to impose and use PFC revenue at Bert Mooney Airport, under the provisions of 49 U.S.C. 40117 and part 158 of the Federal Aviation Regulations (14 CFR part 158).

On June 30, 2004, the FAA determined that the application to impose and use the revenue from a PFC submitted by Bert Mooney Airport Authority, Bert Mooney Airport, Butte, Montana, was substantially complete within the requirements of § 158.25 of part 158. The FAA will approve or disapprove the application, in whole or in part, no later than September 29, 2004.

The following is a brief overview of the application.

Level of the proposed PFC: $3.00.

Proposed charge effective date: March 1, 2005.

Proposed charge expiration date: January 1, 2007.

Total requested for use approval: $189,711.

Brief description of proposed project: Improve Airport Security; Acquire Snow Removal Equipment; Construct Snow Removal Equipment Building; Rehabilitate West General Aviation Apron; Install Southside Security/Wildlife Fence; Update Airport Master Plan; Maintain Pavement (Runway 15/33); Maintain Pavement (Runway 11/29); Maintain Pavement (Commercial Ramp).

Class or classes of air carrier that the public agency has requested not be required to collect PFC's: Air Taxi/Commercial Operators (ATCO) filing FAA Form 1800–31.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT** and at the FAA Regional Airports Office located at: Federal Aviation Administration, Northwest Mountain Region, Airports Division, ANM–600, 1601 Lind Avenue, SW., Suite 315, Renton, WA 98055–4056.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Bert Mooney Airport.

Issued in Renton, Washington, on June 30, 2004.

David A. Field,

Manager, Planning, Programming and Capacity Branch, Northwest mountain Region.

[FR Doc. 04–15649 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Application 04–05–C–00–DTW to Impose and Use the Revenue From a Passenger Facility Charge (PFC) at Detroit Metropolitan Wayne County Airport, Detroit, MI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Detroit Metropolitan Wayne County Airport under the provisions of the 49 U.S.C. 40117 and part 158 of the Federal Aviation Regulations (14 CFR part 158).

DATES: Comments must be received on or before August 9, 2004.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Detroit Airports District Office, 1677 South Wayne Road, Suite 107, Romulus, Michigan 48174.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Lester Robinson, Chief Executive Officer of the Wayne County Airport Authority at the following address: Detroit Metropolitan Wayne County Airport, L.C. Smith Terminal—Mezzanine, Detroit, Michigan 48174.

Air carriers and foreign air carriers may submit copies of written comments previously provided to the Wayne County Airport Authority under § 158.23 of part 158.

FOR FURTHER INFORMATION CONTACT: Jason Watt, Program Manager, Federal Aviation Administration, Detroit Airports District Office, 11677 South Wayne Road, Suite 107, Romulus, Michigan 48174, (734) 229–2906. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Detroit Metropolitan Wayne County Airport under the provisions of the 49 U.S.C. 40117 and part 158 of the Federal Aviation Regulations (14 CFR part 158).

On June 19, 2004, the FAA determined that the application to impose and use the revenue from a PFC submitted by the Wayne County Airport Authority was substantially complete within the requirements of § 158.25 of part 158. The FAA will approve or disapprove the application, in whole or in part, no later than September 21, 2004.

The following is a brief overview of the application.

Proposed charge effective date: September 1, 2029.

Proposed charge expiration date: October 1, 2032.

Level of the proposed PFC: $4.50.

Total estimated PFC revenue: $457,173,000.

Brief description of proposed projects: North Terminal Apron, Runway 3R/21L Design and Pavement Evaluation, McNamara Terminal Phase II Program, Taxiway "Q" Construction, Airfield Safety Vehicles and Equipment, Deicing Pads at Runway 4R, 3L and 22L, Part 150 Study Update, Third Aircraft Rescue and Fire Fighting (ARFF) Facility, Runway 4R/22L Shoulders/Overburden, Perimeter Fencing and Security Enhancements, Surface Movement Guidance Control System (SMGCS), West Airfield Improvements, Runway 3L/21R Planning, and Interconnect Re-route.

Class or classes of air carriers, which the public agency has requested not to be required to collect PFCs: air carriers or foreign air carriers, which enplane fewer than 500 passengers per year.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT.**

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Wayne County Airport Authority.

Issued in Des Plaines, Illinois, on July 2, 2004.

Elliott Black,

Manager, Planning and Programming Branch, Airports Division, Great Lakes Region.

[FR Doc. 04–15648 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2004–17970]

Agency Information Collection Submission for OMB Review: Motor Carrier Safety Assistance Program (MCSAP)

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice.

SUMMARY: The FMCSA announces that the Information Collection Request (ICR) described in this notice is being sent to the Office of Management and Budget (OMB) for review and approval. The FMCSA is requesting OMB's continued approval of the information that is required for the Motor Carrier Safety Assistance Program (MCSAP). That information consists of grant application preparation, quarterly reports and electronic data documenting the results of driver/vehicle inspections performed by the States. The **Federal Register** notice announcing a 60-day comment period on this information collection was published on April 15, 2004 (69 FR 20111). We are required to send ICRs to OMB under the Paperwork Reduction Act of 1995.

DATES: Please submit comments by August 9, 2004.

ADDRESSES: Mail or hand deliver comments to the U. S. Department of Transportation, Dockets Management Facility, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590, or submit electronically at *http://dmses.dot.gov/submit.* Be sure to include the docket number appearing in the heading of this document on your comment. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. If you would like to be notified when your comment is received, you must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically.

FOR FURTHER INFORMATION CONTACT: Mr. James D. McCauley, (202) 366–0133, Office of Safety Programs, Federal Motor Carrier Safety Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:30 a.m. to 4 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: Motor Carrier Safety Assistance Program.

OMB Number: 2126–0010.

Background: Sections 401–404 of the Surface Transportation Assistance Act of 1982 (STAA) (Pub. L. 97–424, Stat. 2079, 2154) established a program of financial assistance to States for the purpose of implementing programs to enforce: (a) Federal rules, regulations, standards and orders applicable to commercial motor vehicle safety; and (b) compatible State rules, regulations, standards and orders. This grant-in-aid program is known as the Motor Carrier Safety Assistance Program (MCSAP). The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) (49 U.S.C. 31101–31104, as amended) added programs, such as drug interdiction, traffic enforcement and size and weight activities to the core program established by the STAA.

The Transportation Equity Act for the 21st Century (TEA–21) (Pub. L. 105–178, 112 Stat.107 (June 9, 1998)) further revised the MCSAP by broadening its purpose beyond enforcement activities and programs by requiring participating States to assume greater responsibility for improving motor carrier safety. The TEA–21 required States to develop performance-based plans reflecting national priorities and performance goals, revised the MCSAP funding distribution formula and created a new incentive funding program. As a result, States are given greater flexibility in designing programs to address national and State goals for reducing the number and severity of commercial motor vehicle (CMV) accidents. The implementing regulations were published in the **Federal Register** on March 21, 2000 (65 FR 15092).

In order to qualify for a grant, participating States must submit a Commercial Vehicle Safety Plan (CVSP). After the grant is awarded, States must submit inspection data and quarterly reports explaining work activities and accomplishments. The FMCSA monitors and evaluates a State's progress under its approved CVSP. The agency also determines whether a change in the State's level of effort is required to meet the intended objectives of the CVSP. If a State fails to operate within the guidelines of the approved CVSP or does not remedy any identified deficiencies or incompatibilities in a timely manner, the FMCSA may cease participation in that State's CVSP. This information collection provides the basis for these responsibilities and decisions.

States submit the CVSP in hard copy. The quarterly report and inspection data continue to be collected electronically. The estimated annual burden for this collection increases slightly due to a growing number of driver/vehicle inspections.

Respondents: State and local MCSAP lead agencies.

Estimated Total Annual Burden: 11,854 hours (Grant application preparation: 848 hours; quarterly report preparation: 339 hours; and inspection data upload: 10,667 hours). The above figures reflect 20 percent of the total estimated hours to perform the activities listed since MCSAP reimburses up to 80 percent of the eligible costs incurred in the administration of an approved plan as set forth in 49 CFR 350.303, 350.309 and 350.311.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended; Pub. L. 97–424, Stat. 2079, 2154 (1982); 49 U.S.C. 31101–31104; Pub. L. 105–178, 112 Stat.107 (1998); and 49 CFR 1.73.

Issued on: July 2, 2004.

Warren E. Hoemann,

Deputy Administrator.

[FR Doc. 04–15650 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA 2004–17439; Notice 2]

Hyundai Motor Company, Grant of Petition for Decision of Inconsequential Noncompliance

Hyundai Motor Company (Hyundai) has determined that certain vehicles that it produced do not comply with S5.3.5(a) of Federal Motor Vehicle Safety Standard (FMVSS) No. 105, "Hydraulic and electric brake systems," and S5.5.5 of FMVSS No. 135, "Passenger car brake systems." Pursuant to 49 U.S.C. 30118(d) and 30120(h), Hyundai has petitioned for a determination that this noncompliance is inconsequential to motor vehicle safety and has filed an appropriate report pursuant to 49 CFR part 573, "Defect and Noncompliance Reports." Notice of receipt of the petition was published with a 30 day comment period on April 20, 2004, in the **Federal Register** (69 FR 21186). NHTSA received no comments.

S5.3.5 of FMVSS No. 105 requires that "Each indicator lamp shall display word, words or abbreviation * * * which shall have letters not less than ⅛-inch high." S5.5.5 of FMVSS No. 135 requires that "Each visual indicator shall display a word or words * * * [which] shall have letters not less than 3.2 mm (⅛ inch) high."

Approximately 237,994 vehicles are affected. Approximately 142,667 vehicles do not meet the letter height requirement for the abbreviation "ABS," where the letter height varies from 2.5 mm to 3.1 mm. These include MY 1998–2004 Accents, MY 1998–2004 Elantras, MY 2002–2004 Tiburons, MY 1999–2004 Sonatas, MY 2001–2004 XGs, and MY 2001–2004 Santa Fes. Approximately 95,327 vehicles do not meet the letter height requirements for the word "brake," where the letter height varies from 2.9 mm to 3.1 mm. These include MY 1998–1999 Accents and MY 1998–2001 Tiburons.

Hyundai believes that the noncompliance is inconsequential to motor vehicle safety and that no corrective action is warranted. Hyundai states that the International Standards Organization (ISO) symbol for the ABS and the "ABS" lettering are part of the same ABS warning indicator, and both are simultaneously illuminated in yellow by the same lighting source. Hyundai explains that both identifications illuminate simultaneously during the instrument cluster warning lamp operation check, and also if an ABS malfunction occurs. Hyundai further states that although the ABS lettering that appears within the ISO symbol is slightly smaller than 3.2 mm in height, the overall height of the ABS warning lamp word/symbol combination significantly exceeds the standard on each of the affected models.

Hyundai says that on the two models where the "brake" lettering is slightly smaller than 3.2 mm in height, the ISO symbol for the brake system and the parking brake ISO symbol are part of the same brake warning indicator. Hyundai states that both the lettering and symbol identifications illuminate simultaneously in red during the instrument cluster warning lamp operation check, every time the parking brake is applied, and also if a brake system malfunction occurs. Hyundai further points out that although the "brake" lettering that appears below the ISO symbols is slightly smaller than 3.2 mm in height, the overall height of the "brake" warning lamp word and symbols combination exceeds the standard. Therefore the visual indicators are visible to the driver under all driving conditions.

The agency agrees with Hyundai this noncompliance will not have an adverse effect on vehicle safety. Due to the positioning, color, use of the ISO symbol, and combined size of both the lettering and symbols, it is very unlikely that a vehicle user would either fail to see or fail to understand the meaning of the brake or ABS warning light in the affected vehicles. The information presented by the telltales is correct. Hyundai has not received any complaints regarding the size or visibility of either light, and is not aware of any crashes or injuries associated with the size or visibility of the indicators. Hyundai has corrected the problem.

In consideration of the foregoing, NHTSA has decided that the petitioner has met its burden of persuasion that the noncompliance described is inconsequential to motor vehicle safety. Accordingly, Hyundai's petition is granted and the petitioner is exempted from the obligation of providing notification of and a remedy for the noncompliance.

Authority: 49 U.S.C. 30118, 30120; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: July 6, 2004.

Kenneth N. Weinstein,

Associate Administrator for Enforcement.

[FR Doc. 04–15652 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–59–U

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA 2004–17438; Notice 2]

Pirelli Tire North America, Grant of Petition for Decision of Inconsequential Noncompliance

Pirelli Pneumatici S.p.A has determined that certain tires it produced do not comply with S4.3(d) and S4.3(e) of 49 CFR 571.109, Federal Motor Vehicle Safety Standard (FMVSS) No. 109, "New pneumatic tires." Pursuant to 49 U.S.C. 30118(d) and 30120(h), Pirelli Tire LLC (Pirelli), as agent for Pirelli Pneumatici S.p.A, has petitioned for a determination that this noncompliance is inconsequential to motor vehicle safety and has filed an appropriate report pursuant to 49 CFR part 573, "Defect and Noncompliance Reports." Notice of receipt of the petition was published with a 30 day comment period on April 20, 2004, in the **Federal Register** (69 FR 21189). NHTSA received no comments.

A total of approximately 190 tires are involved. These are Pzero Asimmetrico 275/40ZR18 99Y (F) H405 tires, which Pirelli Pneumatici S.p.A produced intermittently during the period January to April, 2003. They are marked "reinforced" when in fact they are not, and are marked as two ply when they are one ply. Paragraph S4.3 of FMVSS No. 109 requires "each tire shall have permanently molded into or onto both sidewalls * * * (d) The generic name of each cord material used in the plies * * * of the tire; and (e) Actual number of plies in the sidewall, and the actual number of plies in the tread area if different."

Pirelli states that the incorrect sidewall inscription does not compromise in any way the integrity or the performance characteristics of the tires in question and does not constitute any safety-related issue. Therefore, Pirelli believes that the noncompliance is inconsequential to motor vehicle safety, and that no corrective action is warranted.

With regard to the tires being marked "reinforced" when in fact they are not, NHTSA has no requirement that a tire be labeled with the word "reinforced" even when it is designed to accommodate a greater load than a standard tire of the same size. Therefore, the agency has determined that the petition is moot with regard to this marking.

With regard to the incorrect ply marking, the agency agrees with Pirelli's statement that the marking of the tires as two ply when they are one ply does not present a serious safety concern. The Transportation Recall, Enhancement, Accountability, and Documentation (TREAD) Act (Pub. L. 106–414) required that the agency initiate rulemaking to improve tire label information. In response, the agency published an Advance Notice of Proposed Rulemaking (ANPRM) in the **Federal Register** on December 1, 2000 (65 FR 75222).

The agency received more than 20 comments on the tire labeling information. With regard to the tire construction labeling requirements of FMVSS No. 109, S4.3(d) and (e), most commenters indicated that the information was of little or no safety value. In addition, the agency conducted a series of focus groups, as required by the TREAD Act, to examine consumer perceptions and understanding of tire labeling. Few of the focus group participants had knowledge of tire labeling beyond the tire brand name, tire size, and tire pressure. Therefore, in the agency's judgment, the noncompliance will have an inconsequential effect on the operational safety of vehicles on which these tires are mounted. In addition, the tires are certified to meet all the performance requirements of FMVSS No. 109. Pirelli has corrected the problem.

In consideration of the foregoing, NHTSA has decided that the petitioner has met its burden of persuasion that

the noncompliance described is inconsequential to motor vehicle safety. Accordingly, Pirelli's petition is granted and the petitioner is exempted from the obligation of providing notification of and a remedy for the noncompliance.

Authority: 49 U.S.C. 30118, 30120; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: July 6, 2004.

Kenneth N. Weinstein,

Associate Administrator for Enforcement.

[FR Doc. 04–15653 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–59–U

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2004–18478]

Notice of Receipt of Petition for Decision that Nonconforming 1999 Ferrari 456GT and GTA Passenger Cars Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice of receipt of petition for decision that nonconforming 1999 Ferrari 456GT and GTA passenger cars are eligible for importation.

SUMMARY: This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that 1999 Ferrari 456GT and GTA passenger cars that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because (1) they are substantially similar to vehicles that were originally manufactured for importation into and sale in the United States and that were certified by their manufacturer as complying with the safety standards, and (2) they are capable of being readily altered to conform to the standards.

DATES: The closing date for comments on the petition is August 9, 2004.

ADDRESSES: Comments should refer to the docket number and notice number, and be submitted to: Docket Management, Room PL–401, 400 Seventh St., SW., Washington, DC 20590. (Docket hours are from 9 a.m. to 5 p.m.) Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted 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 (Volume 65, Number 70; Pages 19477–78), or you may visit *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Coleman Sachs, Office of Vehicle Safety Compliance, NHTSA (202–366–3151).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

J.K. Technologies, LLC of Baltimore, Maryland (Registered Importer RI–90–006) has petitioned NHTSA to decide whether 1999 Ferrari 456GT and GTA passenger cars are eligible for importation into the United States. The vehicles that J.K. Technologies believes are substantially similar are 1999 Ferrari 456GT and GTA passenger cars that were manufactured for importation into, and sale in, the United States and certified by their manufacturer as conforming to all applicable Federal motor vehicle safety standards.

The petitioner claims that it compared non-U.S. certified 1999 Ferrari 456GT and GTA passenger cars to their U.S.-certified counterparts, and found the vehicles to be substantially similar with respect to compliance with most Federal motor vehicle safety standards.

J.K. Technologies submitted information with its petition intended to demonstrate that non-U.S. certified 1999 Ferrari 456GT and GTA passenger cars, as originally manufactured, conform to many Federal motor vehicle safety standards in the same manner as their U.S. certified counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that non-U.S. certified 1999 Ferrari 456GT and GTA passenger cars are identical to their U.S. certified counterparts with respect to compliance with Standard Nos. 102 *Transmission Shift Lever Sequence, Starter interlock, and transmission braking effect*, 103 *Windshield Defrosting and Defogging Systems*, 104 *Windshield Wiping and Washing Systems*, 105 *Hydraulic and Electric Brake Systems*, 106 *Brake Hoses*, 109 *New Pneumatic Tires*, 113 *Hood Latch Systems*, 116 *Motor Vehicle Brake Fluids*, 124 *Accelerator Control Systems*, 201 *Occupant Protection in Interior Impact*, 202 *Head Restraints*, 203 *Impact Protection for the Driver from the Steering Control System*, 204 *Steering Control Rearward Displacement*, 205 *Glazing Materials*, 206 *Door Locks and Door Retention Components*, 207 *Seating Systems*, 210 *Seat Belt Assembly Anchorages*, 212 *Windshield Mounting*, 219 *Windshield Zone Intrusion*, and 302 *Flammability of Interior Materials*.

The petitioner also contends that the vehicles are capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays:* (a) Inscription of the word "brake" on the instrument cluster in place of the international ECE warning symbol or installation of a U.S.-model instrument cluster; (b) inscription of the seat belt warning symbol on the instrument cluster or installation of a U.S.-model instrument cluster; (c) modification of the speedometer to read in miles per hour or replacement of the speedometer through the installation of a U.S.-model instrument cluster. U.S. version software must be downloaded to ensure compliant operation of the replaced or modified controls and displays.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* Installation of the following components (a) U.S.-model headlamps; (b) U.S.-model front sidemarker lamps that incorporate reflex reflectors; (c) modification of taillamps to ensure compliance with the standard or installation of U.S.-model taillamp assemblies that incorporate rear sidemarker lamps and reflex reflectors. Petitioner also states that the vehicle is equipped with a high-mounted stop lamp.

Standard No. 110 *Tire Selection and Rims*: Installation of a tire information placard.

Standard No. 111 *Rearview Mirrors*: Inscription of the required warning statement on the passenger side rearview mirror, or installation of U.S.-model passenger side rearview mirror.

Standard No. 114 *Theft Protection*: Reprogramming of the vehicle's computers to the U.S.-mode to ensure compliance with the standard.

Standard No. 118 *Power-Operated Window, Partition, and Roof Panel Systems*: Petitioner states that all vehicles must be inspected to ensure compliance with this standard and that a relay will be added to the power window control circuit as necessary to ensure compliance with this standard.

Standard No. 208 *Occupant Crash Protection:* (a) Reprogramming of the vehicle's computers to the U.S.-mode to activate the seatbelt warning buzzer and lamp; (b) installation of compliant passenger's seat belt and driver's seat belt latch. Petitioner states that all vehicles must be inspected to ensure compliance with this standard and that U.S.-model components will be installed, as necessary, to ensure compliance with the standard. The petitioner also states that the vehicles are equipped with dual front air bags, and with combination lap and shoulder belts at the outboard front seating positions that are self-tensioning and capable of being released by means of a single red push button.

Standard No. 209 *Seat Belt Assemblies*: Inspection of all vehicles and installation of U.S.-model components on vehicles that are not already so equipped to ensure compliance with this standard and standard No. 208 *Occupant Crash Protection.*

Standard No. 214 *Side impact protection*: Inspection of all vehicles and installation of U.S.-model components on vehicles that are not already so equipped to ensure compliance with the standard.

The petitioner states that a supplemental visible label must be affixed to the vehicles near the left windshield post to meet the requirements of 49 CFR part 565, and a reference and certification label must be affixed to the edge of the driver's side door to ensure compliance with the requirements of 49 CFR part 567.

Petitioner also states that all vehicles must be inspected to ensure compliance with the Bumper Standard found at 49 CFR part 581 and that U.S.-model component will be installed, as necessary on vehicles that are not already so equipped. The petitioner expressed the belief that the vehicles do in fact comply with this standard.

Interested persons are invited to submit comments on the petition described above. Comments should refer to the docket number and be submitted to: Docket Management, Room PL–401, 400 Seventh St., SW., Washington, DC 20590. (Docket hours are from 9 a.m. to 5 p.m.) It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 04–15651 Filed 7–8–04; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34519]

Union Pacific Railroad Company—Temporary Trackage Rights Exemption—The Burlington Northern and Santa Fe Railway Company

The Burlington Northern and Santa Fe Railway Company (BNSF) has agreed to grant temporary overhead trackage rights to Union Pacific Railroad Company (UP), between BNSF milepost 141.7 near Rockview, MO, and BNSF milepost 164.9 near Sikeston, MO, a distance of approximately 23.2 miles.

The transaction is scheduled to be consummated on July 1, 2004, and the temporary trackage rights will expire on or about July 23, 2004. The purpose of the temporary rights is to facilitate maintenance work on UP lines.

As a condition to this exemption, any employee affected by the acquisition of the temporary trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights-BN,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate,* 360 I.C.C. 653 (1980), and, in accordance with the decision of the United States Court of Appeals for the District of Columbia Circuit in *United Transportation Union—General Committee of Adjustment (GO–386)* v. *Surface Transportation Board,* 363 F.3d 465 (D.C. Cir. 2004), any employee affected by the discontinuance of those trackage rights will be protected by the conditions set out in *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979).

This notice is filed under 49 CFR 1180.2(d)(8). If it contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34519, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Robert T. Opal, 1416 Dodge Street, Room 830, Omaha, NE 68179.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: July 1, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 04–15630 Filed 7–8–04; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–33 (Sub–No. 217X)]

Union Pacific Railroad Company—Abandonment Exemption—in Monterey County, CA

Union Pacific Railroad Company (UP) has filed a notice of exemption under 49 CFR part 1152 subpart F—*Exempt Abandonments* to abandon a 1.62-mile line of railroad known as the Spreckles Industrial Lead from milepost 121.5 near Spreckles Junction to milepost 123.12 at the end of the line at Spreckles, in Monterey County, CA. The line traverses United States Postal Service ZIP Code 93962.

UP 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 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 August 10, 2004, 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 July 19, 2004. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by July 29, 2004, with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to UP's representative: Mack H. Shumate, Jr., Senior General Attorney, Union Pacific Railroad Company, 101 North Wacker Dr., Room 1920, Chicago, IL 60606.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

UP has filed an environmental report which addresses the effects, if any, of the abandonment on the environment and historic resources. SEA will issue an environmental assessment (EA) by July 16, 2004. 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), UP 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 UP's filing of a notice of consummation by July 9, 2005, 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: July 1, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 04–15520 Filed 7–8–04; 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 $1,100. *See* 49 CFR 1002.2(f)(25).

Corrections

Federal Register
Vol. 69, No. 131
Friday, July 9, 2004

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 36

[Docket No. FAA–2000–7958; Amendment No. 36–25]

RIN 2120–AH10

Noise Certification Regulations for Helicopters

Correction

In rule document 04–12069 beginning on page 31226 in the issue of Wednesday, June 2, 2004, make the following correction:

Appendix H to Part 36—Noise Requirements for Helicopters Under Subpart H

On page 31244, remove Figure H3, duplicated from page 31242.

[FR Doc. C4–12069 Filed 7–8–04; 8:45 am]
BILLING CODE 1505–01–D

Federal Register

Friday,
July 9, 2004

Part II

Environmental Protection Agency

40 CFR Parts 9, 122 et al.
National Pollutant Discharge Elimination System—Final Regulations To Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9, 122, 123, 124, and 125

[FRL–7625–9]

RIN 2040–AD62

National Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Today's final rule implements section 316(b) of the Clean Water Act (CWA) for certain existing power producing facilities that employ a cooling water intake structure and are designed to withdraw 50 million gallons per day (MGD) or more of water from rivers, streams, lakes, reservoirs, estuaries, oceans, or other waters of the United States for cooling purposes. This final rule constitutes Phase II of EPA's section 316(b) regulation development and establishes national requirements, and procedures for implementing those requirements, applicable to the location, design, construction, and capacity of cooling water intake structures at these facilities. The rule applies to existing facilities that, as their primary activity, both generate and transmit electric power or generate electric power but sell it to another entity for transmission. The national requirements, which will be implemented through National Pollutant Discharge Elimination System (NPDES) permits, are based on the best technology available to minimize the adverse environmental impact associated with the use of cooling water intake structures.

Today's final rule establishes performance standards that are projected to reduce impingement mortality by 80 to 95 percent and, if applicable, entrainment by 60 to 90 percent. With the implementation of today's final rule, EPA intends to minimize the adverse environmental impact of cooling water intake structures by reducing the number of aquatic organisms lost as a result of water withdrawals associated with these structures.

DATES: This regulation is effective September 7, 2004. For judicial review purposes, this final rule is promulgated as of 1 p.m. Eastern Standard Time (EST) on July 23, 2004, as provided in 40 CFR 23.2.

ADDRESSES: The docket for today's final rule is available for public inspection at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: For additional technical information contact Martha Segall at (202) 566–1041 or Debra Hart at (202) 566–6379. The e-mail address for the above contacts is *rule.316b@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. What Entities Are Regulated by This Action?

This final rule applies to Phase II existing facilities that are point sources; as their primary activity both generate and transmit electric power or generate electric power for sale to another entity for transmission; use or propose to use one or more cooling water intake structures with a total design intake flow of 50 million gallons per day (MGD) or more to withdraw water from waters of the United States; and use 25 percent of water withdrawn exclusively for cooling water purposes. This rule defines "existing facility" as any facility that commenced constructions on or before January 17, 2002, and any modification of, or any addition of a unit at such a facility that does not meet the definition of a new facility at § 125.83.

This rule defines the term "cooling water intake structure" to mean the total physical structure and any associated constructed waterways used to withdraw cooling water from waters of the United States. The cooling water intake structure extends from the point at which water is withdrawn from the surface water source up to, and including, the intake pumps.

Category	Examples of regulated entities	Standard Industrial Classification (SIC) codes	North American Industry Classification System (NAICS) codes
Federal, State, and Local Government ...	Steam electric generating point source dischargers that employ cooling water intake structures.	4911 and 493	221112, 221113, 221119, 221121, 221122
Industry	Steam electric generating industrial point source dischargers that employ cooling water intake structures (this includes utilities and nonutilities).	4911 and 493	221112, 221113, 221119, 221121, 221122

This exhibit is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This exhibit lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the exhibit could also be regulated. To determine whether your facility is regulated by this action, you should carefully examine the applicability criteria in § 125.91 of the rule. If you have questions regarding the applicability of this action to a particular entity, consult the person listed for technical information in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. How Can I Get Copies of This Document and Other Related Information?

1. Docket

EPA has established an official public docket for this action under Docket ID No. OW 2002–0049. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include information claimed as Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center 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 Water Docket is (202) 566–2426. To view docket materials,

please call ahead to schedule an appointment. Every user is entitled to copy 266 pages per day before incurring a charge. The Docket may charge 15 cents for each page over the 266-page limit plus an administrative fee of $25.00.

2. Electronic Access

You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in section I.B.1. Once in the system, select "search," then key in the appropriate docket identification number.

C. Supporting Documentation

The final regulation is supported by three major documents:

1. Economic and Benefits Analysis for the Final Section 316(b) Phase II Existing Facilities Rule (EPA–821–R–04–005), hereafter referred to as the Economic and Benefits Analysis. This document presents the analysis of compliance costs, closures, energy supply effects, and benefits associated with the final rule.

2. Regional Analysis for the Final Section 316(b) Phase II Existing Facilities Rule (EPA–821–R–04–006), hereafter referred to as the Regional Analysis Document or the Regional Study(ies) Document. This document examines cooling water intake structure impacts and regulatory benefits at the regional level.

3. Technical Development Document for the Final Section 316(b) Phase II Existing Facilities Rule (EPA–821–R–04–007), hereafter referred to as the Technical Development Document. This document presents detailed information on the methods used to develop unit costs and describes the set of technologies that may be used to meet the final rule's requirements.

D. Table of Contents

II. Scope and Applicability of the Final Rule

This rule applies to owners and operators of existing facilities, as defined in § 125.93 of today's rule that meet all of the following criteria:

- The facility's primary activity is to generate electric power. The facility either transmits the electric power itself, or sells the electric power to another entity for transmission;
- The facility is a point source that uses or proposes to use one or more cooling water intake structures, including a cooling water intake structure operated by an independent supplier that withdraws water from waters of the United States and provides cooling water to the facility by any sort of contract or other arrangement;
- The cooling water intake structure(s) withdraw(s) cooling water from waters of the United States and at least twenty-five (25) percent of the water withdrawn is used exclusively for cooling purposes measured on an average annual basis;
- The facility is a point source; and
- The cooling water intake structures have a total design intake flow of 50

million gallons per day (MGD) or greater.

In the case of a Phase II existing facility that is co-located with a manufacturing facility, only that portion of the cooling water flow that is used by the Phase II facility to generate electricity for sale to another entity will be considered when determining whether the 50 MGD and 25 percent criteria are met. Facilities subject to this final rule are referred to as "Phase II existing facilities." Existing facilities with design flows below the 50 MGD threshold, as well as most existing manufacturing facilities, offshore seafood processors, and offshore and coastal oil and gas extraction facilities are not subject to this rule. Those facilities have different characteristics as compared to the large, power-generating facilities subject to today's rule. If an existing facility is a point source and has or is required to have an NPDES permit, but does not meet the applicability thresholds in today's rule, it is subject to permit conditions implementing section 316(b) of the CWA set by the permit director on a case-by-case basis, using best professional judgment. EPA expects to address at least some of these facilities in a separate rulemaking, referred to as Phase III.

In the preamble to the proposed rule EPA indicated that its intent was to exclude from regulation under the Phase II rule existing facilities whose primary business is manufacturing. See, *e.g.*, 67 FR 17124 (April 9, 2002). At the same time, in § 125.91(a)(3) of the proposed rule, the applicability criteria covered facilities that both generate and transmit electric power, or generate electric power but sell it to another entity for transmission. Numerous commenters indicated concerns that, as proposed, § 125.91(a)(3) would not clearly exclude all existing manufacturing facilities from the Phase II rule since some facilities generate electric power primarily for their own use, but transmit or sell any surplus. Therefore, for the final rule, EPA revised § 125.91 so that it reaches only those existing facilities that generate and transmit or sell electric power as their primary activity. The final rule does not apply to existing manufacturing facilities, including manufacturing facilities that generate power for their own use and transmit any surplus power, or sell it for transmission, provided the primary activity of the facility is not electric power generation.

A. What Is an "Existing Facility" for Purposes of the Section 316(b) Phase II Rule?

In today's rule, EPA is defining the term "existing facility" to include any facility that commenced construction as described in 40 CFR 122.29(b)(4) [1] on or before January 17, 2002. EPA established January 17, 2002 as the date for distinguishing new facilities from existing ones because that is the effective date of the Phase I new facility rule. In addition, EPA is defining the term "existing facility" in this rule to include modifications and additions to such facilities, the construction of which commences after January 17, 2002, that do not meet the definition of a new facility at 40 CFR 125.83, the definition used to define the scope of the Phase I rule. That definition states:

"*New facility* means any building, structure, facility, or installation that meets the definition of a 'new source' or 'new discharger' in [other NPDES regulations] and is a greenfield or stand-alone facility; commences construction after January 17, 2002; and uses either a newly constructed cooling water intake structure, or an existing cooling water intake structure whose design capacity is increased to accommodate the intake of additional cooling water. New facilities include only 'greenfield' and 'stand-alone' facilities. A greenfield facility is a facility that is constructed at a site at which no other source is located or that totally replaces the process or production equipment at an existing facility (see 40 CFR 122.29(b)(1)(i) and (ii). A stand-alone facility is a new, separate facility that is constructed on property where an existing facility is located and whose processes are substantially independent of the existing facility at the same site (see 40 CFR 122.29(b)(1)(iii). New facility does not include new units that are added to a facility for purposes of the same general industrial operation (for example, a new peaking unit at an electrical generating station)." [2]

The preamble to the final Phase I rule discusses this definition at 66 FR 65256; 65258–65259; 65285–65287, December 18, 2001.

EPA included in its Phase II proposed rule a freestanding definition of "existing facility." That definition read as follows:

"Existing facility means any facility that commenced construction before January 17, 2002; and

(1) Any modification of such a facility;

(2) Any addition of a unit at such a facility for purposes of the same industrial operation;

(3) Any addition of a unit at such a facility for purposes of a different industrial operation, if the additional unit uses an existing cooling water intake structure and the design capacity of the intake structure is not increased; or

(4) Any facility constructed in place of such a facility, if the newly constructed facility uses an existing cooling water intake structure whose design intake flow is not increased to accommodate the intake of additional cooling water." 67 FR 17221.

Upon further consideration, EPA has decided that it would be clearest to define existing facility primarily by stating that any facility that is not a new facility under 40 CFR 125.83 is an existing facility for purposes of this subpart. Accordingly, the language in this final rule is intended to be clear and consistent with EPA's definition of new facility in the Phase I rule at 40 CFR 125.83. In addition, the definition in today's regulation is also intended to ensure that sources excluded from the definition of new facility in the Phase I rule are captured by the definition of existing facility for the purposes of today's rule. At the same time, EPA believes that the approach taken in

[1] Construction is commenced if the owner or operator has undertaken certain installation and site preparation activities that are part of a continuous on-site construction program, and it includes entering into certain specified binding contractual obligations as one criterion (40 CFR 122.29(b)(4)).

[2] The Phase I rule also listed examples of facilities that would be "new" facilities and facilities that would "not be considered a 'new facility' in two numbered paragraphs. These read as follows:

"(1) Examples of 'new facilities' include, but are not limited to: the following scenarios:

(i) A new facility is constructed on a site that has never been used for industrial or commercial activity. It has a new cooling water intake structure for its own use.

(ii) A facility is demolished and another facility is constructed in its place. The newly-constructed facility uses the original facility's cooling water intake structure, but modifies it to increase the design capacity to accommodate the intake of additional cooling water.

(iii) A facility is constructed on the same property as an existing facility, but is a separate and independent industrial operation. The cooling water intake structure used by the original facility is modified by constructing a new intake bay for the use of the newly constructed facility or is otherwise modified to increase the intake capacity for the new facility.

(2) Examples of facilities that would not be considered a 'new facility' include, but are not limited to, the following scenarios:

(i) A facility in commercial or industrial operation is modified and either continues to use its original cooling water intake structure or uses a new or modified cooling water intake structure.

(ii) A facility has an existing intake structure. Another facility (a separate and independent industrial operation), is constructed on the same property and connects to the facility's cooling water intake structure behind the intake pumps, and the design capacity of the cooling water intake structure has not been increased. This facility would not be considered a 'new facility' even if routine maintenance or repairs that do not increase the design capacity were performed on the intake structure."

today's rule is identical in terms of effect to the approach in the proposed rule. Thus, the approach taken in today's final rule is in no way intended to change the scope of the rule as compared with the proposal as far as the facilities treated as "existing" facilities under the rule. The change is in drafting technique, not in meaning.

The facility encompassed by today's regulation is the point source that uses a cooling water intake structure to generate electric power. This is because the requirements of CWA section 316(b) are implemented through NPDES permits, which are issued only to point source dischargers of pollutants to waters of the United States. A point source generating electric power would be subject to Phase I or Phase II even if the cooling water intake structure it uses is located elsewhere. Similarly, modifications or additions to the cooling water intake structure (or even the total replacement of an existing cooling water intake structure with a new one) does not convert an otherwise unchanged existing facility into a new facility, regardless of the purpose of such changes (*e.g.*, to comply with today's rule or to increase capacity). Rather, the determination as to whether a facility is new or existing focuses on the power-generating point source itself, *i.e.*, whether it is a greenfield facility or a stand-alone facility. This focus on the point source discharger is consistent with section 316(b), which by its express terms applies only to point sources.

Under this rule, an existing power generating facility that uses a cooling water intake structure and repowers by either replacing or modifying an existing generating unit would remain subject to regulation as a Phase II existing facility, unless the existing facility were completely demolished and another facility constructed in its place that used either a new intake structure or the existing structure with an increased design capacity. For example, the following facility modifications or additions would result in a facility being characterized as an existing facility under today's rule:

- An existing power generating facility undergoes a modification of its process short of total replacement of the process and concurrently increases the design capacity of its existing cooling water intake structures;
- An existing power generating facility builds a new process at its site for purposes of the same industrial operation and concurrently increases the design capacity of its existing cooling water intake structures;
- An existing power generating facility completely rebuilds its process but uses the existing cooling water intake structure with no increase in design capacity.

Phase II existing facilities subject to today's rule include point sources that do not presently use, but propose to use, cooling water intake structures and do not meet the definition of new facility at § 125.83. This is appropriate because there may be some cases in which an existing facility historically withdrew its cooling water from a municipal or other source, but then decides to withdraw cooling water from a water of the United States. In these cases, the facility may not previously have met all of the criteria applicable to an existing facility under today's rule (*i.e.*, the facility did not previously withdraw cooling waters from a water of the United States) but may make changes that would place the facility within the scope of today's rule. A comparable situation would be when a facility previously relied on units that do not require cooling water, and then adds or modifies a unit for purposes of the same industrial operation (*i.e.*, power generation) such that cooling water is subsequently required. For example, an existing power generating facility that adds a new generating unit at the same site for purposes of repowering and concurrently increases the design capacity of its existing cooling water intake structure(s), or adds a new intake structure where it did not previously need one, for example when converting a gas turbine to a combined cycle unit, would be considered an existing facility.

In the preamble to the Phase I rule, EPA noted that it had defined "existing facility" in a manner consistent with existing NPDES regulations with a limited exception. EPA noted that it had generally deferred regulation of new sources constructed on a site at which an existing source is located until the Agency had completed analysis of its survey data on existing facilities. 66 FR 65286. Accordingly, the Phase I rule treated almost all changes to existing facilities for purposes of the same industrial operation as existing facilities. These included the addition of new generating units at the same site, even where they required an increase in cooling water intake structure design capacity or the construction of a new cooling water intake structure, as well as the complete demolition of an existing facility and its replacement with a new facility, so long as it did not increase the design capacity of the cooling water intake structure. The only exception was the demolition of an existing facility and its replacement with a new facility accompanied by an increase in design capacity of the cooling water intake structure. As the preamble explained: "The definition of a new facility in the final rule applies to a facility that is repowered only if the existing facility has been demolished and another facility is constructed in its place, and modifies the existing cooling water intake structure to increase the design intake capacity." *Id.*[2a] By contrast, the Phase I rule treated the addition of a new unit for purposes of a different industrial operation as an existing facility only if it used an existing cooling water intake structure whose design intake flow was not increased.

The Phase II proposed rule continued this approach in its definition of "existing facility." It continued to treat all changes to existing facilities for purposes of the same industrial operation as an existing facility unless the change was a complete demolition and replacement of the facility accompanied by an increase in cooling water intake design capacity. It also continued to treat the addition of new units for purposes of a different industrial operation differently, only allowing them to be "existing facilities" if they used an existing cooling water intake structure and did not increase its design intake flow. 67 FR 17221. In putting forth this proposed definition, EPA noted that it had collected data from a variety of sources, including survey data, specifically relating to repowering facilities. *Id.* at 17131–17135. It also made a point of explaining the wide variety of repowering activities that an existing facility could undertake under the proposed rule—anything short of demolition of an existing facility and its replacement with a new facility combined with increasing the design capacity of a cooling water intake structure—while still being regulated as an "existing facility" rather than a "new facility." *Id.* at 17128.

On the basis of the analysis of the survey data and other information in the record, the Agency now has concluded that it should adhere to its provisional

[2a] Because they are part of the same "industrial operation," such units are not "stand-alone" facilities for purposes of the "new facility" definition. As the fifth sentence of the definition of "new facility" explains, they are categorically treated as "existing facilities" regardless of any other considerations unless they completely replace an existing facility and its cooling water design intake capacity is increased. Accordingly, there is thus no need to make a determination whether they are "substantially independent" of the existing facility at the same site under the fourth sentence of the definition in order to determine whether they are "existing" or "new facilities." The fifth sentence alone controls that question.

decision generally giving wide latitude to existing facilities to make changes or additions to their facilities at the same site. In particular, new units that are added to a facility for purposes of the same general industrial operation should be treated as existing facilities because limitations associated with an existing site make it inappropriate to subject such units to new facility requirements. These limitations include space, existing location on a waterbody, location in already congested areas which could affect (if Phase 1 requirements were applied) visibility impairment, highway and airport safety issues, noise abatement issues, salt drift and corrosion problems and additional energy requirements. Moreover, power generation facilities should not be discouraged from making any upgrade, modification, or repowering that would increase energy efficiency or supply out of concern that they would be considered a new facility for purposes of section 316(b). Additional benefits will be realized in terms of reducing industrial sprawl if incremental power generation is not discouraged at existing power generation sites. These considerations counsel in favor of treating new units locating at existing sites as existing rather than new facilities. EPA also noted when it promulgated the Phase I rule (*see* 66 FR 65286) that it is not feasible for the permit authority to judge whether the facility could have been located elsewhere for the purpose of determining whether the facility is subject to the new facility rules. Accordingly, EPA has decided to retain the Phase I definition's provision that a new facility does not include new units that are added to a facility for purposes of the same general industrial operation. As noted above, this decision is fully consistent with the approach to this issue laid out in the proposed Phase II rule.

The final rule definition of "existing facility" is sufficiently broad that it encompasses facilities that will be addressed under the Phase III rule (*e.g.*, existing power generating facilities with design flows below the 50 MGD threshold, certain existing manufacturing facilities, seafood processors, and offshore and coastal oil and gas extraction facilities). EPA notes, however, that these facilities are not covered under this rule because they do not meet the requirements of § 125.91.

B. What Is "Cooling Water" and What Is a "Cooling Water Intake Structure?"

Today's rule adopts for Phase II existing facilities the same definition of a "cooling water intake structure" that applies to new facilities. A cooling water intake structure is defined as the total physical structure and any associated constructed waterways used to withdraw cooling water from waters of the United States. Under the definition in today's rule, the cooling water intake structure extends from the point at which water is withdrawn from the surface water source up to, and including, the intake pumps. Today's rule adopts the new facility rule's definition of "cooling water": Water used for contact or noncontact cooling, including water used for equipment cooling, evaporative cooling tower makeup, and dilution of effluent heat content. The definition specifies that the intended use of cooling water is to absorb waste heat rejected from the processes used, or auxiliary operations on the facility's premises. The definition also indicates that water used in a manufacturing process either before or after it is used for cooling is process water for both cooling and non-cooling purposes and would not be considered cooling water for purposes of determining whether 25 percent or more of the flow is cooling water. This clarification is necessary because cooling water intake structures typically bring water into a facility for numerous purposes, including industrial processes; use as circulating water, service water, or evaporative cooling tower makeup water; dilution of effluent heat content; equipment cooling; and air conditioning. EPA notes that this clarification does not change the fact that only the intake water used exclusively for cooling purposes is counted when determining whether the 25 percent threshold in § 125.91(a)(4) is met.

This definition of "cooling water intake structure" differs from the definition provided in the 1977 Draft Guidance for Evaluating the Adverse Impact of Cooling Water Intake Structures on the Aquatic Environment: Section 316(b) P.L. 92–500 (U.S. EPA, 1977). The final rule definition clarifies that the cooling water intake structure includes the physical structure that extends from the point at which water is withdrawn from the surface water up to and including the intake pumps. Inclusion of the term "associated constructed waterways" in today's rule is intended to clarify that the definition includes those canals, channels, connecting waterways, and similar structures that may be built or modified to facilitate the withdrawal of cooling water. The explicit inclusion of the intake pumps in the definition reflects the key role pumps play in determining the capacity (*i.e.*, dynamic capacity) of the intake. These pumps, which bring in water, are an essential component of the cooling water intake structure since without them the intake could not work as designed.

C. Is My Facility Covered if It Withdraws From Waters of the United States?

The requirements finalized today apply to cooling water intake structures that have the design capacity to withdraw amounts of water equal to or greater than the specified intake flow threshold from "waters of the United States." Waters of the United States include the broad range of surface waters that meet the regulatory definition at 40 CFR 122.2, which includes lakes, ponds, reservoirs, nontidal rivers or streams, tidal rivers, estuaries, fjords, oceans, bays, and coves. These potential sources of cooling water may be adversely affected by impingement and entrainment.

Some facilities discharge heated water to cooling ponds, then withdraw water from the ponds for cooling purposes. EPA recognizes that cooling ponds may, in certain circumstances, constitute part of a closed-cycled cooling system. See, *e.g.*, 40 CFR 125.83. However, EPA does not intend this rule to change the regulatory status of cooling ponds. Cooling ponds are neither categorically included nor categorically excluded from the definition of "waters of the United States" at 40 CFR 122.2. EPA interprets 40 CFR 122.2 to give permit writers discretion to regulate cooling ponds as "waters of the United States" where cooling ponds meet the definition of "waters of the United States." The determination whether a particular cooling pond is or is not a water of the United States is to be made by the permit writer on a case-by-case basis, informed by the principles enunciated in Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001). Therefore, facilities that withdraw cooling water from cooling ponds that are waters of the United States and that meet today's other criteria for coverage (including the requirement that the facility has or will be required to obtain an NPDES permit) are subject to today's rule. The EPA and the U.S. Army Corps of Engineers have jointly issued jurisdictional guidance concerning the term "waters of the United States" in light of the Supreme Court's decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (SWANCC). A copy of that guidance was published as an Appendix to an Advanced Notice of Proposed

Rulemaking on the definition of the phrase "waters of the U.S.," see 68 FR 1991 (January 15, 2003), and may be obtained at (*http://www.epa.gov/owow/wetlands/ANPRM-FR.pdf*). Section 125.91(d) also provides, similar to the new facility rule, that facilities that obtain cooling water from a public water system or use treated effluent are not deemed to be using a cooling water intake structure for purposes of this rule.

D. Is My Facility Covered if It Is a Point Source Discharger?

Today's rule applies only to facilities that are point sources (*i.e.*, have an NPDES permit or are required to obtain one) because they discharge or might discharge pollutants, including storm water, from a point source to waters of the Unites States. This is the same requirement EPA included in the Phase I new facility rule at 40 CFR 125.81(a)(1). Requirements for complying with section 316(b) will continue to be applied through NPDES permits.

Based on the Agency's review of potential Phase II existing facilities that employ cooling water intake structures, the Agency anticipates that most existing power generating facilities that will be subject to this rule will control the intake structure that supplies them with cooling water, and discharge some combination of their cooling water, wastewater, and storm water to a water of the United States through a point source regulated by an NPDES permit. In this scenario, the requirements for the cooling water intake structure will be specified in the facility's NPDES permit. In the event that a Phase II existing facility's only NPDES permit is a general permit for storm water discharges, the Agency anticipates that the Director would write an individual NPDES permit containing requirements for the facility's cooling water intake structure. Alternatively, requirements applicable to cooling water intake structures could be incorporated into general permits. If requirements are placed into a general permit, they must meet the criteria set out at 40 CFR 122.28.

The Agency also recognizes that some facilities that have or are required to have an NPDES permit might not own and operate the intake structure that supplies their facility with cooling water. For example, electric power-generating facilities operated by separate entities might be located on the same, adjacent, or nearby property(ies); one of these facilities might take in cooling water and then transfer it to other facilities prior to discharge of the cooling water to a water of the United States. Section 125.91(c) of today's rule addresses such a situation. It provides that use of a cooling water intake structure includes obtaining cooling water by any sort of contract or arrangement with one or more independent suppliers of cooling water if the supplier or suppliers withdraw water from waters of the United States but that is not itself a Phase II existing facility. This provision is intended to prevent facilities from circumventing the requirements of today's rule by creating arrangements to receive cooling water from an entity that is not itself a Phase II existing facility.

In addressing facilities that have or are required to have an NPDES permit that do not directly control the intake structure that supplies their facility with cooling water, section 125.91(d) also provides, similar to the new facility rule, that facilities that obtain cooling water from a public water system or use treated effluent are not deemed to be using a cooling water intake structure for purposes of this rule.

As EPA stated in the preamble to the final Phase I rule (66 FR 65256 December 18, 2001), the Agency encourages the Director to closely examine scenarios in which a facility withdraws significant amounts of cooling water from waters of the United States but is not required to obtain an NPDES permit. As appropriate, the Director should apply other legal requirements, such as section 404 or 401 of the Clean Water Act, the Coastal Zone Management Act, the National Environmental Policy Act, the Endangered Species Act, or similar State or Tribal authorities to address adverse environmental impact caused by cooling water intake structures at those facilities.

E. What Cooling Water Use and Design Intake Flow Thresholds Result in an Existing Facility Being Subject to This Rule?

This final rule applies to existing facilities that are point sources and use cooling water intake structures that (1) withdraw cooling water from waters of the United States and use at least twenty-five (25) percent of the water withdrawn exclusively for cooling purposes, and (2) have a total design intake capacity of 50 MGD or more measured on an average annual basis (see § 125.91). Today's rule further provides that where a Phase II existing facility is co-located with a manufacturing facility, only that portion of the cooling water intake flow that is used by the Phase II facility to generate electricity for sale to another entity will be considered for purposes of determining whether the 50 MGD and 25 percent criteria have been exceeded.

EPA chose the 50 MGD threshold to focus the rule on the largest existing power generating facilities. EPA estimates that the 50 MGD threshold will subject approximately 543 of 902 (60 percent) existing power generating facilities to this final rule and will address approximately 90 percent of the total flow withdrawn by these facilities. EPA established the 50 MGD threshold because the regulation of existing facilities with flows of 50 MGD or greater in Phase II will address those existing power generating facilities with the greatest potential to cause or contribute to adverse environmental impact. In addition, EPA has limited data on impacts at facilities withdrawing less than 50 MGD. Deferring regulation of such facilities to Phase III provides an additional opportunity for the Agency to collect impingement and entrainment data for these smaller facilities.

Similarly, because Phase II existing facilities typically use far more than 25 percent of the water they withdraw for cooling purposes, EPA established the 25 percent threshold to ensure that nearly all cooling water and the largest existing facilities using cooling water intake structures are addressed by today's requirements. As in the Phase I rule, water used for both cooling and non-cooling purposes does not count towards the 25 percent threshold. Thus, the rule does not discourage the reuse of cooling water as process water or vice versa. Water that serves as cooling water but is either previously or subsequently used as process water is not considered cooling water for purposes of determining the percentage of the water withdrawn that is used for cooling and whether that percentage equals or exceeds 25 percent. Water withdrawn for non-cooling purposes includes water withdrawn for warming by liquified natural gas facilities and water withdrawn for public water systems by desalinization facilities.

III. Legal Authority, Purpose, and Background of Today's Regulation

A. Legal Authority

Today's final rule is issued under the authority of sections 101, 301, 304, 308, 316, 401, 402, 501, and 510 of the Clean Water Act (CWA), 33 U.S.C. 1251, 1311, 1314, 1318, 1326, 1341, 1342, 1361, and 1370. This rule partially fulfills the obligations of the U.S. Environmental Protection Agency (EPA) under a consent decree in *Riverkeeper, Inc.* v. *Leavitt,* No. 93 Civ. 0314, (S.D.N.Y).

B. Purpose of Today's Regulation

Section 316(b) of the CWA provides that any standard established pursuant to section 301 or 306 of the CWA and applicable to a point source must require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available (BTA) for minimizing adverse environmental impact. Today's rule establishes requirements reflecting the best technology available for minimizing adverse environmental impact, applicable to the location, design, construction, and capacity of cooling water intake structures at Phase II existing power generating facilities that have the design capacity to withdraw at least fifty (50) MGD of cooling water from waters of the United States and use at least twenty-five (25) percent of the water they withdraw exclusively for cooling purposes.

C. Background

1. The Clean Water Act

The Federal Water Pollution Control Act, also known as the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, seeks to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. 1251(a). The CWA establishes a comprehensive regulatory program, key elements of which are (1) a prohibition on the discharge of pollutants from point sources to waters of the United States, except as authorized by the statute; (2) authority for EPA or authorized States or Tribes to issue National Pollutant Discharge Elimination System (NPDES) permits that regulate the discharge of pollutants; (3) requirements for limitations in NPDES permits based on effluent limitations guidelines and standards and water quality standards.

Today's rule implements section 316(b) of the CWA as it applies to "Phase II existing facilities" as defined in this rule. Section 316(b) addresses the adverse environmental impact caused by the intake of cooling water, not discharges into water. Despite this special focus, the requirements of section 316(b) are closely linked to several of the core elements of the NPDES permit program established under section 402 of the CWA to control discharges of pollutants into navigable waters. For example, while effluent limitations apply to the discharge of pollutants by NPDES-permitted point sources to waters of the United States, section 316(b) applies to facilities subject to NPDES requirements that withdraw water from waters of the United States for cooling and that use a cooling water intake structure to do so.

Section 402 of the CWA provides authority for EPA or an authorized State or Tribe to issue an NPDES permit to any person discharging any pollutant or combination of pollutants from a point source into waters of the United States. Forty-five States and one U.S. territory are authorized under section 402(b) to administer the NPDES permitting program. NPDES permits restrict the types and amounts of pollutants, including heat, that may be discharged from various industrial, commercial, and other sources of wastewater. These permits control the discharge of pollutants primarily by requiring dischargers to meet effluent limitations established pursuant to section 301 or section 306. Effluent limitations may be based on promulgated Federal effluent limitations guidelines, new source performance standards, or the best professional judgment of the permit writer. Limitations based on these guidelines, standards, or best professional judgment are known as technology-based effluent limits. Where technology-based effluent limits are inadequate to ensure attainment of water quality standards applicable to the receiving water, section 301(b)(1)(C) of the Clean Water Act requires permits to include more stringent limits based on applicable water quality standards. NPDES permits also routinely include monitoring and reporting requirements, standard conditions, and special conditions. In addition, NPDES permits contain conditions to implement the requirements of section 316(b). Section 301 of the CWA prohibits the discharge of any pollutant by any person, except in compliance with specified statutory requirements, including section 402.

Section 510 of the Clean Water Act provides, that except as provided in the Clean Water Act, nothing in the Act shall (1) preclude or deny the right of any State or political subdivision thereof to adopt or enforce any requirement respecting control or abatement of pollution; except that if a limitation, prohibition or standard of performance is in effect under the Clean Water Act, such State or political subdivision may not adopt or enforce any other limitation prohibition or standard of performance which is less stringent than the limitation prohibition or standard of performance under the Act. EPA interprets this to reserve for the States authority to implement requirements that are more stringent than the Federal requirements under state law. *PUD No. 1 of Jefferson County. Washington Dep't of Ecology,* 511 U.S. 700, 705 (1994).

Sections 301, 304, and 306 of the CWA require that EPA develop technology-based effluent limitations guidelines and new source performance standards that are used as the basis for technology-based minimum discharge requirements in wastewater discharge permits. EPA issues these effluent limitations guidelines and standards for categories of industrial dischargers based on the pollutants of concern discharged by the industry, the degree of control that can be attained using various levels of pollution control technology, consideration of various economic tests appropriate to each level of control, and other factors identified in sections 304 and 306 of the CWA (such as non-water quality environmental impacts including energy impacts). EPA has promulgated regulations setting effluent limitations guidelines and standards under sections 301, 304, and 306 of the CWA for more than 50 industries. See 40 CFR parts 405 through 471. EPA has established effluent limitations guidelines and standards that apply to most of the industry categories that use cooling water intake structures (*e.g.*, steam electric power generation, iron and steel manufacturing, pulp and paper manufacturing, petroleum refining, and chemical manufacturing).

Section 316(b) states, in full:

> Any standard established pursuant to section 301 or section 306 of [the Clean Water] Act and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.

The phrase "best technology available" in CWA section 316(b) is not defined in the statute, but its meaning can be understood in light of similar phrases used elsewhere in the CWA. See *Riverkeeper* v. *EPA,* slip op. at 11 (2nd Cir. Feb. 3, 2004) (noting that the cross-reference in CWA section 316(b) to CWA section 306 "is an invitation to look to section 306 for guidance in discerning what factors Congress intended the EPA to consider in determining the 'best technology available' " for new sources).

In sections 301 and 306, Congress directed EPA to set effluent discharge standards for new sources based on the "best available demonstrated control technology" and for existing sources based on the "best available technology economically achievable." For new sources, section 306(b)(1)(B) directs EPA to establish "standards of performance." The phrase "standards of performance" under section 306(a)(1) is defined as being the effluent reduction that is

"achievable through application of the best available demonstrated control technology, processes, operating methods or other alternatives * * *." This is commonly referred to as "best available demonstrated technology" or "BADT." For existing dischargers, section 301(b)(1)(A) requires the establishment of effluent limitations based on "the application of best practicable control technology currently available." This is commonly referred to as "best practicable technology" or "BPT." Further, section 301(b)(2)(A) directs EPA to establish effluent limitations for certain classes of pollutants "which shall require the application of the best available technology economically achievable." This is commonly referred to as "best available technology" or "BAT." Section 301 specifies that both BPT and BAT limitations must reflect determinations made by EPA under Clean Water Act section 304. Under these provisions, the discharge of pollutants from point sources is based not on the impact of the discharge on the receiving waters, but instead upon the capabilities of the equipment or "control technologies" available to control those discharges.

The phrases "best available demonstrated technology"; and "best available technology"—like "best technology available" in CWA section 316(b)—are not defined in the statute. However, section 304 of the CWA specifies factors to be considered in establishing the best practicable control technology currently available, and best available technology.

For best practicable control technology currently available, the CWA directs EPA to consider

> the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of the equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as [EPA] deems appropriate.

33 U.S.C. 1314(b)(1)(b).

For "best available technology," the CWA directs EPA to consider:

> the age of equipment and facilities involved, the process employed, the engineering aspects * * * of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impacts (including energy requirements), and such other factors as [EPA] deems appropriate.

33 U.S.C. 1314(b)(2)(B).

Section 316(b) expressly refers to section 301, and the phrase "best technology available" is very similar to "best technology available" in that section. These facts, coupled with the brevity of section 316(b) itself, prompted EPA to look to section 301 and, ultimately, section 304 for guidance in determining the "best technology available to minimize adverse environmental impact" of cooling water intake structures for existing Phase II facilities.

By the same token, however, there are significant differences between section 316(b) and sections 301 and 304. See *Riverkeeper, Inc.* v. *United States Environmental Protection Agency,* slip op. at 13, (2nd Cir. Feb. 3, 2004) ("not every statutory directive contained [in sections 301 and 306] is applicable" to a section 316(b) rulemaking). Section 316(b) requires that cooling water intake structures reflect the best technology available for minimizing adverse environmental impact. In contrast to the effluent limitations provisions, the object of the "best technology available" is explicitly articulated by reference to the receiving water: To minimize adverse environmental impact in the waters from which cooling water is withdrawn. This difference is reflected in EPA's past practices in implementing sections 301, 304, and 316(b). While EPA has established effluent limitations guidelines based on the efficacy of one or more technologies to reduce pollutants in wastewater in relation to cost without necessarily considering the impact on the receiving waters, EPA has previously considered the costs of technologies in relation to the benefits of minimizing adverse environmental impact in establishing 316(b) limits which historically have been done on a case-by case basis. *In Re Public Service Co. of New Hampshire,* 10 ERC 1257 (June 17, 1977); *In Re Public Service Co. of New Hampshire,* 1 EAD 455 (Aug. 4, 1978); *Seacoast Anti-Pollution League* v. *Costle,* 597 F. 2d 306 (1st Cir. 1979).

For this Phase II rulemaking, EPA therefore interprets CWA section 316(b) as authorizing EPA to consider not only technologies but also their effects on and benefits to the water from which the cooling water is withdrawn. Based on these two considerations, EPA has established in today's rule national requirements for facilities to install technology that is technically available, economically practicable, and cost-effective while at the same time authorizing a range of technologies that achieve comparable reductions in adverse environmental impact.

2. Consent Decree

Today's final rule partially fulfills EPA's obligation to comply with a consent decree, as amended. The Second Amended Consent Decree, which is relevant to today's rule, was filed on November 25, 2002, in the United States District Court, Southern District of New York, in *Riverkeeper, Inc.* v. *Leavitt,* No. 93 Civ 0314, a case brought against EPA by a coalition of individuals and environmental groups. The original Consent Decree, filed on October 10, 1995, provided that EPA was to propose regulations implementing section 316(b) by July 2, 1999, and take final action with respect to those regulations by August 13, 2001. Under subsequent interim orders, the Amended Consent Decree filed on November 22, 2000, and the Second Amended Consent Decree, EPA has divided the rulemaking into three phases and is working under new deadlines. As required by the Second Amended Consent Decree, on November 9, 2001, EPA took final action on a rule governing cooling water intake structures used by new facilities (Phase I). 66 FR 65255 (December 18, 2001). The Second Amended Consent Decree requires that EPA take final action by February 16, 2004, with respect to Phase II regulations that are "applicable to, at a minimum: (1) Existing utilities (*i.e.,* facilities that both generate and transmit electric power) that employ a cooling water intake structure, and whose intake flow levels exceed a minimum threshold to be determined by EPA during the Phase II rulemaking process; and (2) existing nonutility power producers (*i.e.,* facilities that generate electric power but sell it to another entity for transmission) that employ a cooling water intake structure, and whose intake flow levels exceed a minimum threshold to be determined by EPA during the Phase II rulemaking process." The consent decree further requires that EPA propose regulations governing cooling water intake structures used, at a minimum, by smaller-flow power plants and facilities in four industrial sectors (pulp and paper making, petroleum and coal products manufacturing, chemical and allied manufacturing, and primary metal manufacturing) by November 1, 2004, and take final action by June 1, 2006 (Phase III).

3. What Other EPA Rulemakings and Guidance Have Addressed Cooling Water Intake Structures?

In April 1976, EPA published a final rule under section 316(b) that addressed cooling water intake structures. 41 FR

17387 (April 26, 1976), see also the proposed rule at 38 FR 34410 (December 13, 1973). The rule added a new § 401.14 to 40 CFR Chapter I that reiterated the requirements of CWA section 316(b). It also added a new part 402, which included three sections: (1) § 402.10 (Applicability), (2) § 402.11 (Specialized definitions), and (3) § 402.12 (Best technology available for cooling water intake structures). Section 402.10 stated that the provisions of part 402 applied to "cooling water intake structures for point sources for which effluent limitations are established pursuant to section 301 or standards of performance are established pursuant to section 306 of the Act." Section 402.11 defined the terms "cooling water intake structure," "location," "design," "construction," "capacity," and "Development Document." Section 402.12 included the following language:

> The information contained in the Development Document shall be considered in determining whether the location, design, construction, and capacity of a cooling water intake structure of a point source subject to standards established under section 301 or 306 reflect the best technology available for minimizing adverse environmental impact.

In 1977, fifty-eight electric utility companies challenged those regulations, arguing that EPA had failed to comply with the requirements of the Administrative Procedure Act (APA) in promulgating the rule. Specifically, the utilities argued that EPA had neither published the Development Document in the **Federal Register** nor properly incorporated the document into the rule by reference. The United States Court of Appeals for the Fourth Circuit agreed and, without reaching the merits of the regulations themselves, remanded the rule. *Appalachian Power Co.* v. *Train,* 566 F.2d 451 (4th Cir. 1977). EPA later withdrew part 402. 44 FR 32956 (June 7, 1979). The regulation at 40 CFR 401.14, which reiterates the statutory requirement, remains in effect.

Since the Fourth Circuit remanded EPA's section 316(b) regulations in 1977, NPDES permit authorities have made decisions implementing section 316(b) on a case-by-case, site-specific basis. EPA published draft guidance addressing section 316(b) implementation in 1977. See *Draft Guidance for Evaluating the Adverse Impact of Cooling Water Intake Structures on the Aquatic Environment: Section 316(b) P.L. 92–500* (U.S. EPA, 1977). This draft guidance described the studies recommended for evaluating the impact of cooling water intake structures on the aquatic environment and recommended a basis for determining the best technology available for minimizing adverse environmental impact. The 1977 section 316(b) draft guidance states, "The environmental-intake interactions in question are highly site-specific and the decision as to best technology available for intake design, location, construction, and capacity must be made on a case-by-case basis." (Section 316(b) Draft Guidance, U.S. EPA, 1977, p. 4). This case-by-case approach was also consistent with the approach described in the 1976 Development Document referenced in the remanded regulation.

The 1977 section 316(b) draft guidance suggested a general process for developing information needed to support section 316(b) decisions and presenting that information to the permitting authority. The process involved the development of a site-specific study of the environmental effects associated with each facility that uses one or more cooling water intake structures, as well as consideration of that study by the permitting authority in determining whether the facility must make any changes for minimizing adverse environmental impact. Where adverse environmental impact is present, the 1977 draft guidance suggested a stepwise approach that considers screening systems, size, location, capacity, and other factors.

Although the draft guidance described the information that should be developed, key factors that should be considered, and a process for supporting section 316(b) determinations, it did not establish uniform technology-based national standards for best technology available for minimizing adverse environmental impact. Rather, the guidance left the decisions on the appropriate location, design, capacity, and construction of cooling water intake structures to the permitting authority. Under this framework, the Director determined whether appropriate studies have been performed, whether a given facility has minimized adverse environmental impact, and what, if any, technologies may be required.

4. Phase I New Facility Rule

On November 9, 2001, EPA took final action on regulations governing cooling water intake structures at new facilities. 66 FR 65255 (December 18, 2001). On December 26, 2002, EPA made minor changes to the Phase I regulations. 67 FR 78947. The final Phase I new-facility rule (40 CFR Part 125, Subpart I) establishes requirements applicable to the location, design, construction, and capacity of cooling water intake structures at new facilities that withdraw at least two (2) million gallons per day (MGD) and use at least twenty-five (25) percent of the water they withdraw solely for cooling purposes. In the new facility rule, EPA adopted a two-track approach. Under Track I, for facilities with a design intake flow more than 10 MGD, the intake flow of the cooling water intake structure is restricted, at a minimum, to a level commensurate with that which could be attained by use of a closed-cycle, recirculating cooling system. For facilities with a design intake flow more than 2 MGD, the design through-screen intake velocity is restricted to 0.5 ft/s and the total quantity of intake is restricted to a proportion of the mean annual flow of a freshwater river or stream, or to maintain the natural thermal stratification or turnover patterns (where present) of a lake or reservoir except in cases where the disruption is beneficial, or to a percentage of the tidal excursions of a tidal river or estuary. If certain environmental conditions exist, an applicant with intake capacity greater than 10 MGD must select and implement appropriate design and construction technologies for minimizing impingement mortality and entrainment. (Applicants with 2 to 10 MGD flows are not required to reduce intake flow to a level commensurate with a closed-cycle, recirculating cooling system, but must install technologies for reducing impingement mortality at all locations.) Under Track II, the applicant has the opportunity to demonstrate that impacts to fish and shellfish, including important forage and predator species, within the watershed will be comparable to the reduction in impingement mortality and entrainment it would achieve were it to implement the Track I intake flow and velocity requirements.

With the new facility rule, EPA promulgated national minimum requirements for the design, capacity, and construction of cooling water intake structures at new facilities. EPA believes that the final new facility rule establishes a reasonable framework that creates certainty for permitting of new facilities, while providing significant flexibility to take site-specific factors into account.

5. Proposed Rule for Phase II Existing Facilities

On April 9, 2002, EPA published proposed requirements for cooling water intake structures at Phase II existing facilities to implement section 316(b) of the Clean Water Act. EPA proposed to establish requirements that gave facilities three different compliance options for meeting performance standards that vary based on waterbody

type, the percentage of the source waterbody withdrawn, and the facility capacity utilization rate. 67 FR 17122. EPA received numerous comments and data submissions concerning the proposal.

6. Notice of Data Availability

On Wednesday, March 19, 2003, EPA published a Proposed Rule Notice of Data Availability (NODA). 68 FR 13522. This notice presented a summary of the data EPA had received or collected since proposal, an assessment of the relevance of the data to EPA's analysis, revisions to EPA's estimate of the costs and benefits of the proposed rule, new proposed compliance alternatives, and potential modifications to EPA's proposed regulatory approach. As part of the NODA, EPA also reopened the comment period on the complete contents of the proposed rule.

7. Public Participation

EPA has worked extensively with stakeholders from the industry, public interest groups, State agencies, and other Federal agencies in the development of this final rule. These public participation activities have focused on various section 316(b) issues, including issues relevant to development of the Phase I rule and Phase II rule.

EPA conducted outreach to industry groups, environmental groups, and other government entities in the development, testing, refinement, and completion of the section 316(b) survey, which has been used as a source of data for the Phase II rule. The survey is entitled "Information Collection Request, Detailed Industry Questionnaires: Phase II Cooling Water Intake Structures & Watershed Case Study Short Questionnaire," September 3, 1999. In addition, EPA conducted two public meetings on section 316(b) issues. In June of 1998, in Arlington, Virginia, EPA conducted a public meeting focused on a draft regulatory framework for assessing potential adverse environmental impact from impingement and entrainment. 63 FR 27958 (May 21, 1998). In September of 1998, in Alexandria, Virginia, EPA conducted a public meeting focused on technology, cost, and mitigation issues. 63 FR 40683 (July 30, 1998). In addition, in September of 1998, and April of 1999, EPA staff participated in technical workshops sponsored by the Electric Power Research Institute on issues relating to the definition and assessment of adverse environmental impact. EPA staff have participated in other industry conferences, met upon request on numerous occasions with representatives of industry and environmental groups.

In the months leading up to publication of the proposed Phase I rule, EPA conducted a series of stakeholder meetings to review the draft regulatory framework for the proposed rule and invited stakeholders to provide their recommendations for the Agency's consideration. EPA managers have met with the Utility Water Act Group, Edison Electric Institute, representatives from an individual utility, and with representatives from the petroleum refining, pulp and paper, and iron and steel industries. EPA conducted several meetings with environmental groups attended by representatives from 15 organizations. EPA also met with the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) and, with the assistance of ASIWPCA, conducted a conference call in which representatives from 17 States or interstate organizations participated. After publication of the proposed Phase I rule, EPA continued to meet with stakeholders at their request. Summaries of these meetings are in the docket.

EPA received many comments from industry stakeholders, government agencies, and private citizens on the Phase I proposed rule 65 FR 49059 (August 10, 2000). EPA received additional comments on the Phase I Notice of Data Availability (NODA) 66 FR 28853 (May 25, 2001). These comments informed the development of the Phase II proposal.

In January, 2001, EPA also attended technical workshops organized by the Electric Power Research Institute and the Utilities Water Act Group. These workshops focused on the presentation of key issues associated with different regulatory approaches considered under the Phase I proposed rule and alternatives for addressing section 316(b) requirements.

On May 23, 2001, EPA held a day-long forum to discuss specific issues associated with the development of regulations under section 316(b) of the Clean Water Act. 66 FR 20658 (April 24, 2001). At the meeting, 17 experts from industry, public interest groups, States, and academia reviewed and discussed the Agency's preliminary data on cooling water intake structure technologies that are in place at existing facilities and the costs associated with the use of available technologies for reducing impingement and entrainment. Over 120 people attended the meeting.

In August 21, 2001, EPA staff participated in a technical symposium sponsored by the Electric Power Research Institute in association with the American Fisheries Society on issues relating to the definition and assessment of adverse environmental impact under section 316(b) of the CWA.

During development of the Phase I final rule and Phase II proposed rule, EPA coordinated with the staff from the Nuclear Regulatory Commission (NRC) to ensure that there would not be a conflict with NRC safety requirements. NRC staff reviewed the proposed Phase II rule and did not identify any apparent conflict with nuclear plant safety. NRC licensees would continue to be obligated to meet NRC requirements for design and reliable operation of cooling systems. NRC staff recommended that EPA consider adding language which states that in cases of conflict between an EPA requirement under this rule and an NRC safety requirement, the NRC safety requirement take precedence. EPA added language to address this concern in this final rule.

In a concerted effort to respond to a multitude of questions concerning the data and analyses that EPA developed as part of the Phase II proposal, EPA held a number of conference calls with multiple stakeholders to clarify issues and generally provide additional information. To supplement these verbal discussions, EPA drafted three supporting documents: one that explained the methodology EPA used to calculate entrainment rates; and two others that provided specific examples of how EPA applied this methodology to calculate benefits for the proposed rule. In addition, EPA prepared written responses to all questions submitted by the stakeholders involved in the initial conference calls.

Finally, EPA sponsored a *Symposium on Cooling Water Intake Technologies to Protect Aquatic Organisms,* held on May 6–7, 2003, at the Hilton Crystal City at National Airport in Arlington, Virginia. This symposium brought together professionals from Federal, State, and Tribal regulatory agencies; industry; environmental organizations; engineering consulting firms; science and research organizations; academia; and others concerned with mitigating harm to the aquatic environment by cooling water intake structures. Efficacy and costs of various technologies to mitigate impacts to aquatic organisms from cooling water intake structures, as well as research and other future needs, were discussed.

These coordination efforts and all of the meetings described in this section are documented or summarized in the docket established for this rule.

IV. Environmental Impacts Associated With Cooling Water Intake Structures

With the implementation of today's final rule, EPA intends to minimize the adverse environmental impacts of cooling water intake structures by minimizing the number of aquatic organisms lost as a result of water withdrawals associated with these structures or through restoration measures that compensate for these losses. In the Phase I new facility rule and proposed Phase II existing facility rule, EPA provided an overview of the magnitude and type of environmental impacts associated with cooling water intake structures, including several illustrative examples of documented environmental impacts at existing facilities (see 65 FR 49071–4; 66 FR 65262–5; and 67 FR 17136–40).

For the same reasons set forth in the preamble to the Phase I rule (66 FR 65256, 65291–65297), EPA has determined that there are multiple types of undesirable and unacceptable environmental impacts that may be associated with Phase II existing facilities, depending on conditions at the individual site. These types of impacts include entrainment and impingement; reductions of threatened and endangered species; damage to critical aquatic organisms, including important elements of the food chain; diminishment of a population's compensatory reserve; losses to populations including reductions of indigenous species populations, commercial fisheries stocks, and recreational fisheries; and stresses to overall communities and ecosystems as evidenced by reductions in diversity or other changes in system structure and function. Similarly, based on the analyses and for the same reasons set forth in the preamble to the new facility rule (66 FR 65256, 65291–65297), EPA has selected reductions in impingement and entrainment as a quick, certain, and consistent metric for determining performance at Phase II existing facilities. Further, EPA considered the non-impingement and entrainment environmental impacts for this rule and found them to be acceptable at a national level. This section describes the environmental impacts associated with cooling water withdrawals and why they are of concern to the Agency.

EPA estimates that facilities under the scope of today's final rule withdraw on average more than 214 billion gallons of cooling water a day from waters of the United States.[2] A report by the U.S. Geological Survey estimates that the use of water by the thermoelectric power industry accounted for 47 percent of all combined fresh and saline withdrawals from waters of the United States in 1995.[3] The withdrawal of such large quantities of cooling water in turn has the potential to affect large quantities of aquatic organisms including phytoplankton (tiny, free-floating photosynthetic organisms suspended in the water column), zooplankton (small aquatic animals, including fish eggs and larvae, that consume phytoplankton and other zooplankton), fish, and shellfish. Aquatic organisms drawn into cooling water intake structures are either impinged on components of the cooling water intake structure or entrained in the cooling water system itself.

Impingement takes place when organisms are trapped against intake screens by the force of the water being drawn through the cooling water intake structure. The velocity of the water withdrawal by the cooling water intake structure may prevent proper gill movement, remove fish scales, and cause other physical harm or death of affected organisms through exhaustion, starvation, asphyxiation, and descaling. Death from impingement ("impingement mortality") can occur immediately or subsequently as an individual succumbs to physical damage upon its return to the waterbody.

Entrainment occurs when organisms are drawn through the cooling water intake structure into the cooling system. Organisms that become entrained are typically relatively small, aquatic organisms, including early life stages of fish and shellfish. Many of these small, fragile organisms serve as prey for larger organisms higher on the food chain which are commercially and recreationally desirable species. As entrained organisms pass through a facility's cooling system they may be subject to mechanical, thermal, and at times, chemical stress. Sources of such stress include physical impacts in the pumps and condenser tubing, pressure changes caused by diversion of the cooling water into the plant or by the hydraulic effects of the condensers, sheer stress, thermal shock in the condenser and discharge tunnel, and chemical toxic effects from antifouling agents such as chlorine. Similar to impingement mortality, death from entrainment can occur immediately or subsequently as the individual succumbs to the damage from the stresses encountered as it passed through the cooling water system once it is discharged back into the waterbody.

The environmental impacts attributable to impingement mortality and entrainment at individual facilities include losses of early life stages of fish and shellfish, reductions in forage species, and decreased recreational and commercial landings. EPA estimates that the current number of fish and shellfish, expressed as age 1 equivalents, that are killed from impingement and entrainment from cooling water intake structures at the facilities covered by this Phase II rule is over 3.4 billion annually. Expressing impingement mortality and entrainment losses as age 1 equivalents is an accepted method for converting losses of all life stages into individuals of an equivalent age and provides a standard metric for comparing losses among species, years, and facilities. The largest losses are in the mid-Atlantic, where EPA estimates 1.7 billion age 1 equivalents are lost annually due to impingement and entrainment.[4] Although the number of age 1 equivalent fish killed by impingement and entrainment is very large, precise quantification of the nature and extent of impacts to populations and ecosystems is difficult. Population dynamics and the physical, chemical, and biological processes of ecosystems are extremely complex. While generally accepted as a simple and transparent method for modeling losses, the proportional methodology that EPA uses to estimate impingement and entrainment nationwide has uncertainties that may result in under or over estimating actual impingement and entrainment rates.

Decreased numbers of aquatic organisms can disrupt aquatic food webs and alter species composition and overall levels of biodiversity. For example, a model that examined the effect of large entrainment losses of forage fish, such as bay anchovy, predicted subsequent reductions in predator populations (including commercially and recreationally important species such as striped bass, weakfish, and blue fish) as high as 25%.[5] This is because forage species, which comprise a majority of

[2] EPA 1999. Detailed Industry Questionnaires: Phase II Cooling Water Intake Structures & Watershed Case Study Short Questionnaire. U.S. Environmental Protection Agency, Office of Wastewater Management, Washington, D.C. OMB Control No. 2040–0213.

[3] Solley, W.B., R.R. Pierce and H.A. Perlman. 1998. Estimated Use of Water in the United States in 1995. U.S. Geological Survey Circular 1200.

[4] For more information, please see Chapter D2: Evaluation of Impingement and Entrainment in the Mid-Atlantic Region in the Section 316(b) Existing Facilities Regional Studies, Part D: Mid-Atlantic.

[5] Summers, J.K. 1989. Simulating the indirect effects of power plant entrainment losses on an estuarine ecosystem. Ecological Modelling, 49: 31–47.

entrainment losses at many facilities, are often a primary food source for predator species.

EPA is also concerned about the potential impacts of cooling water intake structures located in or near habitat areas that support threatened, endangered, or other species of concern (those species that might be in need of conservation actions, but are not currently listed as threatened or endangered under State or Federal law).[6] In the San Francisco Bay-Delta Estuary, California, in the vicinity of the Pittsburg and Contra Costa Power Plants several fish species (*e.g.*, Delta smelt, Sacramento splittail, chinook salmon, and steelhead) are now considered threatened or endangered by State and/or Federal authorities. EPA evaluated facility data on impingement and entrainment rates for these species and estimated that potential losses of special status fish species at the two facilities may average 8,386 age 1 equivalents per year resulting from impingement and 169 age 1 equivalents per year due to entrainment.[7] In another example, EPA is aware that from 1976 to 1994, approximately 3,200 threatened or endangered sea turtles entered enclosed cooling water intake canals at the St. Lucie Nuclear Generating Plant in Florida.[8] The facility developed a capture-and-release program in response to these events. Most of the entrapped turtles were captured and released alive; however, approximately 160 turtles did not survive. An incidental take limit established by NMFS in a 2001 biological opinion for this facility has been set at no more than 1,000 sea turtles captured in the intake, with less than one percent killed or injured as a result of plant operations (only two of those killed or injured may be Kemp's Ridley sea turtles and none may be hawksbill or leatherback sea turtles).[9] Although the extent to which threatened, endangered, and other special status species are taken by cooling water intake structures more generally is yet to be determined, EPA is concerned about potential impacts to such species.

Examples of Environmental Impacts Caused by Cooling Water Intakes

1. Hudson River

The power generation facilities on the Hudson River in New York are some of the most extensively studied in the nation. The fish populations in the Hudson River have also been studied extensively to measure the impacts of these power plants. Studies of entrainment at five Hudson River power plants during the 1980s predicted year-class reductions ranging from six percent to 79 percent, depending on the fish species.[10] A Draft Environmental Impact Statement (DEIS) prepared by industry of entrainment at three Hudson River facilities (Roseton, Bowline, and Indian Point) predicted year-class reductions of up to 20 percent for striped bass, 25 percent for bay anchovy, and 43 percent for Atlantic tomcod.[11] The New York State Department of Environmental Conservation (NYSDEC) concluded that any "compensatory responses to this level of power plant mortality could seriously deplete any resilience or compensatory capacity of the species needed to survive unfavorable environmental conditions."[12] In the DEIS, the facilities argue that their operation has not harmed the local aquatic communities, because all observed population changes are attributable to causes other than the operation of the power plants, such as water chestnut growth, zebra mussel invasion, changes in commercial fishing, increases in salinity and improved water quality in the New York Harbor.

In contrast, the Final Environmental Impact Statement (FEIS) prepared by NYSDEC for these three facilities concludes that impacts are associated with the power plants and notes that these impacts are more like habitat degradation than the "selective cropping" of fish that occurs during regulated fishing because the entire community is impacted rather than specific species higher on the food chain.[13] The multiple facilities on the Hudson River act cumulatively on the entire aquatic community. New York State's 2002 section 316(b) report lists the Hudson River downstream from the Federal dam at Troy, New York, as impacted by cooling water use by power plants due to the loss each year of a substantial percentage of annual fish production. The FEIS estimates, from samples collected between 1981 and 1987, that the average annual entrainment losses from these three facilities includes 16.9 million American shad, 303.4 million striped bass, 409.6 million bay anchovy, 468 million white perch, and 826.2 million river herring.[14] In addition, related studies have found a small long-term decline in both species richness and diversity within the resident fish community. A commenter on the DEIS cited further evidence that Atlantic tomcod, Atlantic sturgeon, bluefish, weakfish, rainbow smelt, white perch and white catfish are showing long-term trends of declining abundance of 5 to 8% per annum.[15] Declines in abundances of several species and changes in species composition have raised concerns about the overall health of the community. The FEIS concluded that additional technology was necessary to minimize the adverse environmental impact from these three once-through systems.[16]

The FEIS further concluded that entrainment at these facilities has diminished the forage base for each species so there is less food available for the survivors. This disruption of the food chain compromises the health of the entire aquatic community. The FEIS used, as a simplified hypothetical example, the loss of an individual bay anchovy that would ordinarily serve as prey for a juvenile striped bass. If this individual bay anchovy is killed via entrainment and disintegrated upon

[6] For more information, please see Chapter A12: Threatened & Endangered Species Analysis Methods in the Regional Studies for the Final Section 316(b) Phase II Existing Facilities Rule.

[7] Impingement and entrainment data were obtained from the 2000 Draft Habitat Conservation Plan for the Pittsburg and Contra Costa facilities. Please see EPA's Regional Studies for the Final Section 316(b) Phase II Existing Facilities Rule for detailed information on EPA's evaluation of impingement and entrainment at these facilities.

[8] Florida Power and Light Company. 1995. Assessment of the impacts at the St. Lucie Nuclear Generating Plant on sea turtle species found in the inshore waters of Florida.

[9] Florida Power and Light Company, 2002. Florida Power & Light Company St. Lucie Plant Annual Environmental Operating Report 2002.

[10] Boreman J. and P. Goodyear. 1988. Estimates of entrainment mortality for striped bass and other fish species inhabiting the Hudson River Estuary. *American Fisheries Society Monograph* 4:152–160.

[11] Consolidated Edison Company of New York. 2000. Draft environmental impact statement for the state pollutant discharge elimination system permits for Bowline Point, Indian Point 2 & 3, and Roseton steam electric generating stations.

[12] New York State Department of Environmental Conservation (NYSDEC). 2000. Internal memorandum provided to the USEPA on NYDEC's position on SPDES permit renewals for Roseton, Bowline Point 1 & 2, and Indian Point 2 & 3 generating stations.

[13] New York State Department of Environmental Conservation (NYSDEC). 2003. Final Environmental Impact Statement: Concerning the Applications to Renew NYSPDES Permits for the Roseton 1 & 2, Bowling 1 & 2 and Indian Point 2 & 3 Steam Electric Generating Stations, Orange, Rockland and Westchester Counties.

[14] Ibid.

[15] Henderson, P.A. and R.M. Seaby. 2000. Technical comments on the Draft Environmental Impact Statement for the State Pollution Discharge Elimination System Permit Renewal for Bowline Point 1 & 2, Indian Point 2 & 3, and Roseton 1 & 2 Steam Generating Stations. Pisces Conservation Ltd.

[16] New York State Department of Environmental Conservation (NYSDEC). 2003. Final Environmental Impact Statement: Concerning the Applications to Renew NYSPDES Permits for the Roseton 1 & 2, Bowline 1 & 2 and Indian Point 2 & 3 Steam Electric Generating Stations, Orange, Rockland and Westchester Counties.

passage through a CWIS, it is no longer available as food to a striped bass, but rather it is only useful as food to lower trophic level organisms, such as detritivores (organisms that feed on dead organic material). Further, the bay anchovy would no longer be available to consume phytoplankton, which upsets the distribution of nutrients in the ecosystem.[17]

The Hudson River, like many waterbodies in the nation, has undergone many changes in the past few decades. These changes, which have affected fish populations either positively or negatively, include improvements to water quality as a result of upgrades to sewage treatment plants, invasions by exotic species such as zebra mussels, chemical contamination by toxins such as PCBs and heavy metals, global climate shifts such as increases in annual mean temperatures and higher frequencies of extreme weather events (*e.g.*, the El Niño-Southern Oscillation), and strict management of individual species stocks such as striped bass.[18] In addition, there are dramatic natural changes in fish populations on an annual basis and in the long term due to natural phenomena because the Hudson River, like many waterbodies, is a dynamic system with many fundamental, fluctuating environmental parameters—such as flow, temperature, salinity, dissolved oxygen, nutrients, and disease—that cause natural variation in fish populations each year.[19] The existence of these interacting variables makes it difficult to determine the exact contribution of impingement and entrainment losses on a population's relative health. Nonetheless, as described later in this section, EPA is concerned about the potential for cumulative impacts resulting from multiple facility intakes that collectively impinge and/or entrain aquatic organisms within a specific waterbody.

2. Mount Hope Bay

Environmental impacts were also studied in another recent permit reissuance for the Brayton Point Station in Somerset, Massachusetts, where EPA is the permitting authority. EPA determined that, among other things, the facility's cooling water system had contributed to the collapse of the fishery and inhibited its recovery despite stricter commercial and recreational fishing limits and improved water quality due to sewage treatment upgrades. The facility currently withdraws nearly one billion gallons of water each day and the average annual losses of aquatic organisms due to impingement and entrainment are estimated in the trillions, including 251 million winter flounder, 375 million windowpane flounder, 3.5 billion tautog and 11.8 billion bay anchovy. A dramatic change in the fish populations in Mount Hope Bay is apparent after 1984 with a decline by more than 87 percent, which coincides with a 45 percent increase in cooling water withdrawal from the bay due to the modification of Unit 4 from a closed-cycle recirculating system to a once-through cooling water system and a similar increase in the facility's thermal discharge.[20] [21] The downward trend of finfish abundance in Mount Hope Bay is significantly greater than declines in adjacent Narragansett Bay that is not influenced by the operation of Brayton Point Station.[22] Despite fishing restrictions, fish stocks have not recovered.

3. Southern California Bight

At the San Onofre Nuclear Generating Station (SONGS), in a normal (non-El Niño) year, an estimated 57 tons of fish were killed per year when all units were in operation.[23] The amount lost per year included approximately 350,000 juveniles of white croaker, a popular sport fish; this number represents 33,000 adult equivalents or 3.5 tons of adult fish. In shallow water, densities of queenfish and white croaker decreased 60 percent within one kilometer of SONGS and 35 percent within three kilometers from SONGS as compared to densities prior to facility operations. Densities of local midwater fish decreased 50 to 70 percent within three kilometers of the facility. In contrast, relative abundances of some bottom-dwelling species in the same areas were higher because of the enriched nature of the SONGS discharge, which in turn supported elevated numbers of prey items for bottom-dwelling fish.

4. Missouri River

In contrast to these examples, facilities sited on waterbodies previously impaired by anthropogenic activities such as channelization demonstrate limited entrainment and impingement losses. The Neal Generating Complex facility, located near Sioux City, Iowa, on the Missouri River is coal-fired and utilizes once-through cooling systems. According to a ten-year study conducted from 1972–82, the Missouri River aquatic environment near the Neal complex was previously heavily impacted by channelization and very high flow rates meant to enhance barge traffic and navigation.[24] These anthropogenic changes to the natural river system resulted in significant losses of fish habitat. At this facility, there was found to be little impingement and entrainment by cooling water intakes.

Studies like those described in this section provide only a partial picture of the range of environmental impacts associated with cooling water intake structures. Although numerous studies were conducted to determine the environmental impacts caused by impingement and entrainment at existing facilities, many of them are based on limited data that were collected as long as 25 years ago. EPA's review of available facility impingement and entrainment studies identified a substantial number of serious study design limitations, including data collections for only one to two years or limited to one season and for a subset of the species affected by cooling water intakes; limited taxonomic detail (*i.e.*, many losses not identified to the species level); a general lack of statistical information such as inclusion of variance measures in impingement and entrainment estimates; and the lack of standard methods and metrics for quantifying impingement and entrainment, which limits the potential for evaluating cumulative impacts across multiple facilities. Further, in many cases it is likely that facility operating conditions and/or the state of the waterbody itself has changed since these studies were conducted. Finally, the methods for monitoring impingement and entrainment used in the 1970s and 1980s, when most section 316(b) evaluations were performed, were often inconsistent and incomplete, making quantification of impacts difficult in some cases. Recent advances in environmental assessment techniques

[17] Ibid.

[18] Ibid.

[19] Ibid.

[20] Ibid.

[21] T Gibson, M. 1995 (revised 1996). Comparison of trends in the finfish assemblages of Mt. Hope Bay and Narragansett Bay in relation to operations for the New England Power Brayton Point station. Rhode Island Division of Fish and Wildlife, Marine Fisheries Office.

[22] EPA–New England. 2002. Clean Water Act NPDES Permitting Determinations for Thermal Discharge and Cooling Water Intake from Brayton Point Station in Somerset, MA (NPDES Permit No. MA 0003654), July 22, 2002.

[23] Murdoch, W.W., R.C. Fay, and B.J. Mechalas. 1989. Final Report of the Marine Review Committee to the California Coastal Commission. August 1989, MRC Document No. 89–02.

[24] Tondreau, R., J. Hey and E. Shane, Morningside College. 1982. Missouri River Aquatic Ecology Studies: Ten Year Summary (1972–1982). Prepared for Iowa Public Service Company, Sioux City, Iowa.

provide new and in some cases better tools for monitoring impingement and entrainment and quantifying the current magnitude of the impacts.[25] [26]

EPA is also concerned about the potential for cumulative impacts related to cooling water withdrawal. Cumulative impacts may result from (1) multiple facility intakes impinging and/or entraining aquatic organisms within a specific waterbody, watershed, or along the migratory pathway of specific species; (2) the existence of multiple stressors within a waterbody/watershed, including cooling water intake withdrawals; and (3) long-term occurrences of impingement and/or entrainment losses that may result in the diminishment of the compensatory reserve of a particular fishery stock.

Historically, environmental impacts related to cooling water intake structures have been evaluated on a facility-by-facility basis. These historical evaluations do not consider the potential for a fish or shellfish species to be concomitantly impacted by cooling water intake structures belonging to other facilities that are located within the same waterbody or watershed in which the species resides or along the coastal migratory route of a particular species. The potential cumulative effects of multiple intakes located within a specific waterbody or along a coastal segment are difficult to quantify and are not typically assessed. (One relevant example is provided for the Hudson River; see discussion earlier in this section.) Nonetheless, EPA analyses suggest that almost a quarter of all Phase II existing facilities are located on a waterbody with another Phase II existing facility (DCN 4–4009). Thus, EPA is concerned that although the potential for aquatic species to be affected by cooling water withdrawals from multiple facility intakes is high, this type of cumulative impact is largely unknown and has not adequately been accounted for in evaluating impacts. However, recently the Atlantic States Marine Fisheries Commission (ASMFC) was requested by its member States to investigate the cumulative impacts on commercial fishery stocks, particularly overutilized stocks, attributable to cooling water intakes located in coastal regions of the Atlantic.[27] Specifically, the ASMFC study will evaluate the potential cumulative impacts of multiple intakes on Atlantic menhaden stock[28] which range along most of the U.S. Atlantic coast with a focus on revising existing fishery management models so that they accurately consider and account for fish losses from multiple intake structures. Results from these types of studies, although currently unavailable, will provide significant insight into the degree of impact attributable to intake withdrawals from multiple facilities.

EPA also considered information suggesting that impingement and entrainment, in conjunction with other factors, may be a nontrivial stress on a waterbody. EPA recognizes that cooling water intake structures are not the only source of human-induced stress on aquatic systems. Additional stresses to aquatic systems include, but are not limited to, nutrient, toxics, and sediment loadings; low dissolved oxygen; habitat loss; and stormwater runoff. Although EPA recognizes that a nexus between a particular stressor and adverse environmental impact may be difficult to establish with certainty, EPA believes stressors that cause or contribute to the loss of aquatic organisms and habitat such as those described above, may incrementally impact the viability of aquatic resources. EPA analyses suggest that over 99 percent of all existing facilities with cooling water withdrawal that EPA surveyed in its section 316(b) survey of existing facilities are located within two miles of waters that are identified as impaired by a State or Tribe (see 66 FR 65256, 65297). Thus, the Agency is concerned that to the extent that many of the aquatic organisms subject to the effects of cooling water withdrawals reside in impaired waterbodies, they are potentially more vulnerable to cumulative impacts from an array of physical and chemical anthropogenic stressors.

Finally, EPA believes that an aquatic population's potential compensatory ability—the capacity for a species to increase its survival, growth, or reproduction in response to reductions sustained to its overall population size—may be compromised by impingement and entrainment losses in conjunction with all the other stressors encountered within a population's natural range, as well as impingement and entrainment losses occurring consistently over extended periods of time. As discussed in the Phase I new facility rule (see 66 FR 65294), EPA is concerned that even if there is little evidence that cooling water intakes alone reduce a population's compensatory reserve, the multitude of stressors experienced by a species can potentially adversely affect its ability to recover.[29] Moreover, EPA notes that the opposite effect or "depensation" (decreases in recruitment as stock size declines[30]) may occur if a population's size is reduced beyond a critical threshold. Depensation can lead to further decreases in population abundances that are already seriously depleted and, in some cases, recovery of the population may not be possible even if the stressors are removed. In fact, there is some evidence that depensation may be a factor in some recent fisheries collapses.[31] [32] [33]

Another problem associated with assessing the environmental impact of cooling water intakes is that existing fishery resource baselines may be inaccurate.[34] There is much evidence that the world's fisheries are in general decline,[35] [36] however, many fishery stocks have not been adequately assessed. According to a 2002 study, only 23 percent of U.S. managed fish stocks have been fully assessed and of these, over 40 percent are considered depleted or are being fished beyond sustainable levels.[37] Another study estimated that more than 70 percent of commercial fish stocks are fully

[25] Schmitt, R.J. and C.W. Osenberg. 1996. Detecting Ecological Impacts. Academic Press, San Diego, CA.

[26] EPRI 1999. Catalog of Assessment Methods for Evaluating the Effects of Power Plant Operations on Aquatic Communities. TR–112013, EPRI, Palo Alto, CA.

[27] Personal communication, D. Hart (EPA) and L. Kline (ASMFC), 2001.

[28] Personal communication, D. Hart (EPA) and L. Kline (ASMFC), 2003.

[29] Hutchings, J.A. and R.A. Myers. 1994. What can be learned from the collapse of a renewable resource? Atlantic cod, *Gadus morhus*, of Newfoundland and Labrador. Canadian Journal of Fisheries and Aquatic Sciences 51:2126–2146.

[30] Goodyear, C.P. 1977. Assessing the impact of power plant mortality on the compensatory reserve of fish populations. Pages 186–195 in W. Van Winkle, ed., Proceedings of the Conference on Assessing the Effects of Power Plant Induced Mortality on Fish Populations. Pergamon Press, New York, NY.

[31] Myers, R.A., N.J. Barrowman, J.A. Hutchings, and A.A. Rosenburg. 1995. Population dynamics of exploited fish stocks at low population levels. Science 26:1106–1108.

[32] Hutchings, J.A. and R.A. Myers. 1994. What can be learned from the collapse of a renewable resource? Atlantic cod, *Gadus morhus*, of Newfoundland and Labrador. Canadian Journal of Fisheries and Aquatic Sciences 51:2126–2146.

[33] Liermann, M. and R. Hilborn. 1997. Depensation in fish stocks: A hierarchic Bayesian meta-analysis. Can. J. Fish. Aquatic. Sci. 54:1976–1985.

[34] Watson, R. and D. Pauly. 2001. Systematic distortions in world fisheries catch trends. Nature 414:534–536.

[35] Ibid.

[36] Pew Oceans Commission. 2003. America's Living Oceans: Charting a course for sea change. Summary Report. May 2003. Pew Oceans Commission, Arlington, VA.

[37] U.S. Commission on Ocean Policy. 2002. Developing a National Ocean Policy: Mid-Term Report of the U.S. Commission on Ocean Policy. Washington, DC.

exploited, overfished or collapsed.[38] Another estimated that large predatory fish stocks are only a tenth of what they were 50 years ago.[39] Most studies of fish populations last only a few years, do not encompass the entire life span of the species examined, and do not account for cyclical environmental changes such as ENSO events, and other long term cycles of oceanographic productivity.[40]

Although a clear and detailed picture of the status of all our fishery resources does not exist,[41] it is undisputed that fishermen are struggling to sustain their livelihood despite strict fishery management restrictions which aim to rebuild fish populations. EPA shares the concerns expressed by expert fishery scientists that historical overfishing has increased the sensitivity of aquatic ecosystems to subsequent disturbance, making them more vulnerable to other stressors, including cooling water intake structures.

In conclusion, EPA's mission includes ensuring the sustainability of communities and ecosystems. Thus, EPA must comprehensively evaluate all potential threats to resources and work towards eliminating or reducing identified threats. As discussed in this section, EPA believes that impingement and entrainment losses attributable to cooling water intakes do pose a threat to aquatic organisms and through today's rule is seeking to minimize that threat.

V. Description of the Final Rule

Clean Water Act section 316(b) requires that any standard established pursuant to section 301 or section 306 of the CWA and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact. Today's final rule establishes national performance requirements for Phase II existing facilities that ensure such facilities fulfill the mandate of section 316(b).

This rule applies to Phase II existing facilities that use or propose to use a cooling water intake structure to withdraw water for cooling purposes from waters of the United States and that have or are required to have a National Pollutant Discharge Elimination System (NPDES) permit issued under section 402 of the CWA. Phase II existing facilities include only those facilities whose primary activity is to generate and transmit electric power and who have a design intake flow of 50 MGD or greater, and that use at least 25 percent of the water withdrawn exclusively for cooling purposes (see § 125.91). Applicability criteria for this rule are discussed in detail in section II of this preamble.

Under this final rule, EPA has established performance standards for the reduction of impingement mortality and, when appropriate, entrainment (see § 125.94). The performance standards consist of ranges of reductions in impingement mortality and/or entrainment (*e.g.*, reduce impingement mortality by 80 to 95 percent and/or entrainment by 60 to 90 percent). These performance standards reflect the best technology available for minimizing adverse environmental impacts determined on a national categorical basis. The type of performance standard applicable to a particular facility (*i.e.*, reductions in impingement only or impingement and entrainment) is based on several factors, including the facility's location (*i.e.*, source waterbody), rate of use (capacity utilization rate), and the proportion of the waterbody withdrawn. Exhibit V–1 summarizes the performance standards based on waterbody type.

In most cases, EPA believes that these performance standards can be met using design and construction technologies or operational measures. However, under the rule, the performance standards also can be met, in whole or in part, by using restoration measures, following consideration of design and construction technologies or operational measures and provided such measures meet restoration requirements (see § 125.94(c)).

As noted earlier in this section, today's rule generally requires that impingement mortality of all life stages of fish and shellfish must be reduced by 80 to 95 percent from the calculation baseline; and for some facilities, entrainment of all life stages of fish and shellfish must be reduced by 60 to 90 percent from the calculation baseline (see § 125.94(b)).

EXHIBIT V–1.—PERFORMANCE STANDARD REQUIREMENTS

Waterbody type	Capacity utilization rate	Design intake flow	Type of performance standard
Freshwater River or Stream	Less than 15%	N/A [1]	Impingement mortality only.
	Equal to or greater than 15%.	5% or less mean annual flow.	Impingement mortality only.
		Greater than 5% of mean annual flow.	Impingement mortality and entrainment.
Tidal river, Estuary or Ocean	Less than 15%	N/A [1]	Impingement mortality only.
	Equal to or greater than 15%.	N/A	Impingement mortality and entrainment.
Great Lakes	Less than 15%	N/A	Impingement mortality only.
	Equal to or greater than 15%.	N/A	Impingement mortality and entrainment.

[38] Broad, W.J. and A.C. Revkin. 2003. Has the Sea Given Up its Bounty? The New York Times. July 29, 2003.

[39] Myers, R.A. and B. Worm. 2003. Rapid worldwide depletion of predatory fish communities. Nature 423: 280–283.

[40] Jackson, J.B.C., M.X. Kirby, W.H. Berger, K.A. Bjorndal, L.W. Botsford, B.J. Bourque, R.H. Bradbury, R. Cooke, J. Erlandson, J.A. Estes, T.P. Hughes, S. Kidwell, C.B. Lange, H.S. Lenihan, J.M. Pandolfi, C.H. Peterson, R.S. Steneck, M.J. Tegner, and R.R. Warner. 2001. Historical overfishing and the recent collapse of coastal ecosystems. Science 293(5530):629–638.

[41] National Marine Fisheries Service (NMFS). 2002. Annual Report to Congress on the Status of U.S. Fisheries—2001. U.S. Dep. Commerce, NOAA, Natl. Mar. Fish. Serv., Silver Spring, MD, 142 pp.

EXHIBIT V–1.—PERFORMANCE STANDARD REQUIREMENTS—Continued

Waterbody type	Capacity utilization rate	Design intake flow	Type of performance standard
Lakes or Reservoirs	N/A	Increase in design intake flow must not disrupt thermal stratification except where it does not adversely affect the management of fisheries.	Impingement mortality only.

[1] Determination of appropriate compliance reductions is not applicable.

This final rule identifies five alternatives a Phase II existing facility may use to achieve compliance with the requirements for best technology available for minimizing adverse environmental impacts associated with cooling water intake structures. Four of these are based on meeting the applicable performance standards and the fifth allows the facility to request a site-specific determination of best technology available for minimizing adverse environmental impacts under certain circumstances. EPA has established these compliance alternatives for meeting the performance standards to provide a significant degree of flexibility to Phase II existing facilities, to ensure that the rule requirements are economically practicable, and to provide the ability for Phase II existing facilities to address unique site-specific factors. Application requirements vary based on the compliance alternative selected and, for some facilities, include development of a Comprehensive Demonstration Study. Application requirements are discussed later in this section. The five compliance alternatives are described in the following paragraphs.

Under § 125.94(a)(1)(i) and (ii), a Phase II existing facility may demonstrate to the Director that it has already reduced its flow commensurate with a closed-cycle recirculating system, or that it has already reduced its design intake velocity to 0.5 ft/s or less. If a facility can demonstrate to the Director that it has reduced, or will reduce, flow commensurate with a closed-cycle recirculating system, the facility is deemed to have met the performance standards to reduce impingement mortality and entrainment (see § 125.94 (a)(1)(i)). Those facilities would not be required to submit a Comprehensive Demonstration Study with their NPDES application. If the facility can demonstrate to the Director that is has reduced, or will reduce maximum through-screen design intake velocity to 0.5 ft/s or less, the facility is deemed to have met the performance standards to reduce impingement mortality only. Facilities that meet the velocity requirements would only need to submit application studies related to determining entrainment reduction, if subject to the performance standards for entrainment.

Under § 125.94(a)(2) and (3), a Phase II existing facility may demonstrate to the Director, either that its current cooling water intake structure configuration meets the applicable performance standards, or that it has selected design and construction technologies, operational measures, and/or restoration measures that, in combination with any existing design and construction technologies, operational measures, and/or restoration measures, meet the specified performance standards in § 125.94(b) and/or the requirements in § 125.94(c).

Under § 125.94(a)(4), a Phase II existing facility may demonstrate to the Director that it has installed and is properly operating and maintaining a rule-specified and approved design and construction technology in accordance with § 125.99(a). Submerged cylindrical wedgewire screen technology is a rule-specified design and construction technology that may be used in instances in which a facility's cooling water intake structure is located in a freshwater river or stream and meets other criteria specified at § 125.99(a).

In addition, under this compliance alternative, a facility or other interested person may submit a request to the Director for approval of a different technology. If the Director approves the technology, it may be used by all facilities with similar site conditions under his or her jurisdiction if allowed under the State's administrative procedures. Requests for approval of a technology must be submitted to the Director and include a detailed description of the technology; a list of design criteria for the technology and site characteristics and conditions that each facility must possess in order to ensure that the technology can consistently meet the appropriate impingement mortality and entrainment performance standards in § 125.94(b); and information and data sufficient to demonstrate that all facilities under the jurisdiction of the Director can meet the relevant impingement mortality and entrainment performance standards in § 125.94(b) if the applicable design criteria and site characteristics and conditions are present at the facility. A Director may only approve an alternative technology following public notice and opportunity for comment on the approval of the technology (§ 125.99(b)).

Under § 125.94(a)(5) (i) or (ii), if the Director determines that a facility's costs of compliance would be significantly greater than the costs considered by the Administrator for a like facility to meet the applicable performance standards, or that the costs of compliance would be significantly greater than the benefits of meeting the applicable performance standards at the facility, the Director must make a site-specific determination of best technology available for minimizing adverse environmental impact. Under this alternative, a facility would either compare its projected costs of compliance using a particular technology or technologies to the costs the Agency considered for a like facility in establishing the applicable performance standards, or compare its projected costs of compliance with the projected benefits at its site of meeting the applicable performance standards of today's rule (see section IX.H). If in either case costs are significantly greater, the technology selected by the Director must achieve an efficacy level that comes as close as practicable to the applicable performance standards without resulting in significantly greater costs.

During the first permit term, a facility that chooses compliance alternatives in § 125.94(a)(2), (3), (4), or (5) may request that compliance with the requirements of this rule be determined based on the implementation of a Technology Installation and Operation Plan indicating how the facility will install and ensure the efficacy, to the extent practicable, of design and construction

technologies and/or operational measures, and/or a Restoration Plan (§ 125.95(b)(5)). The Technology Installation and Operation Plan must be developed and submitted to the Director in accordance with § 125.95(b)(4)(ii). The Restoration Plan must be developed in accordance with § 125.95(b)(5). During subsequent permit terms, if the facility has been in compliance with the construction, operational, maintenance, monitoring, and adaptive management requirements in its TIOP and/or Restoration Plan during the preceding permit term, the facility may request that compliance during subsequent permit terms be based on its remaining in compliance with its TIOP and/or Restoration Plan, revised in accordance with applicable adaptive management requirements if the applicable performance standards are not being met.

Three sets of data are required to be submitted 180 days prior to expiration of a facility's existing permit by all facilities regardless of compliance alternative selected (see § 122.21(r)(2)(3) and (5)). These are:

- Source Water Physical Data: A narrative description and scaled drawings showing the physical configuration of all source waterbodies used by the facility, including areal dimensions, depths, salinity and temperature regimes, and other documentation that supports your determination of the waterbody type where each cooling water intake structure is located; identification and characterization of the source waterbody's hydrological and geomorphological features, as well as the methods used to conduct any physical studies to determine the intake's area of influence and the results of such studies; and locational maps.
- Cooling Water Intake Structure Data: A narrative description of the configuration of each of its facility's cooling water intake structures and where it is located in the waterbody and in the water column; latitude and longitude in degrees, minutes, and seconds for each of its cooling water intake structures; a narrative description of the operation of each of its cooling water intake structures, including design intake flows, daily hours of operation, number of days of the year in operation, and seasonal changes, if applicable; a flow distribution and water balance diagram that includes all sources of water to the facility, recirculating flows, and discharges; and engineering drawings of the cooling water intake structure.
- Cooling Water System Data: A narrative description of the operation of each cooling water system, its relationship to the cooling water intake structures, proportion of the design intake flow that is used in the system, the number of days of the year the system is in operation, and seasonal changes in the operation of the system, if applicable; and engineering calculations and supporting data to support the narrative description.

In addition to the specified data facilities are require to submit, some facilities are also required to conduct a Comprehensive Demonstration Study. Specific requirements for the Comprehensive Demonstration Study vary based on the compliance alternative selected. Exhibit II summarizes the Comprehensive Demonstration Study requirements for each compliance alternative. Specific details of each Comprehensive Demonstration Study component are provided in section IX of this preamble.

EXHIBIT V–2.—SUMMARY OF COMPREHENSIVE DEMONSTRATION STUDY REQUIREMENTS FOR COMPLIANCE ALTERNATIVES

Compliance altemative (§ 125.94(b))	Comprehensive demonstration study requirements (§ 125.95(b))
1—Demonstrate facility has reduced flow commensurate with closed-cycle recirculating system.	None.
1—Demonstrate facility has reduced design intake velocity to ≤ 0.5 ft/s	No requirements relative to impingement mortality reduction. If subject to entrainment performance standard, the facility must only address entrainment in the applicable components of its Comprehensive Demonstration Study, based on the compliance option selected for entrainment reduction.
2—Demonstrate that existing design and construction technologies, operational measures, and/or restoration measures meet the performance standards.	Proposal for Information Collection. Source Waterbody Flow Information. Impingement Mortality and/or Entrainment Characterization Study (as appropriate). Technology and Compliance Assessment Information —Design and Construction Technology Plan —Technology Installation and Operation Plan Restoration Plan (if appropriate). Verification Monitoring Plan.
3—Demonstrate that facility has selected design and construction technologies, operational measures, and/or restoration measures that will, in combination with any existing design and construction technologies, operational measures, and/or restoration measures, meet the performance standards.	Proposal for Information Collection. Source Waterbody Flow Information. Impingement Mortality and/or Entrainment Characterization Study (as appropriate). Technology and Compliance Assessment Information —Design and Construction Technology Plan —Technology Installation and Operation Plan Restoration Plan (if appropriate). Verification Monitoring Plan.
4—Demonstrate that facility has installed and properly operates and maintains an approved technology.	Technology Installation and Operation Plan. Verification Monitoring Plan.

EXHIBIT V–2.—SUMMARY OF COMPREHENSIVE DEMONSTRATION STUDY REQUIREMENTS FOR COMPLIANCE ALTERNATIVES—Continued

Compliance alternative (§ 125.94(b))	Comprehensive demonstration study requirements (§ 125.95(b))
5—Demonstrate that a site-specific determination of BTA is appropriate	Proposal for Information Collection. Source Waterbody Flow Information. Impingement Mortality and/or Entrainment Characterization Study (as appropriate). Technology Installation and Operation Plan. Restoration Plan (if appropriate). Information to Support Site Specific Determination of BTA including: —Comprehensive Cost Evaluation Study (cost-cost test and cost-benefit test); —Valuation of Monetized Benefits of Reducing IM&E (cost-benefit test only); —Site-Specific Technology Plan (cost-cost test and cost-benefit test); Verification Monitoring Plan.

The requirements in today's final rule are implemented through NPDES permits issued under section 402 of the CWA. Permit applications submitted after the effective date of the rule must fulfill rule requirements. However, facilities whose existing permit expires before [insert four years after date of publication in the FR], may request a schedule for submission of application materials that is as expeditious as practicable but does not exceed [insert three years and 180 days after date of publication in the FR], to provide sufficient time to perform the required information collection requirements. Phase II existing facilities must comply with this final rule when they become subject to an NPDES permit containing these requirements.

Finally, today's rule preserves each State's right to adopt or enforce more stringent requirements (see § 125.90(d)). It also provides that if a State demonstrates to the Administrator that it has adopted alternative regulatory requirements in its NPDES program that will result in environmental performance within a watershed that is comparable to the reductions of impingement mortality and entrainment that would otherwise be achieved under § 125.94, the Administrator must approve such alternative regulatory requirements (§ 125.90(c)).

VI. Summary of Most Significant Revisions to the Proposed Rule

A. Data Updates

Based on comments received, additional information made available, and the results of subsequent analyses, EPA revised a number of assumptions that were used in developing the engineering costs, the information collection costs, the economic analyses, and the benefits analyses. These new assumptions are presented below and were used in the analyses in support of this final rule.

1. Number of Phase II Facilities

Since publishing the NODA, EPA continued to verify design flow information for facilities that had been classified as either Phase II (large, existing power production) or Phase III (smaller, power producing or manufacturing) facilities. This verification resulted in the following changes: One facility that was classified as a Phase II facility at proposal was reclassified as being out of scope of the section 316(b) regulation, as it ceased operating. Four facilities that were classified as Phase III facilities at proposal based on projected design intake flow were reclassified as Phase II facilities. As a result, the overall number of Phase II facilities increased from 540 to 543 facilities.[42] For the final rule, all costs, benefits, and economic analyses are based on the updated set of Phase II facilities.

The reason for the change is that the Agency revised the estimated design intake flows for facilities that responded to the short-technical questionnaire EPA used to collect information for this rule. The Agency has now adopted a more robust set of annual flow data (using all the years of data collected for the final rule, rather than only flows for 1998 as reported at proposal). This change altered the calculated design intake flows for the facilities that provided responses to the short-technical questionnaire that EPA used to collect data. Facilities that provided responses to the detailed questionnaire were unaffected, as the Agency collected maximum design intake flows directly through the detailed questionnaire.

2. Technology Costs

Since publishing the NODA, EPA used new information to revise the capital and operation and maintenance (O&M) costs for several compliance technologies, including those used as the primary basis for the final rule. Overall, the cost updates resulted in the following changes: total capital costs decreased by 5 percent and total operation and maintenance costs decrease by 3 percent. These comparisons are based on the raw costs, adjusted to year-2002 dollars, which have not been discounted or annualized.[43] The revised costing assumptions are discussed in detail in section VI.3.

3. Permitting and Monitoring Costs

Since proposal, EPA made several corrections and revisions to its burden and cost estimates for implementing the information collection requirements of today's rule, based on comments received and additional analysis. The following corrections and revisions were made since proposal:

- EPA corrected the hourly rates for the statistician and biological technician labor categories, which were inadvertently transposed at proposal.
- EPA increased the burdens associated with impingement and entrainment monitoring for the Impingement Mortality and Entrainment Characterization Study.

[42] Note that these numbers are unweighted. [As with many surveys, EPA was able to obtain data from most, but not all of the facilities potentially subject to this rule. To estimate the characteristics for those facilities that were not surveyed, EPA assigned a statistically derived sample weight to those facilities for which data were collected.] On a sample-weighted basis, the number of Phase II facilities increased from 551 to 554. The number of Phase II facilities modeled by the Integrated Planning Model (IPM) increased from 531 to 535.

[43] Based on additional research conducted after NODA publication and prior to issuance of the final rule, EPA changed the projected compliance response for some facilities. These changes, together with the increase in the number of in-scope Phase II facilities, contributed to the change in total compliance costs.

• EPA revised the pilot study costs to assume that only a subset of facilities which are projected to install new technologies will perform pilot studies, and to be proportional to the projected capital costs for installing these new technologies in order to comply with the rule. EPA also developed an alternative national cost estimate using slightly different assumptions with regard to pilot study costs (see section XI).

• EPA adjusted the facility-level costs to account for facilities that were projected to demonstrate compliance through the installation of a wedge-wire screen in a freshwater river under the compliance alternative in 125.94(a)(4).

4. Net Installation Downtime for Non-recirculating Cooling Tower Compliance Technologies

In developing the proposal for this rule, the Agency estimated that technologies other than recirculating cooling towers would not require installation downtime for construction. However, the Agency amended this outlook for the NODA and published revised estimates of net construction downtimes for complying facilities installing a subset of technologies analyzed and developed as candidates for best technology available (BTA). Based on comments received on the NODA, the Agency has conducted further research into the construction downtimes that it used in the NODA for certain technologies. For the final regulation analysis, the Agency has adopted minor revisions to the construction downtimes for certain technologies, with the general effect being an increase in the net construction downtimes for a few technologies that the Agency views as candidates for reducing entrainment. (Net downtime was estimated by subtracting 4 weeks from total downtime, based on an assumption that facilities will schedule construction downtime during a 4 week period of normal downtime unrelated to the rule, for example, for routine maintenance.) As such, the Agency projects that a significant number of facilities expected to comply with the entrainment reduction requirements of the rule will have increased downtime costs compared to the NODA and the proposal analyses. The final costs of this rule reflect these changes, which are further discussed in Section X and the Technical Development Document.

B. Regulatory Approach, Calculation Baseline, and Measuring Compliance

1. Regulatory Approach

EPA has largely adopted the proposed rule with some restructuring and one significant change: an additional compliance alternative, the approved technology option (§ 125.94(a)(4)) which was discussed in detail in the NODA (68 FR 13539). The restructuring of the rule language now makes the reduction of flow commensurate with a closed-cycle recirculating system a separate compliance alternative, such that the rule now includes five compliance alternatives. In addition, EPA has clarified that facilities may comply with the rule requirement in section 125.94 by successfully implementing the construction, operational, maintenance, monitoring, and adaptive management requirements in a Technology Installation and Operation Plan developed in accordance with § 125.95(b)(4)(ii) and/or a Restoration Plan developed in accordance with § 125.95(b)(5). These plans must be designed and adaptively managed to meet the applicable performance standards in § 125.94(b) and (c). The following discussion describes the regulatory approach of the final rule, as developed through the proposed rule and the NODA.

EPA proposed requirements for the location, design, construction, and capacity of cooling water intakes based on the waterbody type and the volume of water withdrawn by a facility (67 FR 17122). EPA grouped waterbodies into five categories, as in the Phase I regulation—freshwater rivers and streams, lakes and reservoirs, Great Lakes, estuaries and tidal rivers, and oceans. In general, the more sensitive or biologically productive the waterbody, the more stringent were the requirements proposed. The proposed requirements also varied based on the percentage of the source waterbody withdrawn and the capacity utilization rate.

Under the proposed rule, a facility could choose one of three compliance options: (1) Demonstrate that the facility currently meets the specified performance standards, (2) select and implement design and construction technologies, operational measures, or restoration measures that will, in combination with any existing design and construction technologies, operational measures, or restoration measures, meet the specified performance standards, and/or (3) demonstrate that the facility qualifies for a site-specific determination of best technology available, because its costs of compliance are significantly greater than those considered by EPA during the development of the proposed rule or the facility's costs of compliance would be significantly greater than the benefits of compliance with the proposed performance standards at the facility. A facility could also use restoration measures in addition to or in lieu of design and construction technologies and/or operational measures to achieve compliance under any of the compliance options.

In the NODA, EPA sought comment on a proposed fourth compliance option (68 FR 13522, 1359–41). In response to comments expressing concern that the proposed Comprehensive Demonstration Study requirements (at § 125.95(b)) would impose a significant burden on permit applicants, EPA examined an additional, more streamlined compliance option under which a facility could implement certain specified technologies that have been predetermined by EPA or the permitting authority to be highly likely to meet applicable performance standards, in exchange for not having to perform most of the elements of the proposed Comprehensive Demonstration Study.

Two variations were offered in the NODA: (1) EPA would evaluate the effectiveness of specific technologies in achieving an 80 to 95 percent reduction in impingement mortality and a 60 to 90 percent reduction in entrainment and then specify applicability criteria to ensure that the technology would meet the performance standards at facilities satisfying the criteria, or (2) EPA would establish the criteria and a process for States to pre-approve intake structure control technologies as likely to meet the performance standards. For facilities located on freshwater rivers and streams and meeting specified criteria, wedgewire screens would be expected to meet the proposed performance standards. EPA also recognized that these two variations are not mutually exclusive and either or both could be adopted in the final rule.

To a large extent, EPA is adopting the regulatory framework put forth in the proposed rule and supplemented by the NODA. To the three compliance alternatives originally proposed, EPA has added an approved technology alternative discussed in the NODA and included reduction of flow commensurate with closed-cycle cooling as a distinct alternative.

2. Calculation Baseline

Also, in response to comments that the proposed definition for the calculation baseline was overly vague,

EPA published in the NODA a series of additional considerations regarding the calculation baseline and a new definition of it taking these considerations into account (68 FR 13522, 13580–81). The specifications are as follows and the new definition is in today's final rule at § 125.93.

- Baseline cooling water intake structure is located at, and the screen face is parallel to, the shoreline or another depth if this would result in higher baseline impingement mortality and entrainment than the surface. EPA believes it is appropriate to allow credit in reducing impingement mortality from screen configurations that employ angling of the screen face and currents to guide organisms away from the structure before they are impinged.
- Baseline cooling water intake structure opening is located at or near the surface of the source waterbody. EPA believes it is appropriate to allow credit in reducing impingement mortality or entrainment due to placement of the opening in the water column.
- Baseline cooling water intake structure has a traveling screen with the standard 3/8 inch mesh size commonly used to keep condensers free from debris. This allows a more consistent estimation of the organisms that are considered "entrainable" vs. "impingeable" by specifying a standard mesh size that can be related to the size of the organism that may potentially come in contact with the cooling water intake structure.
- Baseline practices, procedures, and structural configurations are those that the facility would maintain in the absence of any structural or operational controls implemented in whole or in part for the purpose of reducing impingement mortality and entrainment. This recognizes and provides credit for any structural or operational controls, including flow or velocity reductions, a facility had adopted that reduce impingement mortality or entrainment.

EPA also requested comment on allowing an "as built" approach under which facilities could choose to use the existing level of impingement mortality and entrainment as the calculation baseline if they did not wish to take credit for the previously adopted measures. This could significantly simplify the monitoring and calculations necessary to determine the baseline.

In the NODA, EPA also discussed an approach to compliance under which facilities would have an "optimization period" during which they would not be required to meet performance standards but, rather, would install, operate and maintain the selected control technologies to minimize impingement mortality and entrainment. EPA suggested several possible durations for this optimization period, and also requested comment on not specifying the duration, but instead leaving it up to the Director. 68 FR 13586 (March 19, 2003).

For the final rule, EPA adopted the NODA definition of calculation baseline with some modifications. More specifically, EPA clarified the calculation baseline to include consideration of intake depth other than at or near the surface in determining the baseline. EPA also adopted the "as built" approach for the calculation baseline, which allows facilities to use current levels of impingement mortality and entrainment as the calculation baseline if the facility is configured similarly to the criteria set up for the calculation baseline.

Finally, EPA clarified how compliance with the requirements in § 125.94 should be determined. In particular, the final rule provides that compliance during the first permit term (and subsequent permit terms if specified conditions are met) may be determined based on compliance with the construction, operational, maintenance, monitoring, and adaptive management requirements in an approved Technology Installation and Operation Plan and/ or an approved Restoration Plan, that has been developed in accordance with specified requirements to meet the applicable performance standards.

3. Measuring Compliance

EPA has clarified how compliance will be measured. At proposal, EPA received comment from the industry that there were uncertainties associated with how compliance with the proposed requirements, particularly the numeric impingement mortality and entrainment performance standards, would be determined. Under the proposed rule and NODA, determining compliance, while obviously dependent on the compliance alternative selected, would, in general, require the development of waterbody characterization data, including key criteria (species, parameters, etc.) to be measured and monitored; a determination of baseline environmental impacts; implementation of cooling water intake technologies (assuming the facility does not already meet applicable performance standards and pursues this alternative); monitoring the selected criteria; and an evaluation of compliance with the applicable numeric impingement mortality and/or entrainment permit standard. The industry stakeholders were concerned that using the performance standard to set enforceable performance requirements would require facilities to collect and analyze greater amounts of data than EPA projected to be able to account for the variability inherent in biological and efficacy data needed to support compliance determinations in spite of overall good technology performance. These stakeholders stated that setting enforceable performance standards would lead to greater administrative burdens and delays when determining numeric standards and monitoring requirements to determine compliance. They were also concerned that establishing numeric standards would stifle innovation because of fears that a technology would not perform as anticipated. These stakeholders suggested that the performance standards in the rule serve as a consistent basis for setting permit conditions and for identifying technologies; installing, operating, and maintaining the chosen technology; performing compliance monitoring; and refining or adjusting operation, maintenance, or other factors in light of initial monitoring.

Today's rule allows facilities to develop and implement a Technology Installation and Operation Plan that would, when used, serve as the primary mechanism upon which compliance with the performance standard requirements of this rule is determined. EPA has established this compliance mechanism because it will ensure that Phase II existing facilities will continually be required to achieve a level of performance that constitutes, for them, best technology available for minimizing adverse environmental impact. For facilities that choose to comply with applicable requirements in whole or in part through the use of restoration measures, the Restoration Plan would serve a similar function. The Restoration Plan is discussed in detail in section IX.

An existing facility that chooses to use a Technology Installation and Operation Plan must (1) select design and construction technologies, operational measures, and/or restoration measures that will meet the performance standards, and (2) prepare a Technology Installation and Operation Plan documenting what, how and when it will install, operate, maintain, monitor, assess, and adaptively manage the design and construction technologies and operational measures to meet the performance standards, including operational parameters and

inspection schedules, etc. Each facility using a Technology Installation Operation Plan must specify key parameters regarding monitoring (*e.g.*, parameters to be monitored, location, and frequency), optimization activities and schedules for undertaking them, ways of assessing efficacy (including adaptive management plan for revising design and construction technologies or operational measures) that ensure that such technologies and measures are effectively implemented, and revised as needed to meet performance standards. This plan must be reviewed and approved by the Director and evaluated for sufficiency and/or revised at each permit term to ensure that the facility is moving expeditiously toward attainment of the applicable performance standards. Once approved, each Phase II existing facility must implement the plan according to its terms. Compliance with the final rule's performance standards during the permit term will be assessed based on the terms of the plan. If a facility does not comply with the plan, the Director has discretion to implement the performance standards or requirements through specifying numeric impingement mortality and entrainment requirements or technology prescription (for the site-specific alternative) in the permit. In addition, a facility that is unable to meet the applicable performance standards using the Technology Installation and Operation Plan approach may request in a subsequent permit that the Director make a site-specific determination of best technology available in accordance with § 125.94(a)(5).

Under these provisions, compliance is determined in terms of whether the facility is implementing, in accordance with the Technology Installation and Operation Plan schedule, the technologies, measures and practices determined by the Director to be the best technologies available for minimizing adverse environmental impact for that facility. The Section 316(b) requirements for the facility are expressed non-numerically, which is analogous to the use of best management practices under other provisions of the CWA. See, *e.g.*, sections 402(a) and 402(p). While EPA has been able to calculate ranges for national performance standards based on model technologies, EPA has insufficient data to determine—as it routinely can do in the context of effluent limitations guidelines and standards—that use of those model technologies will consistently result in achievement of those standards.

The record persuades EPA that there is uncertainty associated with the application and long-term efficacy of these technologies at all facilities under the multitude of different site-specific factors and conditions under which these technologies might have to perform. In addition, even at a single site, there is substantial year-to-year variability in species abundance and composition, as well as other natural and anthropogenic factors, that may affect the performance of a particular technology installed at the facility and it is unclear how this would affect the efficacy of the technology. The Technology Installation and Operation Plan provisions are intended to account for this. For example, meeting numerical reduction standards may not be possible at some sites either because hydrological conditions are not conducive to technological effectiveness, or due to species sensitivity. A Technology Installation and Operation Plan allows a facility, working with the Director, to identify, install, and adaptively manage technologies suited to its particular site conditions. In addition, measuring impingement mortality and entrainment reduction is difficult and would require a substantial amount of multi-year biological data and analysis is burdensome for the facility to develop, is often well beyond the type of information EPA can expect State Directors to be able to develop when monitoring compliance. A Technology Installation and Operation Plan simplifies enforcement: if a facility fails to meet the schedules and other terms of its plan, it is violating its section 316(b) requirements; there is no need to engage in extensive debate about the meaning of complex biological data. This does not mean that biological monitoring and assessment of success in meeting applicable performance standards is not important. If fact, it is critical to the compliance approach adopted in the rule in that it informs facilities and permit authorities when adaptive management, including revisions to the Technology Installation and Operation Plan, are needed to meet the performance standards.

The Technology Installation and Operation Plan provisions also reflect that there is uncertainty about how long it would take a facility to adaptively manage the technology and determine the appropriate operating conditions for the technology to meet the applicable performance requirements. Data and comments available to EPA suggest that it is common for existing facilities to adjust technologies over time in order to achieve optimum performance and, therefore, an adaptive management approach as specified under a plan is appropriate. See documentation at DCN# 1–3019–BE, 4–1830, and 6–5001. EPA understands that adaptive management is going to be necessary for a number of facilities because there are relatively few rigorous evaluations of efficacy under different site and operating conditions. The available studies may also be limited in the numbers and types of species that they have evaluated and they may not show the long term demonstrated effectiveness (and/or consistency of effectiveness) of the technology with the added uncertainties associated with the variability of natural biological systems. By requiring facilities to employ adaptive management principles, EPA assures that the facility will be implementing, on an ongoing basis, the best array of technologies available to them.

As noted above, the Technology Installation and Operation Plan provisions also simplify implementation because they identify the specific compliance requirements needed to meet the performance standard ranges and reduce some of the burden associated with measuring and enforcing compliance with these ranges for both existing facilities and Directors. Directors and facilities may find use of a Technology Installation and Operation Plan preferable because it is less feasible to develop and accurately evaluate biological monitoring data over a relatively short period, as would be required by measuring compliance against a numeric performance standard. Rather, the plan provisions allow implementation to be adaptive, and allow for data development and assessment to proceed in a manner that is appropriate for the facility, technology, and waterbody characteristics.

EPA has the legal authority to express section 316(b) requirements in terms of design criteria, in addition to or in place of enforceable numeric performance standards. EPA employed a design criterion approach in the Phase I rule, when EPA was able to identify a single nationally available and economically practicable technology for the category of new facilities as a whole, in that case closed-cycle recirculating cooling technology. In this rule, EPA was not able to identify a uniform set of technologies that would be available and economically practicable for all existing facilities, but EPA was able to articulate a uniform nationally applicable principle in the form of the performance standards in § 125.94(b), by

which such technologies could be identified by the Director and implemented through the use of a Technology Installation and Operation Plan designed to achieve them. While the technology solution was different in Phase I and Phase II, the legal principle is the same. In addition, EPA has the legal authority to identify section 316(b) requirements as an evolving set of technologies, rather than a single technology array fixed in time. Section 316(b) requires that any technology selected under that section must be the best available to the facility. This term encompasses consideration of effectiveness, costs, non-water quality environmental impacts, feasibility issues and a host of other considerations relevant to existing facilities. See section 304(b)(2)(B). The record indicates that for some facilities, the question of what are *available* technologies and, among those, what is the *best* technology, may change over time. A Technology Installation and Operation Plan is intended to assure that at all times a facility is implementing a technology—or a technology plan—that reflects the best of all technologies consistent with uniform guiding principles in the form of performance standards available to them in light of their site-specific circumstances.

Finally, EPA notes that the way in which performance standards guide technology selection and implementation varies slightly among the five compliance options. For facilities complying with § 125.94(a)(1), the technologies identified are so effective that EPA is confident that any facility employing them will meet the performance standards, so a Technology Installation and Operation Plan and performance monitoring are not required. Because these technologies are not available to all Phase II existing facilities, however, EPA has provided alternative compliance options. For facilities complying in accordance with § 125.94(a)(2), (3), or (4), compliance is generally achieved by implementation of a Technology Installation and Operation Plan designed to meet applicable performance standards. Finally, for facilities that comply in accordance with § 125.94(a)(5) for whom even compliance in accordance with § 125.94(a)(2), (3), or (4) is not available because of significantly higher costs, compliance is achieved by implementation of a Technology Installation and Operation Plan that achieves an efficacy as close as practicable to the applicable performance standards.

4. Site-Specific Requirements

a. Costs Significantly Greater Than Costs Considered by the Administrator

In today's final rule, a facility that demonstrates to the Director that the costs of compliance with the performance standards and/or restoration requirements would be significantly greater than the costs considered by the Administrator for a similar facility, will be given a site-specific determination of best technology available for minimizing adverse environmental impact. The standards of the rule have not changed since proposal, with the exception of one clarification: in the final rule, the alternative site-specific requirements established by the Director must achieve an efficacy that is as close as practicable to the performance standards and/or restoration requirements specified in § 125.94(b) and (c). This was not specified in the proposed rule language. In addition, today's final rule also explains how a facility should calculate costs considered by the Administrator for a similar facility, for comparison with the costs of compliance for the facility. EPA details these steps in § 125.94(a)(5)(i)(A)–(F).

In the proposed rule, submittal requirements for facilities requesting a variance based upon a cost-cost test were identical to those for facilities requesting a variance based on a cost-benefit test. Thus, a facility requesting a site-specific determination based on a cost-cost comparison had to submit three studies: the Cost Evaluation Study, the Valuation of Monetized Benefits of Reducing Impingement and Entrainment, and the Site-Specific Technology Plan. In the final rule, by contrast, a facility must submit only the Cost Evaluation Study and the Site-Specific Technology Plan.

Under the Comprehensive Cost Evaluation Study detailed at proposal, a facility must submit detailed engineering cost estimates to document the costs of implementing the technologies and/or operational measures in the facility's Design and Construction Plan. In the final rule, the facility must provide, in addition to the engineering cost estimates, a demonstration that the costs significantly exceed the benefits of complying with the applicable performance standards. EPA did not make significant changes to the requirements under the Site-Specific Technology Plan.

In summary, the major changes in the cost-cost analysis are as follows:

- In the final rule, EPA has specified how a facility must "calculate costs considered by the Administrator" for comparison with the facility's estimate of the costs of compliance with the final rule,
- Elimination of the requirement to submit a Valuation of Monetized Benefits of Reducing Impingement and Entrainment, and
- Addition of the requirement to demonstrate that the costs significantly exceed the costs considered by the Administrator for a similar facility, under the Cost Evaluation Study.

b. Costs Significantly Greater Than Benefits

In today's final rule, a facility that demonstrates to the Director that the costs of compliance with the performance standards and/or restoration requirements would be significantly greater than the benefits will be given a site-specific determination of best technology available for minimizing adverse environmental impact. The standards of the rule have not changed since proposal, with the exception of one clarification: in the final rule, the alternative site-specific requirements established by the Director must achieve an efficacy that is as close as practicable to the performance standards and/or restoration requirements specified in § 125.94(b) and (c). This was not specified in the proposed rule language.

In the final rule, as in the proposal, a facility requesting a site-specific determination based on a cost-benefit comparison must submit three studies: the Cost Evaluation Study, the Benefits Valuation Study (referred to in proposal as Valuation of Monetized Benefits of Reducing Impingement and Entrainment), and the Site-Specific Technology Plan. The final rule has both added and clarified requirements for the first two components relative to the proposal, but has provided no substantive changes in the requirements for the Site-Specific Technology Plan.

Under the Comprehensive Cost Evaluation Study detailed at proposal, a facility must submit detailed engineering cost estimates to document the costs of implementing the technologies and/or operational measures in the facility's Design and Construction Plan. In the final rule, the facility must provide, in addition to the engineering cost estimates, a demonstration that the costs significantly exceed the benefits of complying with the applicable performance standards.

Additional clarifications are found in the Benefits Valuation Study. In the proposed rule, a facility was required to submit (1) a description of the

methodology used to estimate the benefits' value, (2) the basis for assumptions and quantitative estimates, and (3) an uncertainty analysis. In the final rule, EPA has retained the three submittal requirements. Under the first component, EPA has specified the categories of potential valuation estimates in the final rule, namely commercial, recreational and ecological benefits. EPA has added that a facility should include non-use benefits if applicable. To the second component, EPA has added that the basis may include a determination of entrainment survival if the Director approved such a study. Requirements for the uncertainty analysis remain unchanged from proposal. In the final rule, EPA has added that a facility will be required to submit peer review of the items submitted (upon the Director's request) and a narrative description of non-monetized benefits that would result at the site if the facility was to meet applicable performance standards.

In summary, the major changes in the cost-benefit analysis are as follows:

- Facilities will be required to achieve an efficacy that is "as close as practicable" to performance standards and/ or restoration requirements,
- Facilities will need to specifically demonstrate that costs are significantly greater than the benefits of compliance, and
- Facilities will have additional requirements under the Benefits Valuation Study.

VII. Basis for the Final Regulation

A. Why Is EPA Establishing a Multiple Compliance Alternative Approach for Determining Best Technology Available for Minimizing Adverse Environmental Impact?

Today's final rule authorizes a Phase II existing facility to choose one of five alternatives for establishing the best technology available for minimizing adverse environmental impacts at the facility. A facility may (1) demonstrate that it has reduced or will reduce its cooling water intake flow commensurate with a closed-cycle, recirculating system, and or that it has reduced, or will reduce, the maximum through-screen design intake velocity to 0.5 ft/s or less; (2) demonstrate that its existing design and construction technologies, operational measures, and/or restoration measures meet the applicable performance standards and restoration requirements; (3) demonstrate that it has selected design and construction technologies, operational measures, and/or restoration measures that will, in combination with any existing design and construction technologies, operational measures, and/or restoration measures, meet the applicable performance standards and restoration requirements; (4) demonstrate that it will install or has installed and properly operates and maintains an approved design and construction technology; or (5) demonstrate that it has selected, installed, and is properly operating and maintaining, or will install and properly operate and maintain, design and construction technologies, operational measures, and/or restoration measures that the Director has determined to be the best technology available for the facility based on application of a specified cost-to-cost test or a cost-to-benefit test. The basis for each of the five compliance alternatives is explained in section VII.C. of this preamble.

The rule establishes performance standards for the reduction of impingement mortality and entrainment. EPA established these performance standards in part based on a variety of technologies, but the rule does not mandate the use of any specific technology. These performance standards vary by waterbody type (*i.e.*, freshwater river/stream, estuary/tidal river, ocean, Great Lake, or lake/reservoir) and the capacity utilization rate of the facility. They may be met in whole or in part using restoration measures after demonstrating, among other things, that the facility has evaluated the use of design and construction technologies and operational measures at the site. The basis for the performance standards is explained in section VII.B. of this preamble and the basis for the restoration requirements is explained at section VII.F. of this preamble. For a more detailed description of the rule, see sections V and IX of this preamble. These requirements reflect the best technology available for minimizing adverse environmental impact from cooling water intake structures.

EPA adopted this regulatory scheme because it provides a high degree of flexibility for existing facilities to select the most effective and efficient approach and technologies for minimizing adverse environmental impact associated with their cooling water intake structures. This approach also reflects EPA's judgment that, given the wide range of various factors that affect the environmental impact posed by Phase II existing facilities, different technologies or different combinations of technologies can be used and optimized to achieve the performance standards.

B. Why and How Did EPA Establish the Performance Standards at These Levels?

1. Overview of Performance Standards

The final rule establishes two types of performance standards, one that addresses impingement mortality and one that addresses entrainment. EPA used impingement mortality and entrainment as a metric for performance because these are primary and distinct types of harmful impacts associated with the use of cooling water intake structures (*see also* section IV). Both the impingement mortality and the entrainment performance standards apply to facilities demonstrating compliance under alternatives two, three, and four, described above (§ 125.94(a)(2), (3), and (4)). In addition, the Director's site-specific alternative requirements must be as close as practicable to the applicable performance standards under § 125.94. Performance standards for entrainment do not apply to facilities with low utilization capacity, those with a design intake flow of five percent or less of the mean annual flow of a freshwater river or stream, and those that withdraw cooling water from a lake (other than one of the Great Lakes) or reservoir because such facilities have a low propensity for causing significant entrainment impacts due to limited facility operation, low intake flow, or general waterbody characteristics. The impingement mortality performance standard requires a Phase II existing facility that complies under § 125.94(a)(2), (3), and (4) to reduce impingement mortality of all life stages of fish and shellfish by 80 to 95 percent from the calculation baseline.

Both an entrainment performance standard and an impingement mortality standard apply to facilities with a capacity utilization rate of 15 percent or greater and that withdraw cooling water from a tidal river, estuary, ocean, one of the Great Lakes, as well as facilities that use cooling water from a freshwater river or stream and the design intake flow of the cooling water intake structure is greater than five percent of the mean annual flow because EPA believes that these facilities cause more significant entrainment impacts. The entrainment standard, where applicable, requires a Phase II facility to reduce entrainment of all life stages of fish and shellfish by 60 to 90 percent from the calculation baseline.

2. Basis for Performance Standards

Overall, the performance standards that reflect best technology available under today's final rule are not based on a single technology but, rather, are

based on consideration of a range of technologies that EPA has determined to be commercially available for the industries affected as a whole and have acceptable non-water quality environmental impacts, except for some potential regional energy (reliability) impacts that will be minimized to the extent possible through flexible compliance options. Because the requirements implementing section 316(b) are applied in a variety of settings and to Phase II existing facilities of different types and sizes, no single technology is most effective at all existing facilities, and a range of available technologies has been used to derive the performance standards.

EPA developed the performance standards for impingement mortality reduction based on an analysis of the efficacy of the following technologies: (1) Design and construction technologies such as fine and wide-mesh wedgewire screens, as well as aquatic filter barrier systems, that can reduce mortality from impingement by up to 99 percent or greater compared with conventional once-through systems; (2) barrier nets that may achieve reductions of 80 to 90 percent; and (3) modified screens and fish return systems, fish diversion systems, and fine mesh traveling screens and fish return systems that have achieved reductions in impingement mortality ranging from 60 to 90 percent as compared to conventional once-through systems.

Available performance data for entrainment reduction are not as comprehensive as impingement data. However, aquatic filter barrier systems, fine mesh wedgewire screens, and fine mesh traveling screens with fish return systems have been shown to achieve 80 to 90 percent or greater reduction in entrainment compared with conventional once-through systems. EPA notes that screening to prevent organism entrainment may cause impingement of those organisms instead.

3. Discussion of Key Aspects of Performance Standards

The performance standards at § 125.94(b)(1),(2), and (3) are based on the type of waterbody in which the intake structure is located, the volume of water withdrawn by a facility, and the facility capacity utilization rate. Under the final rule, EPA has grouped waterbodies into five categories: (1) Freshwater rivers or streams, (2) lakes or reservoirs, (3) Great Lakes, (4) tidal rivers and estuaries, and (5) oceans. The Agency considers location, one aspect of which is waterbody type, to be an important factor in addressing adverse environmental impact caused by cooling water intake structures. Because different waterbody types have the potential for different adverse environmental impacts, the requirements to minimize adverse environmental impact vary by waterbody type.

The reproductive strategies of tidal river and estuarine species, together with other physical and biological characteristics of those waters, make them more susceptible than other waterbodies to impacts from cooling water intake structures (66 FR 288857–288859; 68 FR 17140). In contrast, many aquatic organisms found in non-tidal freshwater rivers and streams are less susceptible to entrainment due to their demersal (bottom-dwelling) nature and the fact that they do not typically have planktonic (free-floating) egg and larval stages (66 FR 28857; 68 FR 17140). Comments on the proposed Phase II existing facility rule also acknowledge that waterbody type is an important factor in assessing the impacts of cooling water intake structures, although some commenters preferred a site-specific approach, and others maintained that all waters deserve the most rigorous technology. A number of States supported EPA's proposed approach.

Absent entrainment control technologies, entrainment at a particular site is generally proportional to intake flow at that site. As discussed above, EPA believes it is reasonable to vary performance standards by the potential for adverse environmental impact in a waterbody type. EPA is limiting the requirement for entrainment controls in fresh waters to those facilities that withdraw the largest proportion of water from freshwater rivers or streams because they have the potential to impinge and entrain larger numbers of fish and shellfish and therefore have a greater potential to cause adverse environmental impact. EPA is not requiring entrainment reductions in freshwater rivers or streams where facilities withdraw 5 percent or less of the source water annual mean flow because such facilities generally have a low propensity for causing significant entrainment impacts due to the low proportion of intake flow in combination with the characteristics of the waterbody.

There are additional performance standards for facilities withdrawing from a lake (other than one of the Great Lakes) or a reservoir. If such a facility proposes to increase the design intake flow of the cooling water intake structure, the increase in total design intake flow must not disrupt the natural thermal stratification or turnover pattern of the source water except in cases where the disruption does not adversely affect the management of fisheries § 125.94(b)(3)(iii)). The natural thermal stratification or turnover pattern of a lake is a key characteristic that is potentially affected by the intake flow (which can alter temperature and/or mixing of cold and warm water layers) and location of cooling water intake structures within such waterbodies. Cooling water intake structures withdrawing from the Great Lakes are required to reduce fish and shellfish impingement mortality by 80 to 95 percent and to reduce entrainment by 60 to 90 percent. As described in the Phase I proposed rule (65 FR 49086) and NODA (66 FR 28858), EPA believes that the Great Lakes are a unique system that should be protected to a greater extent than other lakes and reservoirs. Similar to oceans, large lakes such as the Great Lakes can possess estuarine-like environments in the lower reaches of tributary streams. For example, within the U.S., a total of 1,370 distinct coastal wetlands fringe the Great Lakes and the channels that connect the lakes. (2–016A Herdendorf, C.E. Great Lakes estuaries. Estuaries, 13(4): 493–503. 1990, pg. 493). The Agency is therefore specifying entrainment controls as well as impingement mortality controls for the Great Lakes. EPA has not applied the entrainment performance standard to lakes other than the Great Lakes because, in general, these waterbodies contain aquatic organisms that tend to be less impacted by entrainment than organisms in estuaries or fresh water rivers or streams.

The performance standards for facilities with cooling water intake structures located in a tidal river or estuary and with a capacity utilization rate of 15 percent or greater are to reduce impingement mortality by 80 to 95 percent and entrainment by 60 to 90 percent for fish and shellfish. As discussed previously, EPA believes estuaries and tidal rivers are more susceptible than other waterbodies to adverse impacts from impingement and entrainment.

The performance standards for facilities with cooling water intake structures located in an ocean are to reduce impingement mortality by 80 to 95 percent and entrainment by 60 to 90 percent for fish and shellfish. EPA is establishing requirements for facilities withdrawing from oceans that are similar to those for tidal rivers and estuaries because the coastal zone of oceans (from which coastal cooling water intake structures withdraw water)

are highly productive areas for fish and shellfish. (*See* the Phase I proposed rule (65 FR 45060) and documents in the record for the Phase I new facility rule (Docket # W–00–03) such as 2–013A through O, 2–019A–R11, 2–019A–R12, 2–019A–R33, 2–019A–R44, 2–020A, 3–0059). EPA is also concerned about the extent to which fishery stocks that rely upon tidal rivers, estuaries and oceans for habitat are overutilized and seeks to minimize the impact that cooling water intake structures may have on these species or forage species on which these fishery stocks may depend. Recent data demonstrate that approximately 78% of the fish stocks managed by the National Oceanic and Atmospheric Administration's National Marine Fishery Service (NMFS) are fully exploited, overfished, or collapsed (America's Living Oceans: Charting a Course for Sea Change, Pew Oceans Commission, June 4, 2003). (*See also* documents 2–019A–R11, 2–019A–R12, 2–019A–R33, 2–019A–R44, 2–020A, 2–024A through O, and 3–0059 through 3–0063 in the record of the Final New Facility Rule (66 FR 65256), Docket # W–00–03).

In accordance with the Phase II rule, facilities that operate with a capacity utilization rate of less than 15 percent are subject to the performance standard for impingement mortality only. EPA is not requiring, in today's rule, that these facilities control entrainment. EPA has several reasons for this. First, EPA has determined that entrainment control technology is not economically practicable in view of the reduced operating levels of these facilities. These facilities also tend to operate most often in mid-winter or late summer, which are times of peak energy demand but periods of generally low abundance of entrainable life stages of fish and shellfish. Finally, the total volume of water withdrawn by these facilities is significantly lower than for facilities operating at or near peak capacity, and as noted above, entrainment at a site is generally proportional to flow, absent entrainment controls. Consequently, EPA determined that it was neither necessary nor cost-effective for these facilities to reduce entrainment where the total volume of water withdrawn and the number of organisms that would be protected from entrainment is likely to be small. EPA is also allowing facilities with multiple, distinct cooling water intakes that are exclusively dedicated to different generating units to determine capacity utilization and applicable performance standards separately for each intake for the same reasons.

As in the Phase I rule, EPA is setting performance standards for minimizing adverse environmental impact based on a relatively easy to measure and certain metric—reduction of impingement mortality and entrainment. Although adverse environmental impact associated with cooling water intake structures can extend beyond impingement and entrainment, EPA has chosen this approach because impingement and entrainment are primary, harmful environmental effects that can be reduced through the use of specific technologies. In addition, where other impacts at the population, community, and ecosystem levels exist, these will also be reduced by reducing impingement and mortality. Using impingement mortality and entrainment as a metric provides certainty about performance standards and streamlines, and thus speeds, the issuance of permits.

EPA is expressing the performance standard in the form of ranges rather than a single performance benchmark because of the uncertainty inherent in predicting the efficacy of any one of these technologies, or a combination of these technologies, across the spectrum of facilities subject to today's rule. The lower end of the range is being established as the percent reduction that EPA, based on the available efficacy data, expects all facilities could eventually achieve if they were to implement and optimize available design and construction technologies and operational measures on which the performance standards are based. (*See* Chapter 4, "Efficacy of Cooling Water Intake Structure Technologies," of the Phase II Existing Facility Technical Development Document, EPA–821–R–04–007, February 2004. Also, *see* EPA's 316(b) technology efficacy database, DCN 6–5000.) The lower end of the range also reflects, in part, higher mortality rates at sites where there may be more fragile species that may not have a high survival rate after coming in contact with fish protection technologies at the cooling water intake structure (*e.g.*, fine mesh screens). The higher end of the range is a percent reduction that available data show many facilities can and have achieved with the available technologies upon which the performance standards are based.

In specifying a range, EPA anticipates that facilities will select the most cost-effective technologies or operational measures to achieve the performance level (within the stated range) based on conditions found at their site, and that Directors will review the facility's application to ensure that appropriate alternatives were considered. Proper selection, operation, and maintenance of these technologies would serve to increase potential efficiencies of the technologies. EPA also expects that some facilities may be able to meet these performance requirements by selecting and implementing a suite (*i.e.*, more than one) of technologies and operational measures and/or, as discussed in this section, by undertaking restoration measures.

Several additional factors support EPA's expectation that the impingement mortality and entrainment reduction reflected in the performance standards can eventually be achieved by all facilities using the design and construction technologies and measures on which the standards were based. First, a significant portion of the available performance data reviewed is from the 1970s and 1980s (when section 316(b) was initially implemented) and does not reflect recent developments, innovations (*e.g.*, aquatic filter barrier systems, sound barriers), or experience using these technologies. These data, developed during early implementation of the CWA, do not fully reflect today's improved understanding of both how the various control technologies work and the various factors that reflect what constitutes and how to measure healthy aquatic conditions. Second, these conventional barrier and return system technologies have not been optimized on a widespread level to date, as would be encouraged by this rule. Available information indicates that facilities that use these cooling water intake structure technologies often achieve better results from the technologies through adjusting which technologies are applied and how they are used. Such optimization, which also benefits from the advances in understanding noted above, would be promoted under this rule as facilities work to achieve the performance standards. Third, EPA believes that some facilities could achieve further reductions (estimated at 15–30 percent) in impingement mortality and entrainment by providing for seasonal flow restrictions, variable speed pumps, systems conversions to closed-cycle, recirculating systems, and other operational measures and innovative flow reduction alternatives. Such operational measures could be used to supplement design and construction technologies where necessary to meet the performance standards. Facilities also could benefit from combining inexpensive technologies as a "suite." For additional discussion, see chapter 4 in the Phase II Existing Facility Technical Development Document.

The calculation baseline used to determine compliance with

performance standards is defined in § 125.93 as an estimate of impingement mortality and entrainment that would occur at a site assuming (1) the cooling water system had been designed as a once-through system; (2) the opening of the cooling water intake structure is located at, and the face of the standard 3/8-inch mesh traveling screen is oriented parallel to, the shoreline near the surface of the source waterbody; and (3) the baseline practices and procedures are those that the facility would maintain in the absence of any operational controls, including flow or velocity reductions, implemented in whole or in part for the purposes of reducing impingement mortality and entrainment. In addition, the facility may choose to use the current level of impingement mortality and entrainment as the calculation baseline. EPA's definition also clarifies the range of available information sources for the baseline. The calculation baseline may be estimated using: historical impingement mortality and entrainment data from the facility or from another facility with comparable design, operational, and environmental conditions; current biological data collected in the waterbody in the vicinity of the facility's cooling water intake structure; or current impingement mortality and entrainment data collected at the facility. Further, a facility may request that the calculation baseline be modified to be based on a location of the opening of the cooling water intake structure at a depth other than at or near the surface if it can demonstrate to the Director that the other depth would correspond to a higher baseline level of impingement mortality and/or entrainment. EPA decided to use this definition because it represents the most common default conditions the Agency could identify to give facilities credit for design and construction technologies, operational measures, and/or restoration measures that they have already implemented to minimize adverse environmental impact, while providing a clear and relatively simple definition. Based on comments received on the Phase II NODA, this calculation baseline definition includes additional criteria that EPA has added to provide clarity to the analysis. (Proposed changes to the calculation baseline were discussed in the Phase II NODA, see 68 FR 13580). In many cases, existing technologies at the site show some reduction in impingement and entrainment when compared to this baseline. In such cases, impingement mortality and entrainment reductions (relative to the calculated baseline) achieved by these existing technologies should be counted toward compliance with the performance standards. In addition, operational measures such as operation of traveling screens, employment of more efficient return systems, and even locational choices should be credited for any corresponding reduction in impingement mortality and entrainment. See section IX of this preamble for a discussion of how the calculation baseline is used to compare facility performance with the rule's performance standards.

C. What Is the Basis for the Five Compliance Alternatives That EPA Selected for Establishing Best Technology Available?

1. Meeting Performance Standards Through Reducing Intake Flow Commensurate With a Closed Cycle Recirculating System or Reduced Design Intake Velocity

Under § 125.94(a)(1)(i), any facility that reduces its flow to a level commensurate with a closed-cycle, recirculating cooling system meets the performance standards in today's rule because such a reduction in flow is deemed to satisfy any applicable impingement mortality and entrainment performance standards for all waterbodies. Facilities that select this compliance alternative either through the use of closed-cycle recirculating system technology at the plant, or by retrofitting their facility, will not be required to further demonstrate that they meet the applicable performance standards. Similarly, under 125.94(a)(1)(ii), any facility that reduces its design intake velocity to 0.5 ft/s or less is deemed to have met the performance standards for impingement mortality and is not required to demonstrate further that it meets the performance standards for impingement mortality.

Available data described in Chapter 3 of the Phase II Existing Facility Technical Development Document suggest that closed-cycle, recirculating cooling systems (*e.g.*, cooling towers or ponds) can reduce mortality from impingement by up to 98 percent and entrainment by up to 98 percent when compared with conventional once-through systems.[44] Although closed-cycle, recirculating cooling is not one of the technologies on which the performance standards are based, use of a closed-cycle, recirculating cooling system would always achieve the performance standards and therefore, facilities that reduce their flow commensurate with closed-cycle, recirculating cooling systems are deemed to have met performance standards. The rule, at § 124.94(a)(1)(i), thus establishes a compliance alternative based on the use of a closed-cycle, recirculating cooling system. While EPA based the requirements of the new facility rule on the performance standards of closed-cycle recirculating systems, EPA has determined that this technology is not economically practicable for many existing Phase II facilities. EPA is nonetheless aware that some existing facilities have installed this highly effective technology and has thus provided a streamlined alternative for such facilities.

Additionally, EPA established a compliance alternative that allows facilities to reduce intake velocity to meet the impingement mortality performance standards. As EPA discussed in the proposed rule at 67 FR 17151 and Phase I final rule at 66 FR 65274, intake velocity is one of the key factors that can affect the impingement of fish and other aquatic biota, since in the immediate area of the intake it exerts a direct physical force against which fish and other organisms must act to avoid impingement and entrainment. As discussed in that notice, EPA compiled data from three swim speed studies (University of Washington study, Turnpenny, and EPRI) and these data indicated that a 0.5 ft/s velocity would protect at least 96 percent of the tested fish. As further discussed, EPA also identified federal documents (Boreman, DCN 1–5003–PR; Bell (1990); and National Marine Fisheries Service (NMFS), (1997)), an early swim speed and endurance study performed by Sonnichsen *et al.* (1973), and fish screen velocity criteria that are consistent with this approach.

[44] Reducing the cooling water intake structure's capacity is one of the most effective means of reducing entrainment (and impingement). For the traditional steam electric utility industry, facilities located in freshwater areas that have closed-cycle recirculating cooling water systems can, depending on the quality of the make-up water, reduce water use by 96 to 98 percent from the amount they would use if they had once-through cooling water systems. Steam electric generating facilities that have closed-cycle, recirculating cooling systems using salt water can reduce water usage by 70 to 96 percent when make-up and blowdown flows are minimized. The lower range of water usage would be expected where State water quality standards limit chloride to a maximum increase of 10 percent over background and therefore require a 1.1 cycle of concentration. The higher range should be attainable where cycles of concentration up to 2.0 are used for the design.

2. Meeting Performance Standards Through the Use of Design and Construction Technologies, Operational Measures, and/or Restoration Measures

Under the second and third compliance alternatives (§ 125.94(a)(2) and (3)), a facility may either demonstrate to the Director that the facility's existing design and construction technologies, operational measures, and/or restoration measures already meet the minimum performance standards specified under § 125.94(b) and (c), or that it has selected design and construction technologies, operational measures, and/or restoration measures or some combination thereof that will meet these performance standards.

Available data indicate that, when considered as a suite of technologies, barrier and fish handling technologies are available on a national basis for use by Phase II existing facilities. These technologies exist and are in use at various Phase II facilities and, thus, EPA considers them collectively technologically achievable. In addition, 50 percent of the potentially regulated facilities that do not already have closed-cycle cooling systems have some other technology in place that reduces impingement or entrainment. In turn, a large subset of these facilities (33 percent) also have fish handling or return systems that reduce the mortality of impinged organisms. The fact that these technologies are collectively available means that one or more technologies within the suite is available to each Phase II facility.

EPA finds that the design and construction technologies necessary to meet the requirements are commercially available and economically practicable for existing facilities, because facilities can and have installed many of these technologies years after a facility began operation. Typically, additional design and construction technologies such as fine mesh screens, wedgewire screens, fish handling and return systems, and aquatic filter fabric barrier systems can be installed during a scheduled outage (operational shutdown). Referenced below are examples of facilities that installed these technologies after they initially started operating.

Lovett Generating Station. A 495 MW facility (gas-fired steam), Lovett is located in Tomkins Cove, New York, along the Hudson River. The facility first began operations in 1949 and has three generating units with once-through cooling systems. In 1994, Lovett began the testing of an aquatic filter barrier system to reduce entrainment, with a permanent system being installed the following year. Improvements and additions were made to the system in 1997, 1998, and 1999, with some adjustments being accepted as improvements of this vendor's technology for all subsequent installations at other locations.

Big Bend Power Station. Situated on Tampa Bay, Big Bend is a 1998 MW (coal-fired steam) facility with four generating units. The facility first began operations in 1970 and added generating units in 1973, 1976, and 1985. Big Bend supplies cooling water to its once-through cooling water systems via two intake structures. When the facility added Unit 4 in 1985, regulators required the facility to install additional intake technologies. A fish handling and return system, as well as a fine-mesh traveling screen (used only during months with potentially high entrainment rates). were installed on the intake structure serving both the new Unit 4 and the existing Unit 3.

Salem Generating Station. A 2381 MW facility (nuclear), Salem is located on the Delaware River in Lower Alloways Creek Township, New Jersey. The facility has two generating units, both of which use once-through cooling and began operations in 1977. In 1995, the facility installed modified Ristroph screens and a low-pressure spray wash with a fish return system. The facility also redesigned the fish return troughs to reduce fish trauma.

Chalk Point Generating Station. Located on the Patuxent River in Prince George's County, Maryland, Chalk Point has a capacity of 2647 MW (oil-fired steam). The facility has four generating units and uses a combination of once-through and closed-cycle, recirculating cooling systems (two once-through systems serving two generating units and one recirculating system with a tower serving the other two generating units). In 1983, the facility installed a barrier net, followed by a second net in 1985, giving the facility a coarse mesh (1.25") outer net and a fine mesh (.75") inner net. The barrier nets are anchored to a series of pilings at the mouth of the intake canal that supplies the cooling water to the facility and serve to reduce both entrainment and the volume of trash taken in at the facility.

3. Meeting Performance Standards Through Use of an Approved Design and Construction Technology

Under the fourth compliance alternative, a facility can demonstrate that it meets specified conditions and that it has installed and properly operates and maintains a pre-approved technology. EPA is approving one technology at this time: submerged cylindrical wedgewire screen technology to treat the total cooling water intake flow. There are five conditions that must be met in order to use this technology to comply with the rule: (1) The cooling water intake structure is located in a freshwater river or stream; (2) the cooling water intake structure is situated such that sufficient ambient counter currents exist to promote cleaning of the screen face; (3) the through screen design intake velocity is 0.5 ft/s or less; (4) the slot size is appropriate for the size of eggs, larvae, and juveniles of any fish and shellfish to be protected at the site; and (5) the entire main condenser cooling water flow is directed through the technology (small flows totaling less than two MGD for auxiliary plant cooling uses are excluded). Directors are explicitly authorized in § 125.99 to pre-approve other technologies for use at facilities with other specified characteristics within their respective jurisdiction after providing the public with a notice and an opportunity to comment on the request for approval of the technology. The Director's authority to pre-approve other technologies is not limited to technologies for use by facilities located on freshwater rivers and streams.

EPA has adopted this compliance alternative in response to comments that suggested that EPA provide an additional, more streamlined compliance option under which a facility could implement certain specified technologies that are deemed highly protective in exchange for reducing the scope of the Comprehensive Demonstration Study. (*See* 68 FR 13522, 13539; March 19, 2003). EPA evaluated the effectiveness of specific technologies using the impingement mortality and entrainment reduction performance standards as assessment criteria. The technology selected for the approved technology option has a demonstrated ability to reduce impingement mortality by 80 to 95 percent for fish and shellfish and, if required, reduce entrainment by 60 to 90 percent for any stages of fish and shellfish at facilities that meet the conditions specified in section 125.99(a). Thus, the technology has a demonstrated ability to meet the most stringent performance standards that would apply to any facility situated on a freshwater river or stream. (*See* DCN 1–3075, 1–5069, 1–5070, 3–0002, and 4–4002B. *Also see,* DCN 6–5000 and Chapter 3 of the Technical Development Document.) Because cylindrical wedgewire screens are believed to be effective when deployed under the

specified conditions and properly maintained, facilities that select this compliance option are provided substantially streamlined requirements for completing the Comprehensive Demonstration Study. However, facilities selecting this option are still required to prepare a Technology Installation and Operation Plan to monitor the effectiveness of the technology at their site in meeting the performance standards.

4. Site-Specific Determination of Best Technology Available To Minimize Adverse Environmental Impact

A facility may comply with the rule by seeking a site-specific demonstration of the best technology available to minimize adverse environmental impact by demonstrating, to the Director's satisfaction, that its cost of complying with the applicable performance standards would be significantly greater than the costs considered by EPA for a like facility when establishing such performance standards, or that its costs would be significantly greater than the benefits of complying with such performance standards at the facility. (*See* sections 125.94(a)(5)(i) and (ii)). If a facility satisfies one of the two cost tests in § 125.94(a)(5), then the Director must establish site-specific alternative requirements based on design and construction technologies, operational measures, and/or restoration measures that achieve an efficacy that is, in the judgment of the Director, as close as practicable to the applicable performance standards without resulting in costs that are significantly greater than either the costs considered by the Administrator in establishing the applicable performance standards, or the benefits at the facility.

In establishing the performance standards in 125.94(b) and the compliance alternatives in sections 125.94(a)(1)–(4), EPA considered several factors, including efficacy, availability, ease of implementation, indirect effects, the costs that EPA expects all existing facilities to incur (national costs) and the benefits if all existing facilities meet the performance standards (national benefits). This provision for alternative requirements is included in the rule to give facilities flexibility to demonstrate that the best technology available to minimize adverse environmental impact at their particular sites may be less stringent than would otherwise be achieved if the facility selected one of the compliance alternatives in sections 125.94(a)(1)–(4). (For a discussion of EPA's legal authority to authorize compliance with alternative requirements based on this cost-cost comparison, *see* Section VIII. I.).

a. Basis of the Cost-Cost Test

For a number of related reasons, EPA chose to use a comparison of a facility's actual costs to the costs EPA estimated that facility would incur to meet the national performance standards (a "cost-cost test") as a basis for obtaining a site-specific determination of best technology available. EPA's record for this rule shows that, for the category of existing facilities as a whole, today's rule is technically achievable and economically practicable. Although EPA collected more information for this rulemaking than is typical for an effluent limitation guideline rulemaking, detailed information on some factors important to the effectiveness and costs of the technologies, such as debris loading and the presence of navigational channels within the waterbody at which cooling water intakes are sited, was not requested. Moreover, the information EPA used to develop its costs was in some cases limited by the fact that, while EPA sent surveys to all facilities covered under today's rule, only 42% were sent detailed questionnaires. The remaining 58% only received a short technical questionnaire which requested minimal characterization information. Also, EPA may not have elicited information regarding characteristics of a particular facility that, if known would have either significantly changed EPA's national cost estimates or demonstrated that none of the technologies on which the categorical requirements are based are economically achievable by the facility. Similarly, existing facilities have less flexibility than new facilities in selecting the location of their intakes and technologies for minimizing adverse environmental impact, and therefore it may be difficult for some facilities to avoid costs much higher than those EPA considered when establishing the performance standards. The cost-cost site-specific alternative ensures that the overall rule remains economically practicable for facilities subject to today's rule. In short, for certain facilities EPA may not have anticipated some site-specific costs or the costs for retrofit may exceed those EPA considered. Despite EPA's best effort, such costs are difficult to estimate in a national rule. Because of the wide range of available technologies considered and a number of site-specific factors that may significantly affect the cost and practicability of installing particular technologies at particular sites, the site-specific uncertainty in the cost estimates is higher than for an effluent limitations guidelines rulemaking. Thus, EPA may not have anticipated all site-specific costs that a facility could incur. In addition, existing facilities have less flexibility than new facilities in selecting the location of their intakes and technologies for minimizing adverse environmental impact and, therefore, it may be difficult for some facilities to avoid costs much higher than those EPA considered when establishing the performance standards in the rule. For all of these reasons, EPA believes that the cost-cost site-specific compliance alternative is necessary to ensure that the rule is economically practicable for existing Phase II facilities. In order to ensure that this alternative provides only the minimum relaxation of performance standards that is needed to make the rule economically practicable, § 125.94(a)(5)(i) requires that the site-specific requirements achieve an efficacy that is as close as practicable to the applicable performance standards without resulting in costs that are significantly greater than those considered by the Administrator for a like facility when establishing the performance standards.

b. Basis of the Cost-Benefit Test

EPA decided to use a comparison of a facility's costs to the benefits of meeting the performance standards at the facility (a "cost-benefit test") as another basis for obtaining a site-specific determination of BTA to minimize adverse environmental impact. Section 316(b) authorizes consideration of the environmental benefit to be gained by requiring that the location, design, construction, and capacity of cooling water intake structures reflect the best economically practicable technology available for the purpose of minimizing adverse environmental impact. Accordingly, in determining that the technologies on which EPA based the compliance alternatives and performance standards are the best technologies available for existing facilities to minimize adverse environmental impact, EPA considered the national cost of those technologies in comparison to the national benefits—*i.e.*, the reduction in impingement and entrainment that EPA estimated would occur nationally if all existing facilities selected one of the compliance options in sections 125.94(a)(1)–(4). While EPA believes that there is considerable value in promulgating national performance standards under section 316(b) based on what EPA determines, on a national basis, to be the best technology available to minimize adverse environmental impacts, EPA also recognizes that, at

times, determining what is necessary to minimize adverse environmental impacts can necessitate a site-specific inquiry. EPA's comparison of national costs to national benefits may not be applicable to a specific site due to variations in (1) the performance of intake technologies and (2) characteristics of the waterbody in which the intake(s) are sited, including the resident aquatic biota. For example, there may be some facilities where the absolute numbers of fish and shellfish impinged and entrained is so minimal that the cost to achieve the required percentage reductions would be significantly greater than the benefits of achieving the required reductions at that particular site. More specifically, because of the location of the intake, the characteristics of a particular waterbody, or the behavioral patterns of the fish or shellfish in that particular waterbody, there may be little or no impingement mortality or entrainment occurring at the site (see Neal Generating Complex facility example provided in section IV of this preamble). For such a facility, the cost of reducing an already small amount of impingement mortality and entrainment by 80 to 95 percent and 60 to 90 percent, respectively, may be significantly greater than the benefits. In short, it may not be cost-effective and, therefore may be economically impracticable for a facility to achieve percentage reductions when attempting to save a small number of fish or shellfish. Thus, in a waterbody that is already degraded, very few aquatic organisms may be subject to impingement or entrainment, and the costs of retrofitting an existing cooling water intake structure may be significantly greater than the benefits of doing so. By requiring best technology available to minimize adverse environmental impact, section 316(b) invites a consideration of both technology and of environmental conditions, including the potential for adverse impacts, in the receiving waterbody. EPA believes it is a reasonable interpretation of the statute to allow the Director to consider the results of meeting the performance standards in terms of reducing environmental impacts (*i.e.*, the benefits) in cases where the costs of installing the technology are significantly greater than the reduction in environmental impacts would warrant. As with the cost-cost site-specific provision, EPA also wants to ensure that any relaxation of the performance standards be the minimum necessary to ensure that the costs are not significantly greater than the benefits. Section 125.94(a)(5)(i) thus provides that alternative site-specific requirements must achieve an efficacy that is as close as practicable to the applicable performance standards without resulting in costs that are significantly greater than the benefits of meeting the performance standards at the facility.

D. How Has EPA Assessed Economic Practicability?

The legislative history of section 316(b) indicates that the term "best technology available" should be interpreted as "best technology available commercially at an economically practicable cost."[45] This position reflects congressional concern that the application of best technology available should not impose an impracticable and unbearable economic burden. Thus, EPA has conducted extensive analyses of the economic impacts of this final rule, using an integrated energy market model (the IPM[45]). For a complete discussion of this analysis, please refer to section XI.B.1 of this preamble or Chapter B3 of the Economic and Benefits Analysis (EBA) in support of this final rule (DCN 6–0002).

EPA believes that the requirements of this rule reflect the best technology available at an economically practicable cost. EPA examined the effects of the rule's compliance costs on capacity, generation, variable production costs, prices, net income, and other measures, both at the market and facility levels. In addition, the other economic analyses conducted by EPA showed that the costs for this rule are economically practicable.

However, EPA believes that a consideration of the relationship of costs to environmental benefits is an important component of economic practicability. As discussed in section VIII.C of the proposed Phase I rule (65 FR 49094) EPA has long recognized that there should be some reasonable relationship between the cost of cooling water intake structure control technology and the environmental benefits associated with its use. As the preamble to the 1976 final rule implementing section 316(b) stated, neither the statute nor the legislative history requires a formal or informal cost-benefit assessment (41 FR 17387; April 26, 1976).

[45] *See* 118 CONG. REC 33,762 (1972), reprinted in 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 264 (1973) (Statement of Representative Don H. Clausen).

E. What Were the Major Options Considered for the Final Rule and Why Did EPA Reject Them?

EPA considered a number of options for determining the best technology available to minimize adverse environmental impact at Phase II existing facilities and assessed these options based on overall efficacy, availability, economic practicability, including economic impact and the relationship of costs with benefits, and non-water quality environmental impacts, including energy impacts. Under the options EPA considered, facilities would be allowed to implement restoration measures to meet the performance standards. Similarly, any options considered also would allow facilities to request alternative, less stringent, requirements if the Director had determined that data specific to the facility indicated that compliance with the relevant requirement would result in compliance costs significantly greater than those EPA considered in establishing the applicable requirement, or compliance costs significantly greater than the benefits of complying with the applicable performance standards. The alternative requirements would be no less stringent than justified by the significantly greater cost or the significant adverse impacts on local air quality or local energy markets. EPA also considered several site-specific approaches to establishing best technology available. These include the site-specific sample rule discussed at 67 FR 17159, an alternative based on EPA's 1977 Draft Guidance, and alternatives suggested by the Utility Water Act Group (UWAG) and Public Service Electric and Gas Company (PSEG), respectively (*see* 67 FR 17162). EPA's reasons for not adopting these site specific alternatives are discussed in section VII.E.5 of this preamble. The five major technology options EPA considered but did not select for the final rule are discussed in greater detail in the next section. Finally, the costs and benefits presented below are those developed at proposal because these estimates are most useful for purposes of comparison. Subsequent analyses, such as those presented in the NODA, have resulted in higher cost estimates in general, but did not alter the relative ranking of these options as EPA made determinations regarding the final rule. Rather, these analyses indicated that the costs for options that would have required more extensive retrofitting efforts than the final rule are even higher relative to the costs of the final

rule than they were estimated to be at proposal.

1. Intake Capacity Commensurate With Closed-Cycle, Recirculating Cooling System for All Facilities

EPA considered a regulatory option that would have required Phase II existing facilities with a design intake flow 50 MGD or more to reduce the total design intake flow to a level, at a minimum, commensurate with that which can be attained by a closed-cycle recirculating cooling system using minimized make-up and blowdown flows. In addition, facilities in specified circumstances (*e.g.*, located where additional protection is needed due to concerns regarding threatened, endangered, or protected species or habitat; or regarding migratory, sport or commercial species of concern) would have had to select and implement additional design and construction technologies to minimize impingement mortality and entrainment. This option would not have distinguished between facilities on the basis of the waterbody type from which they withdraw cooling water. Rather, it would have required that the same stringent controls be the nationally applicable minimum for all waterbody types. This is the basic regulatory approach EPA adopted for new facilities at 40 CFR 125.80.

EPA did not select a regulatory scheme based on the use of closed-cycle, recirculating cooling systems at existing facilities based on its generally high costs (due to conversions), the fact that other technologies approach the performance of this option, concerns for energy impacts due to retrofitting existing facilities, and other considerations. Although closed-cycle, recirculating cooling water systems serve as the basis for requirements applied to Phase I new facilities, for Phase II existing facilities, a national requirement to retrofit existing systems is not the most cost-effective approach and at many existing facilities, retrofits may be impossible or not economically practicable. EPA estimates that the total capital costs for individual high-flow plants (*i.e.*, greater than 2 billion gallons per day) to convert to wet towers generally ranged from $130 to $200 million, with annual operating costs in the range of $4 to $20 million (*see* TDD; DCN 6–0004). For purposes of general comparison, EPA estimated that capital and installation costs for cooling towers under the Phase I rule would range from approximately $170,000 to $12.6 million per plant (annualized), depending on flow. At proposal, EPA estimated that the total social cost of compliance for this option for Phase II existing facilities would be approximately $3.5 billion per year.

It is significant to note, however, that EPA's estimates did not fully incorporate costs associated with acquiring land needed for cooling towers and, therefore, these estimates may not fully reflect the costs of the option. For example, based on a survey conducted by one industry commenter, EPA learned that 31 out of 56 plants surveyed said that they would need to acquire additional property to accommodate cooling towers, if required by today's rule. EPA recognizes that this could be a significant cost. EPA also recognizes that there may be impediments, irrespective of costs, to acquiring land for cooling towers. Land upon which to construct cooling towers may be difficult or impossible to obtain, especially in urban areas; some facilities might even turn to displacement of wetlands as a solution. The Agency did not include these potential costs in its analysis for the NODA or proposal. In contrast to new facilities, which can take into account the Phase I requirements when choosing where to situate their structures (including cooling towers), existing facilities have far less flexibility and incur far greater costs. EPA believes that this is a special problem for existing facilities that is relevant to determining whether, as a national categorical matter, closed-cycle cooling is the best technology available for existing facilities for minimizing adverse environmental impacts associated with cooling water intake structures. EPA received retrofit cost estimates from a number of commenters that indicate that such costs could be at least twice those projected by EPA.

Another issue concerns the energy impacts of cooling towers. EPA examined the information it received after publication of the proposed rule and NODA, and agrees that the energy penalty associated with cooling towers, together with other factors, indicates that this technology is not the best technology available for existing facilities for minimizing adverse environmental impacts associated with cooling water intake structures. In reaching this conclusion, EPA relied on energy penalty information provided by the U.S. Department of Energy. EPA worked closely with the U.S. Department of Energy in preparing today's rule because of their expertise in power plant operations and engineering. The U.S. Department of Energy pointed out to EPA that existing fossil-fuel facilities converting from once-through cooling water systems to wet-cooling towers would produce 2.4 percent to 4.0 percent less electricity even while burning the same amount of coal. For at least one nuclear power plant, which provides 78% of the electricity consumed by the State of Vermont, the energy penalty associated with converting to cooling towers was estimated to be 5.3 percent. Expressed differently, DOE estimated that nationally, on average 20 additional 400-MW plants might have to be built to replace the generating capacity lost by replacing once-through cooling systems with wet cooling towers if such towers were required by all Phase II facilities.

This energy penalty leads to other negative consequences. Because this deficit is predicted to occur during the summer months (when energy demand is highest), the net effect would be more consumption of fossil fuel, which in turn increases the emission of sulfur dioxide, NO_X, particulate matter, mercury and carbon dioxide. Increasing fuel consumption at existing coal power plants yields the largest increase in air emissions because existing systems are less efficient at producing power (and therefore burn more coal) and because they generally have less air pollution control equipment in place. EPA believes that it is reasonable to consider these non-water quality environmental impacts and the additional costs associated with controlling these increased emissions in making today's decision. EPA further believes that it is authorized to do so because of the links between § 316(b) and sections 301 and 306, which require EPA to consider both the energy impacts and the air pollution impacts of technologies when identifying technologies in the effluent guidelines context. *See* CWA section 304(b)(2)(B) (cross-referenced in § 301); CWA section 306(b)(1)(B) (new source performance standards).

Some commenters also assert that EPA underestimated the down time that the facility would experience as it converts to cooling towers. This, again, is not an impact that would be experienced by new facilities. EPA agrees that such down time can be significant. Indeed, one of the four retrofit case studies EPA developed indicated a down time of 10 months, and EPA believes it is reasonable to infer that many other facilities would experience the same loss.

EPA also agrees with the commenters who assert that the empirical data base of four retrofit cases to which EPA compared cooling tower retrofit costs and engineering characteristics is not representative of the broader population of facilities and could be too narrow a set from which to develop national costs that would be applicable to a wide range

of facilities. Of the four retrofits EPA studied, two were in a single state (South Carolina), none were located along a coast, and only one generated more than 500 MW of electricity. EPA also recognizes that all of these conversions were performed before 1992. While it is true that the vast majority of the new, greenfield utility and non-utility combined cycle plants built in the past 20 years have wet cooling towers, EPA believes that it is significant that so few existing facilities retrofitted to the technology during the same period. The rarity of this technology as a retrofit further indicates that it is not economically practicable for the vast majority of existing facilities.

EPA also considered several additional points made by commenters in rejecting this option. Some commenters asserted that certain facilities with closed-cycle, recirculating cooling systems often need to address the impacts of cooling tower plumes, and subsequent fog and icing in metropolitan areas, and noise abatement. Commenters also asserted that the costs of retrofitting and operating such systems at facilities which do not now have them is disproportionate to the potential benefits derived, particularly given the similarity in the level of protection provided under this option (all facilities required to reduce flow commensurate with a closed-cycle, recirculating system) and the final rule. Finally, they stated that the need for flexibility in a rule pertaining to existing facilities is critical to allow facility owners a range of options to meet the fish protection requirements. EPA does not agree that in all cases the costs of retrofitting a closed-cycle cooling water system is disproportionate to the benefits derived. Nevertheless, EPA recognizes that these concerns have merit for many facilities and that the validity and extent of such concerns often must be assessed on a case-by-case basis.

Each of these factors has a cost and an economic impact that EPA believes is appropriate to consider when evaluating whether cooling towers are the best technology available for existing facilities for minimizing adverse environmental impacts associated with cooling water intake structures. The capital costs estimated by EPA at proposal are already very high; when costs reflecting reasonable changes to EPA's assumptions are added to them, the total capital cost investment and associated economic impact is simply too high at this time for EPA to be able to justify selecting cooling towers as a required technology for all existing Phase II facilities.

EPA further compared the efficacy of closed-cycle, recirculating cooling systems with that estimated for design and construction technologies. Although not identical, the ranges of impingement and entrainment reduction are similar under both options, such that the reductions estimated for the design and construction technologies, particularly when optimized, approach those estimated for closed-cycle, recirculating cooling systems. Therefore, the use of design and construction technologies as the basis for this rule is supported since they can approach closed-cycle, recirculating systems at less cost with fewer implementation problems. EPA considered this similarity in efficacy, along with the economic practicability and availability of each type of technology, in determining that a closed-cycle, recirculating cooling system is not the required technology for all Phase II existing facilities.

2. Intake Capacity Commensurate With Closed-Cycle, Recirculating Cooling Systems Based on Waterbody Type

EPA also considered an alternate technology-based option in which closed-cycle, recirculating cooling systems would have been required for all facilities on certain waterbody types. Under this option, EPA would have grouped waterbodies into the same five categories as in today's rule: (1) Freshwater rivers or streams, (2) lakes or reservoirs, (3) Great Lakes, (4) tidal rivers or estuaries; and (5) oceans. Because oceans, estuaries and tidal rivers contain essential habitat and nursery areas for the vast majority of commercial and recreational important species of shell and finfish, including many species that are subject to intensive fishing pressures, these waterbody types would have required more stringent controls based on the performance of closed-cycle, recirculating cooling systems. EPA discussed the susceptibility of these waters in a Notice of Data Availability (NODA) for the Phase I rule (66 FR 28853, May 25, 2001) and invited comment on documents that may support its judgment that these waters are particularly susceptible to adverse impacts from cooling water intake structures. In addition, the NODA presented information regarding the low susceptibility of non-tidal freshwater rivers and streams to impacts from entrainment from cooling water intake structures.

Under this alternative option, facilities that operate at less than 15 percent capacity utilization would, as in today's final rule, only be required to have impingement control technology. Facilities that have a closed-cycle, recirculating cooling system would have required additional design and construction technologies to increase the survival rate of impinged biota or to further reduce the amount of entrained biota if the intake structure was located within an ocean, tidal river, or estuary where there are fishery resources of concern to permitting authorities or fishery managers.

Facilities with cooling water intake structures located in a freshwater (including rivers and streams, the Great Lakes and other lakes) would have had the same requirements as under today's final rule. If a facility for which closed-cycle recirculating technology was required chose to comply with alternative requirements, then the facility would have had to demonstrate that alternative technologies would reduce impingement and entrainment to levels comparable to those that would be achieved with a closed-loop recirculating system (90% reduction). If such a facility chose to supplement its alternative technologies with restoration measures, it would have had to demonstrate the same or substantially similar level of protection. (For additional discussion see the Phase I final rule 66 FR 65256, at 65315 columns 1 and 2.)

At proposal, EPA estimated that there would be 109[46] facilities located on oceans, estuaries, or tidal rivers that do not have a closed-cycle, recirculating cooling system and would need to reduce intake flow to a level commensurate with that which can be attained by a closed-cycle, recirculating cooling system or upgrade design and construction technology (*e.g.*, screens) in order to meet performance standards for reducing impingement mortality and entrainment.

Although EPA estimated the costs of this option to be less expensive at the national level than an option based on closed-cycle, recirculating cooling systems everywhere, EPA did not select this option based on total social costs estimates of greater than $1 billion per year and its lack of cost-effectiveness, as well as on concerns regarding potential energy impacts. Facilities located on oceans, estuaries, and tidal rivers would incur high capital and operating and maintenance costs for conversions of their cooling water systems. Furthermore, since impacted facilities would be concentrated in coastal regions, EPA is concerned that there is

[46] Sample-weighted.

the potential for short term energy impacts and supply disruptions in these areas if multiple facilities retrofit concurrently or over a relatively short time-frame, as would be required by these regulations.

3. Intake Capacity Commensurate With Closed-Cycle, Recirculating Cooling System Based on Waterbody Type and Proportion of Waterbody Flow

EPA also considered a variation on the above approach that would have required only facilities withdrawing very large amounts of water from an estuary, tidal river, or ocean to reduce their intake capacity to a level commensurate with that which can be attained by a closed-cycle, recirculating cooling system. For example, for facilities with cooling water intake structures located in a tidal river or estuary, if the intake flow is greater than 1 percent of the source water tidal excursion, then the facility would have had to meet standards for reducing impingement mortality and entrainment based on the performance of wet cooling towers. These facilities would instead have had the choice of reducing cooling water intake flow to a level commensurate with wet cooling towers or of using alternative technologies to meet reduction standards based on the performance of wet cooling towers. If a facility on a tidal river or estuary had intake flow equal to or less than 1 percent of the source water tidal excursion, the facility would have only had to meet the same impingement and entrainment performance standards as in the final Phase II rule. These standards were developed based on the performance of technologies such as fine mesh screens and traveling screens with well-designed and operating fish return systems. The more stringent, closed-cycle, recirculating cooling system-based requirements would have also applied to a facility that has a cooling water intake structure located in an ocean with an intake flow greater than 500 MGD.

This option also would impose much higher costs on a subset of facilities than the final rule. Based on an analysis of data collected through the detailed industry questionnaire and the short technical questionnaire, at proposal, EPA estimated there were potentially 109 Phase II existing facilities located on estuaries, tidal rivers, or oceans which would incur capital costs under this option. Of these 109 facilities, EPA estimated that 51 would exceed the applicable flow threshold and be required to meet performance standards for reducing impingement mortality and entrainment based on a reduction in intake flow to a level commensurate with that which can be attained by a closed-cycle recirculating system. Of the 58[47] facilities estimated to fall below the applicable flow threshold, 10 facilities already meet these performance standards and would not require any additional controls, whereas 48[48] facilities would require entrainment or impingement controls, or both. Because this option would only require cooling tower-based performance standards for facilities located on tidal rivers, estuaries or oceans where they withdraw saline or brackish waters, EPA does not believe that this option would raise any significant water quantity issues.

At proposal, EPA estimated the total social cost of compliance for the waterbody/capacity-based option to be approximately $0.97 billion per year. EPA did not select this option because it was not determined to be the most cost-effective approach on a national basis. While the national costs of this option are slightly lower than those of requiring wet cooling towers-based performance standard for all facilities located on oceans, estuaries and tidal rivers, the cost for facilities to meet these standards are still substantial. Although EPA would provide an opportunity to seek alternative requirements to address locally significant air quality or energy impacts, EPA does not believe a framework such as this provides sufficient flexibility to ensure effective implementation and to minimize non-water quality (including energy) impacts. In addition, as noted above for the other cooling tower based options that EPA rejected, facilities can achieve almost the same level of impingement mortality and entrainment reductions using the technologies on which this final rule is based as they can using cooling towers, but at substantially lower cost.

4. Impingement Mortality and Entrainment Controls Everywhere

At proposal, EPA evaluated an option that required impingement mortality and entrainment controls for all facilities. This option did not allow for the development of best technology available on a site-specific basis. This alternative based requirements on the percent of source water withdrawn and, like today's final rule, also restricted disruption of the natural thermal stratification of lakes or reservoirs. It also imposed entrainment performance requirements on Phase II existing facilities located on freshwater rivers or streams, and lakes or reservoirs where EPA has determined in today's final rule that such controls are not necessary. Finally, under this alternative, restoration could be used, but only as a supplement to the use of design and construction technologies or operational measures.

This option established clear performance-based requirements that were based on the use of available technologies to reduce adverse environmental impact. Such an alternative would be consistent with the focus on use of best technology required under section 316(b). However, as indicated above, this option lacks the flexibility of the final rule in applying the necessary and appropriate available technology and therefore would be less effective in addressing the specific cooling water intake structure impacts posed by Phase II facilities in their various environmental settings.

At proposal, total social cost of compliance for this option was estimated at approximately $300 million per year. EPA did not select this option because other options were more cost-effective, in part because this option requires entrainment controls in freshwater rivers, streams, and lakes. The benefits of the final rule are almost the same as those for this option but a lower cost (since lakes and reservoirs, and for design intake flows below 5% in freshwater rivers and streams are the least likely to provide significant benefits).

5. Site-Specific Options as Best Technology Available To Minimize Adverse Environmental Impact

In the proposed rule EPA also considered several site-specific approaches to establishing best technology available. These include the site-specific sample rule discussed at 67 FR 17159, an alternative based on EPA's 1977 Draft Guidance (67 FR 17161), and alternatives suggested by UWAG and PSEG, respectively (*see* 67 FR 17162).

EPA did not adopt any of these site-specific regulatory options for several reasons. None of these site-specific approaches would have established national performance standards for best technology available to minimize adverse environmental impact. EPA believes that such national performance standards promote the consistent application of the best technology available to minimize adverse environmental impact. In addition, based on contact with States (*see* Phase I NODA, 66 FR 28865, Phase II proposal 67 FR 17152–3) and anecdotal

[47] Not sample-weighted.

[48] Not sample-weighted.

information [49] EPA believes that each of these site-specific options would have resulted in higher administrative burdens being imposed on applicants and permit writers relative to the final rule. As EPA has discussed in the preamble to the proposal (*see* 67 FR 17167), these administrative burdens can be associated with the need to determine in each case whether adverse impacts are occurring, the nature and level of any such impacts, and which design and construction technologies constitute the best technology available to minimize adverse environmental impacts, including a consideration of costs and benefits. Further, all of the proposed site-specific options increase the likelihood that each significant cooling water intake permitting issue would become a point of contention between the applicant and permit writer, which EPA's experience indicates slows the permitting process, makes it more resource intensive, and makes it more costly. Finally, because the final rule provides facilities with the option of selecting from five compliance alternatives, including a site-specific compliance alternative, the final rule provides facilities with flexibility comparable to that of a site-specific rule. The site-specific alternative in the final rule provides clear standards for eligibility (the cost-cost and cost-benefit tests), and clear standards on which to base the alternative requirements that they achieve an efficacy as close as practicable to the national performance standards without exceeding the cost-test or benefits-test thresholds. EPA believes that structuring a site-specific compliance alternative in this way will significantly reduce the potential areas of disagreement between permit writer and applicant that are inherent in the other site-specific approaches that it rejected, while still providing facilities with appropriate flexibility. Through the multiple compliance alternatives specified in this rule, EPA has sought to balance the statutory requirements of section 316(b) and the need for reasonable limits on the administrative burden imposed on both applicants and permit writers against the need for existing facilities to have flexibility in implementing the requirements.

6. Flow Reduction Commensurate With the Level Achieved by Dry Cooling Systems Based on Waterbody Type

EPA conducted a full analysis for the Phase I rule and concluded that dry cooling was not an economically practicable option for new facilities on a national basis. Dry cooling systems use either a natural or a mechanical air draft to transfer heat from condenser tubes to air. In conventional closed-cycle recirculating wet cooling towers, cooling water that has been used to cool the condensers is pumped to the top of a recirculating cooling tower; as the heated water falls, it cools through an evaporative process and warm, moist air rises out of the tower, often creating a vapor plume. Hybrid wet-dry cooling towers employ both a wet section and dry section and reduce or eliminate the visible plumes associated with wet cooling towers.

For the Phase I rule, EPA evaluated zero or nearly zero intake flow regulatory alternatives, based on the use of dry cooling systems. EPA determined that the annual compliance cost to industry for this option would be at least $490 million. EPA based the costs on 121 new facilities having to install dry cooling. For the Phase II proposal, EPA estimated that total social costs for dry cooling based on waterbody type were $2.1 billion per year (or roughly double the costs for wet towers). Thus, this option would be more expensive than dry cooling for new facilities. The cost for Phase II existing facilities to install dry cooling would be significantly higher than the cost for new facilities to do so due to the complexities of retrofitting both the dry cooling equipment and components of the cooling system. At proposal, EPA estimated that 550 Phase II existing facilities would be subject to Phase II regulation. The cost would be significantly higher because existing facilities have less flexibility, thus incurring higher compliance costs (capital and operating) than new facilities. For example, existing facilities might need to upgrade or modify existing turbines, condensers, and/or cooling water conduit systems, which typically imposes greater costs than use of the same technology at a new facility. In addition, retrofitting a dry cooling tower at an existing facility would require shutdown periods during which the facility would lose both production and revenues, and decrease the thermal efficiency of an electric generating facility.

The disparity in costs and operating efficiency of dry cooling systems compared with wet cooling systems is considerable when viewed on a nationwide or regional basis. For example, under a uniform national requirement based on dry cooling, facilities in the southern regions of the United States would be at an unfair competitive disadvantage compared to those in cooler northern climates because dry cooling systems operate more efficiently in colder climates. Even under a regional subcategorization strategy for facilities in cool climatic regions of the United States, adoption of a minimum requirement based on dry cooling would likely impose unfair competitive restrictions for steam electric power generating facilities because of the elevated capital and operating costs associated with dry cooling. Adoption of requirements based on dry cooling for a subcategory of facilities under a particular capacity would pose similar competitive disadvantages for those facilities.

As explained in the preamble to the proposal, EPA does not consider performance standards based on dry cooling a reasonable option for a national requirement, nor for subcategorization under this rule, because the technology of dry cooling carries costs that would potentially cause significant closures for Phase II existing facilities. Dry cooling technology would also have a significant detrimental effect on electricity production by reducing the energy efficiency of steam turbines. Unlike a new facility that can use direct dry cooling, an existing facility that retrofits for dry cooling would most likely use indirect dry cooling which is much less efficient than direct dry cooling. In contrast to direct dry cooling, indirect dry cooling does not operate as an air-cooled condenser. In other words, the steam is not condensed within the structure of the dry cooling tower, but instead indirectly through a heat exchanger. Therefore, the indirect dry cooling system would need to overcome additional heat resistance in the shell of the condenser compared to the direct dry cooling system. Ultimately, the inefficiency (*i.e.*, energy penalty) of indirect dry cooling systems will exceed those of direct dry cooling systems in all cases.

Although the dry cooling option is extremely effective at reducing impingement and entrainment, it is not economically practicable for existing facilities and would cause additional adverse environmental impacts and serious energy impacts. Although dry cooling technology uses extremely low-

[49] For example, a site-specific determination for Brayton Point, Rhode Island, has required resources for greater than two full time equivalents (FTEs) over three years for permitting and support staff, as well as approximately $400,000 in contractor costs to address technical issues and applicant experts. Similarly, development of a permit for Salem has required resources for greater than two full time equivalents (FTEs) over three years for permitting and support staff, as well as approximately $340,000 in contractor costs to address technical issues and applicant experts.

level or no cooling water intake, thereby reducing impingement and entrainment of organisms to extremely low levels, section 316(b) does not require that adverse environmental impact be completely eliminated, but that it be minimized using the best technology available. (DOE energy penalty study; DCN 4–2512). EPA does not believe that dry cooling technology is "available" to most Phase II existing facilities.

Although EPA has rejected dry and wet cooling tower technologies as a national minimum requirement, EPA does not intend to restrict the use of these technologies or to dispute that they may be the appropriate cooling technology for some facilities. For example, facilities that are repowering and replacing the entire infrastructure of the facility may find that dry cooling is an acceptable technology in some cases. This technology may be especially appropriate in situations where access to cooling water is limited. Wet cooling tower technology may be suitable where adverse effects of cooling water intakes are severe and where screening systems are impractical, or where thermal discharge impacts pose serious environmental problems. Under Clean Water Act section 510, a State may choose to impose more stringent standards than required by Federal regulations. States may continue to use this authority to require facilities to use dry or wet cooling systems.

F. What Is the Role of Restoration and Trading Under Today's Final Rule?

1. What Is the Role of Restoration?

EPA is providing facilities with the option to use restoration for compliance alternatives § 125.94(a)(2), (3), and (5) where the performance of the restoration measures (the production and increase of fish and shellfish in the facility's waterbody or watershed, including maintenance of community structure and function), is substantially similar to that which would have been achieved if the facility reduced impingement mortality and entrainment through the use of design and construction technologies and/or operational measures, to meet the applicable performance standards. (For a complete discussion of the legal analysis supporting restoration, see section VIII of this preamble.) The role of restoration under this rule is to provide additional flexibility to facilities in complying with the rule by eliminating or significantly offsetting the adverse environmental impact caused by the operation of a cooling water intake structure. Restoration measures that increase fish and shellfish in an impacted waterbody or watershed and result in performance substantially similar to that which would otherwise be achieved through reductions in impingement mortality and entrainment further the goal of minimizing adverse environmental impact while offering additional flexibility to both permitting authorities and facilities. Restoration measures may include such activities as removal of barriers to fish migration, reclamation of degraded aquatic organism habitat, or stocking of aquatic organisms. These are still technologies, within the meaning of that term as used in section 316(b) and as such are an appropriate means for meeting technology based performance standards. They are not analogous to water quality based effluent limitations on pollutant discharges because they are not designed to meet water quality standards or dependent on the condition of the receiving waterbody. Rather, they provide an additional means to meet the same performance standards that guide the selection of design and construction technologies and operational measures.

Restoration measures have been used at existing facilities as one of many tools to implement section 316(b) on a case-by-case, best professional judgment basis to compensate for the death and injury of fish and other aquatic organisms caused by the cooling water intake structure. Under today's rule, a Phase II existing facility may utilize restoration either in lieu of or as a supplement to design and construction technologies and/or operational measures. For example, a facility may demonstrate to the Director that velocity controls are the most feasible technology choice for the facility but that, when used on their own, the velocity controls are insufficient to meet the applicable performance standards at § 125.94(b). The facility may then, in conjunction with the use of velocity controls, implement restoration measures to increase the fish and shellfish productivity of the waterbody in order to meet the performance standards at § 125.94(b). Another facility might demonstrate to the Director that restoration measures alone achieve the greatest compliance with the performance standards. A facility may alternatively request a site-specific determination of best technology available under § 125.94(a)(5) and use restoration measures to meet the alternate requirements.

Facilities that propose to use restoration measures must demonstrate to the Director that they evaluated the use of design and construction technologies and operational measures and determined that the use of restoration measures is appropriate because meeting the applicable performance standards or requirements through the use of other technologies is less feasible, less cost-effective, or less environmentally desirable than meeting the standards in whole or in part through the use of restoration measures. Facilities must also demonstrate that the restoration measures they plan to implement, alone, or in combination with design and construction technologies and/or operational measures, will produce ecological benefits (production of fish and shellfish) at a level that is substantially similar to the level that would be achieved through compliance with the applicable impingement mortality and/or entrainment performance standards under § 125.94(b), or alternative site-specific requirements under § 125.94(a)(5). In other words, restoration measures must replace the fish and shellfish lost to impingement mortality and entrainment, either as a substitute or as a supplement to reducing impingement mortality and entrainment through design and control technologies and/or operational measures. While the species makeup of the replacement fish and shellfish may not be exactly the same as that of the impingement mortality and entrainment losses, the Director must make a determination that the net effect is to produce a level of fish and shellfish in the waterbody that is "substantially similar" to that which would result from meeting the performance standards through design and construction technologies and/or operational measures alone. The final rule requires that a facility use an adaptive management method for implementing restoration measures because the performance of restoration projects must be regularly monitored and potentially adjusted to ensure the projects achieve their objectives (see 67 FR 17146–17148 and 68 FR 13542).

The final rule also requires that restoration projects which replace the lost fish and shellfish with a different species mix ("out of kind" restoration) be based on a watershed approach to restoration planning. The boundaries of a "watershed" should be guided by the cataloging unit of the "Hydrologic Unit Map of the United States" (USGS, 1980), although it may be appropriate to use another watershed or waterbody classification system developed at the state or local level if such a system compares favorably in level of detail. For example, in coastal systems that support migratory fish, a coastal

waterbody that transects a number of watersheds may be the most appropriate unit for planning restoration.

2. What Is the Role of Trading in Today's Rule?

In § 125.90(c), today's final rule provides that if a State demonstrates to the Administrator that it has adopted alternative regulatory requirements in its NPDES program that will result in environmental performance within a watershed that is comparable to the reductions of impingement mortality and entrainment that would otherwise be achieved under § 125.94, the Administrator must approve such alternative requirements. A trading program could be a part of these alternative regulatory requirements.

At proposal, EPA sought comment on the potential role of trading in the context of the section 316(b) Phase II rulemaking and possible approaches for developing a trading program. Trading under other EPA programs has been shown to provide opportunities for regulatory compliance at reduced costs. The EPA Office of Water's Water Quality Trading Policy, published in January 2003 [DCN 6–5002], fully supports trading nutrients and sediment and adopts a case-by case approach to evaluating proposals to trade other pollutants.

Trading in the context of section 316(b) raises many complex issues, for example, how to establish appropriate units of trade and how to measure these units effectively given the dynamic nature of the populations of aquatic organisms subject to impingement mortality and entrainment. Should a State choose to propose a trading program under § 125.90(c), EPA will evaluate the State's proposal on a case-by-case basis to ensure the program complies with the regulatory requirement—that it will result in environmental performance within a watershed that is comparable to the reductions of impingement mortality and entrainment that would otherwise be achieved under the requirements established at § 125.94. Some commenters suggested that EPA adopt a trading program that would allow trading between aquatic organisms and pollutant discharges. EPA is concerned that such a program would introduce comparability and implementation challenges that would be difficult to overcome and therefore, EPA does not expect that such a program would work within the framework of today's final rule. In addition, EPA does not believe that it is possible at this time to quantify with adequate certainty the potential effects on ecosystem function, community structure, biodiversity, and genetic diversity of such trades, especially when threatened and/or endangered species are present. Based on the current state of the science in aquatic community ecology and ecological risk assessment, States wishing to develop trading programs within the context of 316(b) would be best off focusing on programs based on metrics of comparability between fish and shellfish gains and losses among trading facilities, rather than the much more complex metrics that would be necessary for comparability among fish and shellfish losses on the one hand, and pollutant reductions on the other.

VIII. Summary of Major Comments and Responses to the Proposed Rule and Notice of Data Availability (NODA)

A. Scope and Applicability

1. Phase II Existing Facility Definition

Numerous commenters supported limiting the scope of the Phase II rule to existing facilities that generate and transmit electric power, or generate and sell such power to another entity for transmission, but suggested that EPA has not sufficiently limited the rule to only these facilities. Commenters noted that the proposed definition of "Phase II existing facility" does not adequately exempt existing manufacturing facilities that may occasionally transfer power off-site during peak load events. Some commenters suggested that EPA clarify the Phase II rule to specify that it does not apply to facilities whose primary business is not power generation. Some suggested limiting applicability to specified SIC codes (*e.g.*, provided that the rule only applies to facilities in SIC 4911). Examples of facilities identified by commenters that they believe should be excluded from Phase II include manufacturers that produce electricity by co-generation, power generating units that predominantly support a manufacturer, *e.g.*, iron and steel, but also export some power, and facilities that generate power for internal use.

Commenters requested that EPA further clarify when repowering is subject to existing facility requirements. For example, some commenters viewed as inconsistent the fact that the addition of a generating unit at an existing single unit site could increase intake flows by 100% and meet the existing facility definition, while a replacement facility that increases intake flows by a much lesser amount (*e.g.*, 25%) would not meet the existing facility definition. These commenters suggested that EPA consider a facility as an existing facility unless changes to the facility result in new environmental impacts.

In § 125.91(a)(3) of today's rule, an existing facility is subject to this rule if its primary activity is either to generate and transmit electric power, or to generate electric power that it sells to another entity for transmission. This provision was included in the rule in response to comments such as those described previously in this section. EPA believes that this criterion—the primary activity being the generation of electric power—sufficiently clarifies and limits the scope of this rule to existing facilities whose primary business is power generation. As discussed in Section II of this preamble, the final rule does not apply to existing manufacturing facilities, including manufacturing facilities that generate power for their own use and transmit any surplus power, or sell it for transmission, provided the primary activity of the facility is not electric power generation. For example, in the case of a facility that operates its own power generating units and such units predominantly support that facility's manufacturing operation, its primary activity remains manufacturing, even if the facility exports some power. Whether a facility's primary activity is to generate electric power will need to be determined on a case-by-case basis. Section II also makes clear that a manufacturing facility is not covered by this final rule just because it is co-located with another Phase II facility.

EPA considered specifying SIC or NAIC codes to clarify the scope of the rule beyond that proposed in § 125.91(a)(3), but did not do so because it believes the changes in the final rule are sufficient to address many issues raised in comments and because of concerns that SIC and NAIC codes may change over time, which could unintentionally alter the scope of the rule.

With regard to repowering, section II of today's notice discusses the scope of the final rule and specifically discusses the repowering issue. Section II also addresses other Phase I versus Phase II classification issues.

2. Thresholds

Some commenters supported use of the 50 MGD design intake flow threshold and the 25 percent cooling water use criteria in § 125.91(a)(2) and (4), respectively. Some suggested that facilities agreeing to limit their actual intake to less than 50 MGD should be excluded from the rule's requirements or be allowed to request an exemption. Other commenters maintained that permitted or actual flows should be used rather than design flows. Some commenters asked that EPA clarify that,

when applicable, the lesser design value of an intake facility and conveyance structure versus the design volume of intake pumps should be used to determine the 50 MGD threshold for applicability. Alternatively, others asserted that EPA should provide guidance that a facility's design intake flow is not necessarily the flow associated with that of the intake pumps.

Several commenters stated that emergency cooling water and emergency service water intakes should be exempt from the 50 MGD design intake flow threshold. These commenters recommended that EPA distinguish between primary cooling water intakes and emergency service water intakes, for example, at nuclear facilities. They reasoned that emergency service water systems, which can have a large design capacity (*i.e.,* design capacity greater than 50 MGD), generally use an intake that normally operates a nominal amount of time to ensure that the system is in working order. Such back-up systems are required for safety, but under normal conditions do not increase the operational capacity of the facility. Thus, these commenters maintain that rarely used emergency service water should not count towards 50 MGD.

With regard to the criterion that a Phase II existing facility must use at least 25 percent of the water it withdraws exclusively for cooling, some commenters indicated that proposed § 125.91(d), which describes how to measure whether 25 percent of water withdrawn is used for cooling, was ambiguous. Commenters asserted that EPA should not require monthly determinations of applicability of the Phase II rule. One commenter suggested that EPA should assess the 25 percent cooling water use on an annual basis calculated once during permit renewal, since such an approach would provide a high degree of certainty.

As discussed in the proposed rule (67 FR 17129–17130), EPA chose the design intake flow 50 MGD threshold to focus on the largest existing power generating facilities, which the Agency believes are those with the greatest potential to cause or contribute to adverse environmental impact. EPA estimates that the 50 MGD threshold would subject approximately 543 of 902 (60 percent) of existing power generating facilities to this rule and would address 90 percent of the total flow withdrawn by existing steam electric power generating facilities. The 25 percent threshold ensures that nearly all cooling water and the most significant facilities using cooling water intake structures are addressed by these requirements. EPA notes that Phase II existing facilities, which are limited to facilities whose primary activity is power generation, typically use far more than 25 percent of the water they withdraw for cooling. Yet, as in the new facility rule, cooling water that is used in a manufacturing process either before or after it is used for cooling would not count towards calculating the percentage of a facility's intake flow that is used for cooling purposes.

EPA has retained in the final rule the 50 MGD threshold based on design intake flow, rather than actual flow, for several reasons. Design intake flow is a fixed value based on the design of the facility's operating system and the capacity of the circulating and other water intake pumps employed at the facility. This approach provides clarity—the design intake flow does not change, except in those limited circumstances when a facility undergoes major modifications or expansion, whereas actual flows can vary significantly over sometimes short periods of time. EPA believes that an uncertain regulatory status is undesirable because it impedes both compliance by the permittee and regulatory oversight, as well as achievement of the overall environmental objectives. Further, using actual flow may result in the NPDES permit being more intrusive to facility operation than necessary since facility flow would be a permit condition and adjustments to flow would have to be permissible under such conditions and applicable NPDES procedures. It also would require additional monitoring to confirm a facility's status, which imposes additional costs and information collection burdens, and it would require additional compliance monitoring and inspection methods and evaluation criteria, focusing on operational aspects of a facility.

With regard to intake versus pump capacity, EPA notes that under § 125.93 of the final rule, design intake flow means the value assigned (during the cooling water intake structure design) to the total volume of water withdrawn from a source waterbody over a specific time period. Because numerous aspects of a cooling water intake or system can limit a facility's intake flow, and because flow is a critical factor that affects the impacts posed by each facility's cooling water intake structures, EPA has determined that it is more appropriate for the final rule to focus on a facility's total designed volume of water withdrawn over a period of time, rather than to condition applicability of the rule on more specific parameters, such as intake capacity or pump design, which individually do not fully determine total design intake flow.

The final rule does not explicitly exclude emergency cooling water and emergency service water intakes from consideration in determining which facilities are in-scope. Although EPA does not have detailed data on emergency cooling water and emergency intakes, based on other available data EPA does not believe that including consideration of emergency intakes within this rule significantly alters the scope of the rule. EPA's survey of all existing electric utilities and non-utilities indicated that 84 percent of surveyed facilities have an average flow that equals or exceeds 50 MGD. These facilities would by necessity have a design intake flow that also equals or exceeds 50 MGD. Moreover, EPA assumes that this average flow data represent normal operating conditions and does not include emergency cooling water use. Consequently, EPA believes that relatively few facilities are potentially affected by this issue.

Finally, § 125.91(a)(4), which describes how a facility must determine whether it meets the 25 percent cooling water use criterion has been changed in the final rule and provides that the percent of cooling water used be measured on an average annual basis. EPA believes this approach is more appropriate than making this determination on an average monthly basis, primarily because the annual average is an easier measurement to make. Furthermore, because all Phase II existing facilities generate power, most of the water will be used for cooling, rendering monthly evaluation of this value unnecessary. The final rule does not specify how often the facility must measure flow for this annual average. The facility is encouraged to consult the Permit Director to determine what level of data collection is needed.

B. Environmental Impact Associated With Cooling Water Intake Structures

Many comments addressed adverse environmental impact, questioning the definition and quantification of adverse environmental impacts. Several suggested defining adverse environmental impact exclusively at the population, community, or ecosystem levels, and believe that numbers of impinged and entrained organisms should not be a measure of adverse environmental impact. Some commenters argued that, if a facility can prove it does not cause adverse environmental impact at the population level, then it should be exempt from section 316(b) regulations. Commenters

cited numerous studies to illustrate whether cooling water intake structures cause adverse environmental impacts and claimed that where abundance or biomass falls, it was usually the result of some other stressor (overfishing, pollution, etc). These commenters asserted that populations are able to thrive despite high rates of impingement and entrainment because of density-dependence and compensation.

Numerous other commenters disagreed with limiting the definition of adverse environmental impact to the population, community or ecosystem levels, and contended that any measure of impingement and entrainment constitutes adverse environmental impact. They asserted that power plants contribute to fish kills directly by impingement and entrainment, and indirectly by habitat loss. These commenters maintained that the results of population or ecosystem studies are highly subjective, and have no place in determining BTA, as once such impact levels are reached, recovery is often impossible. Regardless of the severity of adverse environmental impact, these commenters argued that section 316(b) requires minimization of adverse environmental impact. They maintained that cooling water intake structures contribute to fishery collapse and vast reductions in fish biomass and abundance that are measurable at the species level. These commenters suggested that actual national impacts due to cooling water intake structures are vastly underestimated due to poor data collection methodologies utilized when the majority of the studies were performed and because studies performed on impinged and entrained organisms overlooked the vast majority of affected species.

In today's final rule, EPA has elected not to define adverse environmental impact. EPA believes that it is reasonable to interpret adverse environmental impact as the loss of aquatic organisms due to impingement and entrainment. For a further discussion of this issue, see Section IV above.

With regard to the relationship between intake flow and adverse environmental impact, some commenters asserted that the relationship of impingement and entrainment to flow is such that catch rates increase non-linearly (exponentially) in relation to the volume of water withdrawn, with entrainment rates being more strongly correlated to flow than impingement. Environmental commenters advocated for flow reduction technologies, such as retrofitting closed-cycle cooling technologies, as the most direct means of reducing fish kills from power plant intakes; they assert that reducing intake by up to 98 to 99 percent would result in a similarly high reduction of impinged and entrained organisms. Other commenters insisted that there is no statistically significant relationship between catch rate and flow, and the mathematical models that evaluate this relationship are inaccurate.

EPA believes the record contains ample evidence to support the proposition that entrainment is related to flow (see DCN 2–013L–R15 and 2–013J) while impingement is related to a combination of flow, intake velocity and fish swim speed (see DCN 2–029). Larger withdrawals of water may result in commensurately greater levels of entrainment. Entrainment impacts of cooling water intake structures are closely linked to the amount of water passing through the intake structure because the eggs and larvae of some aquatic species are free-floating and may be drawn with the flow of cooling water into an intake structure. Swim speeds of affected species as well as intake velocity must be taken into account to predict rates of impingement in relation to flow in order to account for the ability of juvenile and adult lifestages of species to avoid impingement. Due to this relationship, EPA agrees that reducing intake by installing flow reduction technologies will result in a similarly high reduction of impinged and entrained organisms, but EPA believes that other technologies that do not necessarily reduce flow but that do reduce the number of aquatic organisms impinged and entrained will also minimize adverse environmental impact associated with cooling water intake structures. As such, today's rule provides for flexibility in meeting the performance standards.

C. Performance Standards

The performance standards promulgated today are expressed as reductions of impingement and entrainment measured against a calculation baseline. The purpose of a calculation baseline is to properly credit facilities that have installed control technologies prior to the promulgation of the rule. EPA received numerous comments on the performance standards and the calculation baseline.

1. Appropriate Standards

Many commenters discussed the appropriateness of the performance standards. While many commenters acknowledged that the performance range may be attained at some facilities (using certain technologies and in appropriate conditions), several commenters stated that the technical justification for the performance standards was insufficient and may be biased towards higher performing examples of each technology. Many commenters submitted that some technologies will perform at some sites, but that no technology will meet the standards at all sites. Another commenter supported the concept of the performance standards, as long as sufficient flexibility was retained through the use of restoration measures and cost tests. Some commenters suggested allowing permit writers the flexibility to create site-specific performance standards.

EPA has selected performance standards to facilitate a more streamlined permitting process, and to provide consistent national standards. EPA has chosen to express the targets by reference to a percentage reduction in impingement and entrainment because, as discussed above, these losses can easily be traced to cooling water intake structures. Therefore, this is a convenient indicator of the efficacy of controls in reducing environmental impact. As discussed in more detail below, it is also a useful basis against which to consider the efficacy of restoration technologies, which focus on the replacement of fish and shellfish as an alternative means of minimizing adverse environmental impact of intake structures.

Additional documentation has been collected and reviewed by EPA to further support the percent reductions contained in the performance standards. EPA has added this information to the Technology Efficacy database (DCN 6–5000), which EPA has expanded to allow users to query and compare basic data on technology performance and applicability. EPA recognizes that some may disagree with basing the performance standards on the wide range of data available in the database. While many documents do show a level of success in reducing impingement mortality or entrainment, other studies have shown the deployed technology to be unsuccessful or at best inconclusive. EPA does not view the varying degrees of success with regards to a specific technology as indicative that the performance standards cannot be met, but rather as evidence that some technologies work in some applications but not in others.

It is for this reason that performance standards, rather than prescriptive technologies, were chosen. By opting for performance standards instead of requiring the deployment of specified technologies, EPA maintains a desired

flexibility in the implementation of the rule, thus allowing a facility to select measures that are appropriate to the site conditions and facility configuration. EPA believes that there are technologies available (including restoration measures) that can be used to meet the performance standards at the majority of facilities subject to the final Phase II rule. EPA believes that it will likely be the exceptional case where no technology or suite of technologies will be able to achieve the performance standards. This is not to say, however, that the technologies are always economically practicable to implement; there may be situations where the costs are not justified and it is for those situations that EPA has provided for site-specific determinations of best available technology for minimizing adverse environmental impact.

2. Application of the Performance Standards

Commenters generally noted that the application of the performance standards would be very difficult, for a number of site-specific reasons. Several commenters noted that the performance standards are not sufficiently defined to make a full evaluation of their applicability. For example, EPA has not defined the performance standards as being measured using all species or selected species, or by counting individuals versus measuring biomass. Some commenters noted that each of the methods discussed by EPA could have merit at a given facility, and that flexibility would be needed to evaluate compliance at a variety of intake configurations. Another commenter further noted that it is inappropriate for EPA to state that the performance standards are achievable when the standards are undefined. One commenter suggested that EPA has not shown that the performance standards can be met at a reasonable cost. Other commenters stated that reductions may be achievable for only some species of life stages and that this approach may not account for natural fluctuations in population. These commenters claim that implementing a uniform, nationwide performance standard would be exceedingly complex and subject to site-specific factors that could significantly affect the performance of the control technology. Several commenters noted that, for these reasons, EPA should strongly consider a site-specific approach to implement 316(b), including a risk assessment-based approach as suggested by one commenter.

A number of commenters stated that the performance standards would be best implemented as a set of goals or as a best management practice. These commenters contended that in view of the wide variety of environmental conditions at facilities, including natural fluctuations in populations, compliance with a national performance standard will be difficult. They claimed that by using the standards as a goal instead of a condition in the permit, a facility can have greater certainty as to its compliance status. Similarly, several commenters suggested that the permit contain conditions requiring proper technology selection, installation, maintenance, and adjustments instead of requiring compliance with the performance standards.

Commenters were divided over the concept of a range for the performance standards. Some commenters supported the range, arguing that a facility can achieve some reduction within the range and still be compliant, and others were opposed, claiming that a range of performance promotes uncertainty in determining compliance. Some commenters also noted that, by giving a facility a range of performance, EPA is encouraging performance in the lower end of the range and therefore not meeting the definition of "best technology available."

Several commenters noted that consideration of entrainment mortality is important to correctly determine compliance. One commenter also noted that natural events will affect compliance, such as moribund fish being swept into an intake or heavy debris loads following a storm.

As in the Phase I rule, EPA is setting performance standards for minimizing adverse environmental impact based on a conceptually simple and certain metric-reduction of impingement mortality and entrainment. EPA recognizes however, that there are challenges associated with measuring such reduction due to fluctuations in waterbody conditions (species abundance, composition, etc.) over time. While it is relatively straightforward to measure impingement mortality and entrainment reductions relative to past levels, it is more difficult to determine reductions relative to what would have occurred in the absence of control technologies if waterbody conditions change after the technologies are installed. Data provided with the proposed rule (DCN 4–0003) indicate that there is substantial variability over time in the numbers and species mix of impinged and entrained organisms at any given facility. While changes in operational practices and sampling methods account for some of this variability, the data indicate that there may be substantial natural variability in waterbody conditions as well. This natural variability and the changes to species composition over time may affect the ability of these technologies to perform consistently at a certain level. This is one reason why EPA has provided a compliance determination alternative under which facilities comply with the construction, operational, maintenance, monitoring, and adaptive management requirements of a Technology Installation and Operation Plan (or Restoration Plan) designed to meet the performance standards, rather than having to demonstrate quantitatively that they are consistently meeting them, which may be difficult in the face of natural variability. Under this approach, if monitoring data suggest that performance standards are not being met despite full compliance with the terms of the Technology Installation and Operations Plan or the Restoration Plan, the Plan will need to be adjusted to improve performance.

EPA has provided examples of facilities in different areas of the country sited on different waterbody types that are currently meeting or exceeding the performance standards promulgated today. The ability of these facilities to attain similar performance standards suggests that while site-specific factors can influence the performance of a given technology, it is the exceptional situation where no design or construction technology is capable of meeting the performance standards. EPA opted for performance ranges instead of specific compliance thresholds to allow both the permittee and the permitting authority a certain degree of flexibility in meeting the obligations under the final Phase II rule. EPA does not believe that performance ranges promote uncertainty. Instead, EPA has selected performance ranges out of the recognition that precise results may not be able to be replicated in different waterbody types in different areas of the country. EPA disagrees with the comment that it has not shown that the performance standards can be met at a reasonable cost. The cost and economic impact analysis for the final rule supports EPA's determination that the final rule, including the performance standards, are economically practicable at a national level. In addition, the final rule includes a site-specific compliance alternative to address any potential situation where meeting the performance standards, when evaluated on a facility-specific basis, would result in costs that are significantly greater than the costs

considered by EPA, for a like facility in establishing the standards, or that are significantly greater than the benefits of compliance with the applicable performance standards at the facility. Thus, the final rule ensures that the costs of the rule are economically practicable to the extent required by section 316(b).

In developing the final rule, EPA identified and examined a broad range of cooling water intake structure technologies and determined, at a national level, that these technologies support the final performance standards. EPA notes that, although the performance standards address all life stages of fish and shellfish, the Director has significant discretion as to how the performance standards are applied in the permit. For example, the Director may determine that all species must be considered or that only representative species are to be considered. With regard to natural fluctuations in fish and shellfish populations, and the Technology Installation and Operation Plan compliance scheme discussed above addresses the concern that natural fluctuations could impact the level of impingement mortality and entrainment at a given facility over time. Further, the Director is given considerable discretion to determine, based on the facility's Comprehensive Demonstration Study, the appropriate averaging period and precise metric for determining impingement mortality and entrainment reductions. Generally, averaging over longer time periods (*i.e.*, a full five year permit term) can substantially reduce the impact of natural variability on the determination of whether the performance standards are being met.

3. Requirements by Waterbody Type

As stated in section C. 2, different performance standards would apply for facilities located upon different waterbody types. Comments were received both in support of and against basing performance standards in part on waterbody type. Some commenters did not support the withdrawal threshold of 5 percent of the mean annual flow for facilities on freshwater rivers, as the organisms at an intake may not be subject to entrainment or may not be evenly distributed. Some State commenters supported the withdrawal threshold for freshwater rivers, and another suggested correlating the intake flow requirements with the total flow of the waterbody to better protect smaller flow rivers. One State commenter generally opposed all of the proposed thresholds on freshwater rivers as being arbitrary and stated that the regulations would be more effective by considering the impacts to the population within the waterbody. For lakes and reservoirs, one commenter opposed the requirement to not disturb the thermal stratification of the waterbody, stating that the requirement has not been defined in sufficient detail, that EPA has presented no evidence that the disruption is always detrimental, or presented any discussion of technologies that might mitigate any thermal disturbances. Some commenters did not support additional controls on the Great Lakes, stating that the Lakes are not unique and do not require greater protection. Another State commenter suggested that additional requirements be implemented for any impaired waterbody.

EPA considers location to be an important factor in addressing adverse environmental impact and one expressly included in the language of section 316(b). When cooling water is withdrawn from sensitive biological areas, there is a heightened potential for adverse environmental impact, since these areas typically have higher concentrations of impingeable and entrainable aquatic organisms. Therefore, the final rule includes performance standards that vary, in part, by waterbody type. For example, estuaries and tidal rivers have a higher potential for adverse impact because they contain essential habitat and nursery areas for a majority of commercial and recreational species of fish and shellfish. Therefore, EPA believes that these areas warrant a higher level of control that includes both impingement and entrainment controls.

EPA also included performance standards for other waterbody types. Facilities withdrawing greater than 5% of the mean annual flow from freshwater rivers and streams will have additional requirements. As described in the Phase I proposed rule (65 FR 49060) and the Phase II NODA (66 FR 28853), the withdrawal threshold is based on the concept that absent any other controls, withdrawal of a unit volume of water from a waterbody will result in the entrainment of an equivalent unit of aquatic life (such as eggs and larval organisms) suspended in that volume of the water column. Thus, facilities withdrawing greater than 5% of the mean annual flow from freshwater rivers and streams may entrain equal proportions of aquatic organisms. Freshwater rivers and streams are somewhat less susceptible to entrainment than certain other categories of waterbodies and, therefore, the final rule limits the requirement for entrainment control in fresh waters to those facilities that withdraw the largest proportion of water from freshwater rivers or streams. EPA has promulgated special requirements for facilities withdrawing from lakes and reservoirs. Facilities tend to withdraw from the deeper portions of lakes and reservoirs, as these areas hold the coolest water. The rule specifies that the intake flows must not disturb the natural stratification (thermoclines) in the waterbody, as this may disrupt the composition of dissolved oxygen and adversely affect aquatic species. While such disruption is often detrimental, this additional performance standard does not apply where the disruption does not adversely affect the management of fisheries. Intake location, the volume of water withdrawn, and other design technologies can be used to address this requirement. Facilities located on the Great Lakes are also subject to additional requirements because these waterbodies have areas of high productivity and sensitive habitat and in this respect have an ecological significance akin to estuaries.

4. Approved Design and Construction Technology Option

In response to comments on the burden to facilities and permit writers, EPA is including in the final rule an approved design and construction technology option (previously referred to as a "streamlined technology option" or "pre-approved technology option") for facilities in certain locations. Under this option, a facility installing a specified technology would be subject to reduced application requirements, including a reduced Comprehensive Demonstration Study. In addition, the final rule sets forth criteria that State Directors may use to identify and approve additional technologies.

Nearly all commenters supported the concept of an approved design and construction technology option as a positive step in facilitating implementation of section 316(b). Several commenters added that this option should not preclude the use of cost tests, restoration measures or the use of other approaches. One commenter opposed the approved design and construction technology option, arguing that the selection of only one or two technologies oversimplifies the complexity of waterbodies, and that the approach would not be sufficiently protective.

Some commenters agreed that the wedgewire screen should be an effective technology in certain situations and noted that EPA should specify screen slot openings in the approved design

and construction technology option. One of the commenters stated that research on the wedgewire screen suggests that the technology should easily meet the impingement requirements, but that further research may be necessary to confirm the effectiveness for entrainment reductions with varying slot openings.

Some commenters offered suggestions for additional changes to the option, such as developing scientifically sound, peer-reviewed criteria for evaluating pre-approved technologies, identifying the technologies in technical guidance documents as opposed to the regulation, and continuing to allow restoration measures. Some commenters also suggested specifying that any monitoring performed would be informational in nature and not affect the facility's compliance status, or that facilities only be required to "substantially meet" the stated goals. Other commenters suggested expanding the scope of the approved design and construction technology option to include prescribed operational or restoration measures or preapproved technologies for intakes located on man-made cooling reservoirs.

A facility that chooses to comply under the pre-approved technology option should not, in addition, need to employ restoration measures. The intent of the pre-approved technology compliance alternative is to provide a means to reduce the application and information collection requirements for facilities that are able to meet performance standards through a technology that is proven to meet performance standards for impingement mortality and entrainment in most cases. A facility that chooses to comply by meeting the conditions specified at § 125.99(a), therefore, should be able to achieve the performance standards for both impingement mortality and entrainment. Facilities that propose an alternative technology for consideration as a pre-approved technology under § 125.99(b) are encouraged by EPA to propose technologies to the Director for approval that are capable of meeting performance standards for both impingement mortality and entrainment with a high degree of confidence. However, a situation could arise where a pre-approved technology only meets performance standards for impingement mortality or entrainment. In such cases, facilities that choose to comply using an approved design and construction technology that only met a subset of applicable performance standards could either employ other (1) design and construction technologies, operational measures and/or restoration measures or (2) request a site-specific requirements for the remaining performance standards based on either the cost-cost or cost-benefit test.

Some commenters stated that EPA should specify the wedgewire screen slot opening size. EPA disagrees that it should specify a uniform screen slot opening size for all facilities that choose the approved design and construction technology alternative. The rule states in § 125.99(a)(1)(iv) that the screen slot size must be appropriate for the size of eggs, larvae, and juveniles of all fish and shellfish to be protected from entrainment at the site. Because the species to be protected differ among locations, the slot sizes will need to be tailored to the sizes of the various assemblages of species at each site. EPA therefore has determined that the Director should determine the appropriate design criteria, such as wedgewire screen slot opening size, on a case-by-case basis. Since no impingement mortality and entrainment Characterization Study is required under this streamlined option, EPA expects that this determination would be based on available information regarding species and life-stage composition of organisms within the receiving waterbodies. Facilities may wish to assemble available data and propose a screen slot opening size for the Director's consideration.

Some commenters stated that EPA should develop peer-reviewed criteria for evaluating pre-approved technologies other than the wedgewire screen technology described in § 125.99(a). EPA disagrees that it needs to develop specific criteria for evaluating pre-approved technologies. EPA believes that the Director is best equipped to determine the most appropriate technologies for approval in their jurisdictions, since these Directors are most familiar with the site-conditions and intake configurations of the facilities within their jurisdictions, and have physical access to the facilities. Under § 125.99, EPA has set forth a broad framework outlining the types of information that the permitting authority would need to evaluate specific technologies, including design criteria of the proposed technology, site characteristics and conditions necessary to ensure that the technology will meet the performance standards, and data to demonstrate that the facilities in the Director's jurisdiction with the proposed technology and site conditions will be able to meet the performance standards in § 125.94(b). EPA believes that the Directors will be able to evaluate the data and make determinations as to whether the proposed technologies are suitable for use as approved design and construction technologies in their jurisdictions. However, EPA is requiring that the Director take public comment on such determinations prior to finalizing them.

In answer to comments that EPA should not require facilities choosing the approved design and construction compliance alternative to demonstrate through monitoring that they meet the applicable performance standards, EPA disagrees. EPA believes that verification monitoring is very important because, while the pre-approved technologies are designed to meet the performance standards in most cases, the actual efficacy of any technology will be affected by site-specific circumstances and conditions, as well as proper operation and maintenance of the technology. For this reason, EPA believes that it is necessary and appropriate for these facilities to prepare a Technology Installation and Operation Plan that describes how they will operate and maintain the technology and assess success in meeting the performance standards, as well as adaptive management steps they will take if the technology does not perform as expected. They must also propose a Verification Monitoring Plan to describe the monitoring they will perform to support their performance assessment. EPA notes that facilities that select the approved technology alternative have significantly reduced application and information collection requirements relative to facilities that comply under other alternatives.

One commenter stated that the approved design and construction technology alternative will not be sufficiently protective given the complexity of waterbodies. While EPA does not agree with this comment, EPA recognizes that the efficacy of a given technology will be affected by site-specific conditions, such as biological and chemical factors in the waterbody. Because the efficacy of the technology will be affected by such site-specific conditions, EPA has required all facilities that choose to comply using the approved design and construction technology compliance alternative to submit a Technology Installation and Operation Plan and a Verification Monitoring Plan, and to determine if they are meeting the applicable performance standards through monitoring, and adjust their operations accordingly if they are not. EPA believes, based upon extensive research, that the majority of facilities with the appropriate site conditions, and that have installed and properly operated

and maintained submerged cylindrical wedgewire screen technology, should be capable of meeting the performance standards set forth in § 125.94(b). For facilities that fail to meet performance standards through the approved design and technology alternative, the Director may amend the facility's permit to require the use of additional design and construction technologies, operational measures, and/or restoration measures, in order to meet the performance standards, or if appropriate, issue a site-specific determination of BTA.

5. Capacity Utilization Threshold

In the proposed rule, EPA introduced reduced requirements for facilities that are typically not operating year-round and would therefore bear a proportionately higher cost to comply with the rule. EPA proposed that facilities that operate less than 15% of the time (also known as peaking facilities) would only be subject to impingement reductions, regardless of the waterbody type upon which the facility is located.

Generally, commenters supported the concept of reduced requirements for peaking facilities. However, commenters stated that EPA must further refine the definition of peaking facilities and in many cases suggested that EPA adopt the United States Department of Energy's definition of capacity utilization. Aspects of EPA's definition on which commenters requested clarification included how to measure the capacity rate (per intake, per facility, per generating unit, etc.), the time frame for determining historic utilization rates, and the definition of "available" with respect to how to calculate the capacity utilization rate. One commenter further suggested that EPA allow an expanded definition (*i.e.*, a higher capacity utilization rate) for facilities that typically operate in periods of low abundance of entrainable organisms. One commenter further requested that the reduced requirements for peaking facilities be extended to account for future operations at the plant as well. Another commenter expressed concern over the definition of the threshold, as the operational time for the facility could still coincide with periods of high abundances of organisms and therefore still result in significant entrainment. One commenter opposed the threshold, stating it could encourage facilities to reduce electricity production in order to have less stringent requirements and therefore impact energy production, prices, and energy supply nationwide.

State commenters generally supported the concept, but were divided as to the threshold utilization rate; some States preferred a lower threshold and one mentioned that it would prefer a higher threshold. One State did not support the reduced requirements for peaking facilities, noting that the time frame in which the facility operates may be more important than the volume withdrawn. Another State suggested that restoration or mitigation also be required of peaking facilities.

EPA has identified peaking facilities in the final Phase II rule as those facilities that operate at an overall capacity of less than 15 percent. EPA believes that facilities operating below 15% should be subject to less stringent compliance requirements relative to a typical base load facility. The threshold of 15% is based on these facilities' reduced operating levels, low potential for entrainment impacts, and consideration of economic practicability (*see*, 67 FR 17141). To address commenter concerns, EPA has modified the capacity utilization definition to say that the capacity utilization rate applies only to that portion of the facility that generates electricity for transmission or sale using a thermal cycle employing the steam water system as the thermodynamic medium. The Agency has amended the definition of the capacity utilization rate threshold to remove the term "available" from the definition, as requested by comments. Further, the Agency has allowed for calculation of the capacity utilization rate on an intake basis, when the intake is exclusively dedicated to a subset of the plant's generating units, and for determination of the capacity utilization rate based on a binding commitment of future operation below the threshold.

Peaking facilities are typically older, less efficient generating units. Because the cost of operation is higher, peaking facilities are generally employed when generating demand is greatest and economic conditions justify their use. Such usage is typically a fraction of the unit's overall generating capacity and represents significantly less cooling water used when compared to the design intake capacity. This would appear to obviate the need for entrainment controls for the facility.

Most peaking facilities are employed during the highest electrical demand period, typically mid-winter or mid-summer. It is generally accepted that while these seasons can sometimes be associated with a higher abundance of aquatic organisms or spawning events, mid-winter and mid-summer are not typically considered to be critical periods for aquatic communities. Given these operating conditions, generally entrainment controls would appear to be an unnecessary cost for these facilities because the losses, while they occur, would have minimal adverse environmental impact.

D. Site-Specific Approach

Past implementation of section 316(b) often followed the draft guidance document published in 1977, which promoted a largely site-specific approach. In this rulemaking, EPA is establishing national performance standards for best technology available for minimizing adverse environmental impacts in connection with cooling water intake structures. Many comments were received regarding a site-specific approach to implementation.

1. Approach

Many commenters favored a site-specific approach in place of national performance standards. Many of the commenters cited a need for flexibility to comply with the regulations, and stated that only a site-specific approach can represent the best framework for addressing site-specific environmental impacts in a cost-effective manner. Commenters also favored an approach that resembles current practices for implementation of 316(b), in which site-specific determinations are made without reference to national performance standards.

Some commenters did not support the concept of a site-specific rule. One commenter stated that it does not fulfill a national standard and allows a more lenient application for some facilities. Another commenter added that a site-specific approach favors industry, as the resources of the regulators and interested public groups to respond to information-intensive site-specific determinations are limited. Some States also expressed concern over a site-specific approach, as it could be less stringent than the present approach, as well as more burdensome. Some other States expressed support for site-specific approaches.

In the final rule, EPA has established national performance requirements for the reduction of impingement mortality and entrainment that reflect best technology available to minimize adverse environmental impact for Phase II existing facilities, and has authorized five different compliance alternatives to achieve those standards, including a site-specific alternative. Thus, the Agency has provided both clear national standards of environmental protection and sufficient flexibility to allow for the selection of cost-efficient approaches to compliance and permit administration. In addition, under certain compliance alternatives, Phase II existing facilities

can use restoration measures, either in lieu of, or in combination with technologies and/or operational measures, when design and construction and/or operational measures alone are less feasible, less cost-effective or less environmentally desirable. This provides additional flexibility to permittees and permitting agencies. Finally, as discussed in Section VII of this preamble, EPA does not agree that all aspects of certain site-specific approaches effectively fulfill the requirements of section 316(b).

2. Existing Programs and Determinations

Several commenters stated that there is already a successful 30-year history of implementing section 316(b). Some commenters noted that many States currently implement 316(b) using a site-specific approach and that these programs should be allowed to continue, including any restoration or enhancement programs the States have established. Others stated that existing BTA determinations (conducted using a site-specific approach) should remain valid.

EPA acknowledges that some States' existing programs and determinations have been successful in reducing adverse environmental impacts to waters of the United States associated with cooling water intake structures. EPA disagrees, however, that all existing BTA determinations should remain valid. Some historical BTA decisions may be based on physical, chemical or biological conditions that are no longer relevant at the site, or reflect BTA technology that is outdated and would not meet the performance standards set forth in today's final rule. However, the final rule provides for EPA approval of alternative State program requirements where such State NPDES requirements will result in environmental performance within a watershed that is comparable to the reductions of impingement mortality and entrainment that would otherwise be achieved under § 125.94. (*see* § 125.90(c)). Thus, this rule provides a reasonable degree of flexibility for States to implement existing effective programs. In § 125.94(e), States are also allowed to establish more stringent BTA requirements if necessary to comply with State, tribal, or other federal law.

E. Implementation

1. Calculation Baseline

Numerous commenters indicated that they were unclear as to how to calculate the baseline conditions for impingement mortality and entrainment. Some commenters suggested that the calculation baseline should reflect unrestricted operation at full design capacity year-round to avoid continually changing the baseline, since maintenance and operational schedules change over time. Another commenter added that the baseline definition must specify that data be based upon maximum operation of a given facility, to avoid allowing a facility to withdraw more water than it has been permitted for (based on an averaged flow). Other commenters claimed that the use of a calculation baseline was problematic due to the difficulties of extrapolation between localities and waterbody types. One commenter asserted that the calculation baseline should reflect current local environmental conditions, not historical or hypothetical future conditions and should specify the level of operation that would be maintained in the absence of operational controls implemented for reducing impingement and entrainment.

Many commenters supported an "As Built" alternative approach where a facility would calculate entrainment reduction based on historical measurements before installation of new technology or sampling immediately in front of the new technology and enumerating the organisms of a size that will pass through a standard 3/8-inch screen. Several commenters agreed that the use of historical data would aid in estimating the calculation baseline while others cautioned against the use of historical data that may not be relevant to the current conditions. One commenter disagreed with EPA's statement that the baseline could be estimated by evaluating existing data from a nearby facility; the commenter asserted that site-specific factors determine whether an organism will interact with a cooling water intake structure and/or survive the interaction. Overall, most commenters recommended that EPA allow the Director broad discretion and flexibility in evaluating the calculation baseline due to varying site conditions.

The calculation baseline provides a standard intake configuration by which facilities can determine relative reductions in impingement and entrainment. EPA acknowledges the numerous comments on the proposed definition and has refined the definition to provide more clarity in implementing this concept. For example, the definition in the proposed rule incorporated a shoreline intake structure. In the final rule, the definition has been clarified to specify a 3/8-inch mesh traveling screen at a shoreline intake structure. Based on available data that indicate this is a common intake structure configuration at Phase II existing facilities, EPA designated a 3/8-inch screen as the standard mesh size against which reductions will be calculated. Similarly, the assumption of no impingement or entrainment controls in the definition in the proposed rule has been clarified to describe an intake where the baseline operations do not take into include any procedures or technologies to reduce impingement or entrainment. EPA recognizes that some facilities may have control technologies in place that already reduce impingement or entrainment; the final calculation baseline would allow credit for such reductions. Additionally, EPA further clarified the definition to include the potential data sources that may be used in defining the calculation baseline, such as historical data, data collected at nearby locations, or data collected at the facility. EPA is authorizing the use of existing biological data in determining the calculation baseline to minimize the impacts to facilities, provided that the data are representative of current facility and/or waterbody conditions (as applicable) and were collected using appropriate quality control procedures.

EPA has further clarified the definition to provide that the calculation baseline may be based on an intake structure located at a depth other than a surface intake if the facility can demonstrate that the standard definition (*i.e.*, a shoreline surface intake) would correspond to a higher baseline level of impingement mortality and/or entrainment.

EPA chose not to incorporate operating capacity into the calculation baseline, as the definition is not dependent upon intake flow volumes. EPA has chosen to adopt the "as built" approach: as stated in § 125.93, a facility may choose to use the current level of impingement mortality and entrainment as the calculation baseline.

EPA recognizes that this definition cannot address the variety of intake configurations and other conditions at all facilities and therefore cannot define the calculation baseline in all settings. However, EPA believes that the calculation baseline in the final rule is clear and straightforward to implement, and allows for proactive facilities (*i.e.*, those with control technologies, operational procedures, or restoration measures already in place) to take credit for existing measures.

2. How Will Attainment of the Standards Be Measured?

At the time of the NODA, EPA was evaluating several approaches for

measuring success in meeting performance standards. EPA therefore requested comments on whether performance should be measured based on an assessment of the impacts to all fish and shellfish species ("all-species approach") or to fish and shellfish from only a subset of species determined to be representative of all the species that have the potential to be impinged or entrained ("representative species approach"). These comments are addressed under section 2. a below. Several terms to describe the representative species approach have been used historically. To avoid confusion among the terms "representative indicator species," "representative important species," and "critical aquatic organisms," EPA is adopting the term "representative species" for the purpose of simplicity in this section. EPA also requested comment as to whether enumeration of organisms or biomass should be used as the metric for measuring success in meeting the performance standards. These comments are addressed in section 2. b below. With regard to counting absolute numbers of organisms, EPA also requested comment on the option of counting undifferentiated organisms (*i.e.*, counting without specifying taxonomic identification).

After attempting to select optimal approaches for both the scope and metric to use in determining attainment of the performance standards, EPA has determined site-specific factors such as biological assemblage at the site, intake location, and waterbody type must be factored into decisions regarding how to evaluate attainment. EPA has therefore decided that, in its Verification Monitoring Plan (125.95(b)(7)), the facility must propose, among other things, the parameters to be monitored for determining attainment. The Director will be best suited to review and approve proposed parameters for each facility on a case-by-case basis.

a. Scope of Evaluation: All-Species Consideration vs. Representative Species

Several commenters supported the use of a representative species evaluation, as opposed to the all-species evaluation, as the most practical approach in many cases. Another commenter stated that even with the representative species approach, factors other than simply numeric reduction in impingement mortality and entrainment must be considered when determining attainment. On the other hand, one commenter stated that an "all species" approach could make compliance demonstrations simpler and somewhat less expensive so long as the taxonomic identity of collected organisms is not required. The commenter noted that this would not be appropriate, however, in cases where taxonomic identification is needed, such as where eggs and larval stages are converted to age-1 equivalents.

As part of the representative species inquiry, EPA also requested comment on whether 10 to 15 species might be an appropriate number of representative species to protect all species and ecosystem functions at a facility. One commenter responded, stating that 15 was too large a number. This commenter suggested that a demonstration should focus on the four or five species and add to the list only if there was another species of special concern.

In response to the commenter who suggested that EPA should evaluate factors other than reduction in numbers of organisms impinged or entrained, EPA has selected several means by which to determine compliance with section 316(b) requirements. For facilities that choose to demonstrate compliance with the performance standards, the metric that will be used to evaluate compliance with the performance standards is the facility's reduction of impingement mortality and entrainment through the installation of design and control technologies and/or operational measures. For these facilities, compliance may then be measured against a facility's calculation baseline, which the facility estimates and submits with its permit application package. The calculation baseline is defined at § 125.93. For facilities that choose to use compliance with the terms of a Technology Installation and Operation Plan or Restoration Plan to determine compliance, the degree of success in meeting performance standards is still an important criteria for determining if adaptive management is needed, but it would not be the basis for determining compliance. For facilities that choose to use restoration measures, attainment of performance standards will be based upon whether the production of fish and shellfish from the restoration measures is substantially similar to the level of fish and shellfish the facility would achieve by meeting the applicable impingement and/or entrainment requirements. If a facility has been approved for a site-specific determination of best technology available, the Director will establish alternate requirements accordingly. EPA expects that a variety of factors will be considered in determining the appropriate compliance option for a facility, such as waterbody type, intake location, percentage withdrawal of mean annual flow of rivers or streams, capacity to upset thermal stratification in lakes, a facility's calculation baseline, and the appropriateness of existing or proposed protective technologies or measures.

EPA agrees that a single approach may not be optimal in all cases. The Agency has therefore not prescribed the methods (including a metric) for assessing success in meeting performance standards in today's final rule. Rather, the Director must determine whether a clearly defined all-species approach or representative species approach is appropriate on a case-by case basis, based upon the information and proposed methods presented by the facility. The Director may choose to require evaluation of all species or of certain representative species.

In response to comments regarding EPA's suggested number of representative species, the facility will propose the number of species to monitor, as well as decisions regarding species and life stages to monitor, for review and approval by the Director as part of Verification Monitoring Plan (125.95(b)(7)), Technology Installation and Operation Plan (125.95(b)(4)(ii)), and, if applicable, the Restoration Plan required at 125.95(b)(5). As such, in cases where the representative species approach is applied, the Director may approve the number of representative species proposed by the facility, based upon the specifics of the waterbody from which the facility is withdrawing, the percentage volume of water withdrawn relative to the freshwater river or stream (as applicable), and other factors.

b. Metric: Absolute Counts vs. Biomass

EPA requested comment as to whether species impinged or entrained may be measured by counting the total number of individual fish and shellfish, or by weighing the total wet or dry biomass of the organisms. In response to the use of absolute counts of organisms or biomass (weight) for determining compliance, commenters offered a variety of views. Regarding the use of biomass as a metric, one commenter expressed that measuring either biomass or total undifferentiated numbers of species would be appropriate for cases where restoration was the chosen option, since restoration will never result in one-for-one species compensation. Several commenters pointed out a disadvantage of counting numbers of organisms: early life stages will dominate the numbers and thereby dominate the compliance

determination, even though most of them would have suffered large natural mortality losses even without entrainment. To correct for this, a few commenters suggested identifying the organisms and converting them to an equivalent unit to ensure that each life stage is appropriately weighed. Specifically, one commenter suggested converting to equivalent juveniles, when measuring organisms by biomass, to correct for the fact that the count will be dominated by later larval stages even though the number of these organisms per unit weight will be small compared to eggs and larvae. This commenter continued that this approach would be useful for forage species, since biomass is an appropriate measure of the organisms that serve as a food source for commercial and recreational species.

EPA received many comments regarding the need for flexibility in determining the appropriate metric to use to determine attainment of performance standards. Several commenters asserted that the rule should allow flexibility in the approach and the choice of metric should factor in whether one is assessing impingement mortality, entrainment or both; species and life stages affected, and compliance option.

EPA has decided to give the Director the authority to review and approve methods of determining compliance proposed by the facility as part of the Verification Monitoring Plan. (125.95(b)(7)), Technology Installation and Operation Plan (125.95(b)(4)(ii)), and, if applicable, the Restoration Plan required at 125.95(b)(5). Thus, the facility will propose, and the Director will review and approve, species and life stages of concern. The Director may choose to require evaluation of all species or of certain indicator species; or the Director may elect to verify attainment of performance standards using biomass as a metric. EPA believes that as each situation will be somewhat unique, it should be left to the facility to propose and the Director approve the appropriate unit, biomass or actual counts.

c. Other Means of Determining Attainment of Performance Standards

Several commenters also suggested that EPA should allow for the use of existing data for measuring attainment in lieu of requiring existing facilities to collect and develop new data. Commenters also suggested that if a facility currently implements the best technology available to minimize adverse environmental impact, it should be found in compliance even if the newly promulgated performance standards are not being met. Other commenters expressed that a facility should be considered in compliance even during occurrences of unavoidable episodic impingement and entrainment events. These commenters stated that in such unusual circumstances, the facility should be provided with an exemption from any regulatory actions.

EPA agrees with commenters that under certain circumstances, facilities' historical data may be sufficient to verify that they are meeting performance standards, as long as the historical data is reflective of current operation of the facility and of current biological conditions at the site. For example, under compliance alternative 2, a facility may use historical data to demonstrate that existing design and construction technologies, operational or restoration measures, meet the performance standards. EPA also believes that some historical data may be appropriate for determining the calculation baseline and for characterizing the nature of impingement and entrainment at the site, and therefore has given the Director the discretion to determine whether historical data are applicable to current conditions (see 125.95(b)(1)(ii), 125.95(b)(2)(i), and 125.95(b)(3)(iii)). In addition, a facility that proves, using existing data, that it has reduced its intake capacity commensurate with closed-cycle recirculating systems would be considered to be in compliance, and therefore would not be required to meet the performance standards for either impingement mortality or entrainment.

After the first permit term, facilities may submit a request for reduced information collection activities to their Director. Facilities that are able to demonstrate that conditions at their facility and in the waterbody from which their facility withdraws surface water are substantially unchanged since their previous permit application will qualify for reduced requirements (§ 125.95(a)(3)). In all these cases, historical data are used and required to measure success in meeting performance standards. However, facilities required to submit a Verification Monitoring Plan must still submit verification monitoring data for at least two years following implementation of technologies and/or operational measures.

Other commenters argued that a facility that is implementing permit conditions reflecting a historical determination of the best technology available should be considered in compliance with today's final rule even if the facility is not meeting performance standards. EPA disagrees that a historical determination of the best technology available is appropriate for complying with the requirements set forth by today's rule. Many historical determinations of the best technology available are less protective of aquatic organisms and ecosystems than the standards set by today's rule, and would undermine the national performance standards that EPA has determined reflect the current best technology available for minimizing adverse environmental impact. Furthermore, biological, chemical and physical conditions at the facilities may have changed since the earlier determinations were made, and the best technology available determinations may no longer apply. Many of the historical best technology available determinations are twenty years old or older and may not correspond with current waterbody or operating conditions.

The question whether a facility should be considered in compliance even during occurrences of unavoidable episodic impingement and entrainment events is left to the Director. At the Director's discretion, facilities that are generally in compliance, but that experience an unusual peak of impingement mortality and/or entrainment, may be considered to still be in compliance on the basis of past good performance. Moreover, the inclusion of a compliance determination alternative based on a Technology Installation and Operations Plan in the final rule also addresses these episodic issues.

d. Monitoring

One commenter stated that monitoring frequencies should be established to address the inherent variability in the rates in impingement and entrainment over the seasons of the year. Monthly or biweekly monitoring is probably appropriate in many cases. The same commenter stated that standard statistical procedures could be followed to establish sample sizes needed to establish appropriate levels of precision in the estimates (*e.g.*, 95% confidence intervals within 15–25% of the mean). In contrast, another commenter pointed out that weekly sampling would be necessary to determine compliance, as had been necessary for the Salem facility. Another commenter suggested that the most cost-effective way of conducting studies would be over the periods of peak abundance.

Some commenters stated that facilities should be allowed to cease monitoring following achievement of the performance standards. Some

suggested that facilities meeting performance standards through a closed-cycle cooling system should be exempt from monitoring. Another commenter disagreed with the two-year monitoring requirement altogether.

EPA has determined that a uniform averaging period would not be appropriate; rather, the Director will be best suited to make all such determinations by evaluating these and other factors for each facility on a case-by-case basis. The Director will be able to make determinations regarding averaging periods based upon site-specific factors, such as biological assemblage at the site, annual and diel fluctuations in concentration and populations present, and the selected compliance alternative. EPA disagrees that a facility should cease monitoring once performance standards are achieved, as site-specific conditions at any facility are bound to change with time, affecting a facility's ability to achieve performance standards. EPA agrees that facilities meeting performance standards through flow reductions commensurate with closed-cycle cooling should be exempt from monitoring (see § 125.94(a)(1)(i)). Finally, EPA believes that the two-year monitoring requirement is appropriate so that any site-specific variability in impingement and entrainment rates can be detected.

e. Timing

Some States favored flexibility in implementation including delaying the effective date for permits to be renewed soon after the rule is finalized. Some commenters suggested that the requirements of the rule must be timed so that facilities are not forced into a period of noncompliance because of the time needed to determine, design, and install new intake technology.

One commenter expressed that implementation schedules are too strict. Along the same vein, another commenter suggested that EPA should build flexibility into the implementation schedule so that facilities are not forced into periods of noncompliance.

Commenters generally wanted to see flexibility in the averaging periods (time increments for determining success in meeting the percent reduction or production specified by the performance standards and restoration requirements in § 125.94,) and a way to tailor the sampling schedules to the needs of the site. These commenters indicated that the monitoring should be frequent enough to provide useful information, but not so intensive as to make the program unnecessarily costly or time-consuming. Furthermore, several recommended that a compliance schedule be written into the permits, to allow facilities to install and test new equipment. Several commenters agreed that different facilities might require different amounts of time, as dictated by where they are in the cycle and what their circumstances are.

EPA has provided for time to comply with permitting requirements. A facility whose permit expires more than four years after the date of publication of this final rule must submit the required information 180 days before the expiration of their permit. A facility whose permit expires within four years of the date of publication of this final rule may request that the Permit Director establish a schedule for submission of the permit application. Such submission should be as expeditiously as practicable, but no later than three and one-half years from the date of publication of this final rule. It is expected that the time that facilities need to comply with permitting requirements will be variable, ranging from one year for those not needing to do an impingement mortality and entrainment study to over three years for those needing to collect more than one years worth of impingement and entrainment data.

EPA has also provided that facilities may opt to comply with the Technology Installation and Operations Plan compliance scheme that allows facilities who properly implement the Technology Installation and Operations Plan (or Restoration Plan, as applicable) to be considered in compliance with the requirements of § 125.94. As indicated above, the final rule provides the Director the flexibility to establish an appropriate averaging period to meet the particular situation present in the waterbody within which the facility is located.

3. Entrainment Survival

EPA invited comment on whether to allow Phase II existing facilities to incorporate estimates of entrainment survival when determining compliance with the applicable performance standards. Commenters responded with numerous comments regarding survival with respect to the performance standards as well as comments regarding EPA's assumption of zero percent entrainment survival (100 percent mortality) in the benefits assessment for today's rule.

Some commenters opposing the zero percent survival assumption argued that in the event a facility can demonstrate entrainment survival, it should be awarded credits towards meeting performance standards. EPA disagrees. Today's final rule sets performance standards for reducing entrainment rather than reducing entrainment mortality. EPA chose this approach because EPA does not have sufficient data to establish performance standards based on entrainment survival for the technologies used as the basis for today's rule. If EPA had incorporated entrainment survival into any of its conclusions regarding the appropriate performance standards, then the actual performance standard would most likely have been higher.

Many commenters argued that in many cases organisms survive entrainment and the zero percent survival assumption was too conservative. Some commenters suggested that EPA was biased in its approach to entrainment survival. For example, one commenter stated that EPA was biased as a result of relying heavily on old entrainment survival literature.

Based on its review of all entrainment survival studies available to the Agency, EPA believes that its assumption of zero percent survival in the benefits assessment is justified. The primary issue with regard to the studies EPA reviewed is whether the results can support a defensible estimate of survival substantially different from the value zero percent survival assumed by EPA. The review of the studies has shown that while organisms are alive in some of the discharge samples, the proportion of the organisms that are alive in the samples is highly variable and unpredictable on a national basis. In addition, some studies contain various sources of potential bias that may cause the estimated survival rates to be higher than the actual survival rates. For these reasons, EPA believes the current state of knowledge does not support reliable predictions of entrainment survival that would provide a defensible estimate for entrainment survival above zero at a national level. However, today's final rule does allow facilities to use the results of a well-constructed, sites-specific entrainment survival study, approved by the Director, in their benefits assessments when seeking site-specific entrainment requirements. The permitting authority must review and accept the study before the results may be incorporated into the benefits assessments. In cases where there is uncertainty in the survival rates, permitting authorities may want to specify that benefits be presented as a range that reflects this uncertainty.

4. Comprehensive Demonstration Study (CDS)

a. Requirements and Burden

The majority of commenters expressed two concerns regarding the CDS: (1) it was too burdensome and costly, and the volume of information required was too overwhelming, and (2) several components required clarification. These commenters generally suggested that the costs of such a study were underestimated, and many indicated that the cost estimates for completing the CDS contained misleading or incorrect information. Commenters indicated that the information required for completing the CDS was similar to the data that would be needed for implementing a purely site-specific approach and was therefore overly burdensome. Commenters suggested that EPA require a more simplified demonstration study or waive the requirement for facilities that select one of the approved technologies. Some commenters suggested, in general, that costs could be greatly reduced by streamlining this process, for example, by exempting facilities from certain components based on (1) facilities that have proven that they are not harming the aquatic community, and (2) facilities for which there exists relevant historical data.

Several States anticipated that the majority of their facilities were likely to choose the site-specific compliance alternative, and indicated that a rule that requires cost/benefit analyses for many decisions would be difficult to administer and require significant resources to implement. They claimed that the site-specific performance standards compliance option would impose a substantial review burden and would require specialized expertise. Some States questioned whether existing permitting staff resources over the first 5 years will be sufficient to review material and develop permit requirements.

Many commenters suggested that EPA could lower costs by streamlining the CDS, exempting facilities that are not causing adverse environmental impact or have historical data, and waiving the monitoring components for facilities that have installed approved technologies.

EPA believes that many efficiencies have been added to the rule since the proposal and the NODA to address concerns that the CDS is too burdensome and costly. First, EPA has provided five compliance alternatives to choose from, one of which allows a facility to install an approved design and construction technology with minimal CDS requirements. In addition, facilities with design intake flow commensurate with closed-cycle recirculating systems are exempt entirely from the CDS; facilities may only have to submit partial CDS information if they have reduced their design intake velocity to less than or equal to 0.5 feet per second and are only required to meet requirements as they relate to reductions in entrainment. In addition, requiring an early submission of the Proposal for Information Collection allows the Director to potentially minimize the amount of information required by the facility. Also, by allowing the use of historical data, EPA has minimized costs for many facilities. In the cases where new studies are required, EPA has given the permittee and the Director discretion to set conditions for the studies which will not be overly burdensome. Facilities may also reduce costs incurred through the information collection process in subsequent permit terms by submitting, one year prior to expiration of the existing permit, a request for reduced permit application information based on conditions of their cooling water intake structure and waterbody remaining substantially unchanged since the previous permit issuance.

One commenter expressed concern that historical data should not be allowed in the development of the CDS, as it may not accurately reflect current conditions. EPA believes that some historical data may be appropriate for determining the calculation baseline and for characterizing the nature of impingement and entrainment at the site, and therefore has given the Director the discretion to determine whether historical data are applicable to current conditions. EPA expects to provide guidance to Directors to help them make determinations about historical data submitted by facilities. Historical data will not be used to determine attainment of performance standards; this will be verified through a monitoring program approved by the Director.

b. Timing of Submitting Information

Commenters submitted a variety of opinions about timing. Generally, most favored limiting the submittal of CDS components to a frequency equal to or greater than once every five years (one permitting cycle) to reduce burden. Another commenter argued that there is no reason to mandate timing, and that approval of the Director should not be necessary. Other commenters suggested that a time frame is necessary, and that the information should be submitted with the renewal application for a NPDES permit. Numerous commenters asserted that consultation activities should occur prior to development of the Comprehensive Demonstration Study; that schedules and requirements should be specified in the permit for various data collection, analysis, and application submission activities; implementation schedules are too strict; and monitoring requirements need clarification. Yet another commenter suggested to "start the clock" with the issuance of the renewed permit. Commenters also indicated that anywhere from one year to several years might be necessary to verify success in meeting the performance standards. Several commenters suggested that given the nature of cooling water intake impacts and the proposed requirements, section 316(b) permit and BTA determinations should not be made every five years. Instead, they suggested that one-time determinations should suffice, or that facilities should be allowed to rely on previous section 316(b) demonstrations if conditions remain essentially unchanged. There was also some general confusion as to when the rule would actually become effective.

In response to the comment that EPA should not request submittal of CDS components more frequently than every five years or more, EPA has included a provision whereby a facility may be granted reduced CDS submittal requirements if it can prove that conditions at the facility and in the waterbody have not substantially changed. Facilities will be required to review whether conditions, such as biological, chemical or physical conditions, have substantially changed at each permit renewal cycle. If conditions have changed, facilities will be required to submit all of the relevant CDS components (those that would be affected by the changed conditions when they submit the application for permit renewal.

One commenter stated that the CDS should be a one-time submittal. EPA disagrees that all components of the CDS should only be researched and submitted a single time for the lifetime of the facility, regardless of potential changes in the plant and/or waterbody, because the natural and anthropogenic changes that occur in waterbodies over time may affect a facility's ability to meet performance standards using the current design and construction technologies, operational measures, and/or restoration measures in place.

In response to comments that timing was not clear in previous versions of the rule, EPA agrees, and has clarified timing issues in today's final rule. A

facility whose permit expires more than four years after the date of publication of this final rule must submit the required information 180 days before the expiration of their permit. A facility whose permit expires within four years of the date of publication of this final rule may request that the Permit Director establish a schedule for submission of the permit application, but that such submission should be as expeditiously as practicable, but no later than three and one-half years from the date of publication of this final rule. It is expected that the time that facilities need to comply with permitting requirements will be variable, ranging from one year for those not needing to do an impingement mortality and entrainment study to over three years for those needing to collect more than one years worth of impingement and entrainment data.

Some commenters felt that decisions about the timing of the CDS submittal should be left to the Director. EPA agrees and has provided only that the proposal for information collection should be submitted prior to the start of information collection activities, but that the facility may initiate information collection prior to receiving comment from the Permit Director. All other components of the Comprehensive Demonstration Study must be submitted 180 days prior to permit expiration except as noted above for the first, permit term following promulgation of the rule.

5. State Programs

Many States requested that existing State section 316(b) programs be allowed to be used to meet the requirements of Phase II. One commenter asserted that the Phase II rule should not overturn past State section 316(b) decisions at existing facilities that were made on a site-specific basis and that examined the impacts of the cooling water intake structure in relation to the specific biological community. Several commenters stated that EPA did not sufficiently recognize the work already done by the States in implementing section 316(b). Several commenters do not believe that a State should have to demonstrate that its program is "functionally equivalent" to today's rule (*i.e.*, that its alternative regulatory requirements achieve environmental performance within a watershed that is comparable to the reductions of impingement mortality and entrainment that would otherwise be achieved under § 125.94).

In response to comments about existing State section 316(b) programs, EPA believes that § 125.90(c) in today's rule, by allowing alternative State programs, acknowledges the work already done by States. In response to the comment that a State should not have to prove that its program achieves environmental performance comparable to those that would be achieved under § 125.94, EPA disagrees. While EPA is giving significant flexibility to permitting agencies at the State level to determine how and what each facility must protect and monitor, it believes it is important to set uniform national performance standards.

F. Restoration

In the proposed rule EPA requested comments on the use of restoration measures by facilities within scope of the rulemaking (67 FR 17146). EPA received diverse comments. Many commenters supported a role for restoration measures. Several commenters stated that allowing restoration provides additional flexibility to those who must comply with the section 316(b) requirements, and may provide a more cost-effective means of minimizing adverse environmental impact than operational measures or design and construction technologies. Other commenters stated that restoration is a well-accepted concept that should have a voluntary role in section 316(b) determinations and constitutes an appropriate means for reducing the potential for causing adverse environmental impact. Several commenters felt that restoration could provide significant benefits in addition to compensating for impingement and entrainment losses. A number of commenters requested flexibility in the implementation of restoration projects. Some commenters stated that restoration should not be limited to supplementing technology or operational measures, but should instead be allowed as a complete substitute for such measures. However, other commenters stated that restoration measures should only be used once every effort has been made to use technology to avoid impacts.

Commenters further stated that restoration should not be mandatory and that EPA lacks authority under section 316(b) to require it, but also asserted that it should have an important role in section 316(b) permitting decisions. Commenters also stated that restoration should not be considered the best technology available for minimizing adverse environmental impact because it is not a technology that addresses the location, design, construction, or capacity of a cooling water intake structure. However, one commenter argued that past restoration measures should be considered during a regulator's determination of whether or not adverse environmental impact is occurring from a cooling water intake structure.

Other commenters felt restoration should have a limited role or no role in the context of section 316(b). One commenter wrote that restoration measures, in the context of section 316(b), are generally unworkable and that the only measurable restoration method would be offsetting, in which an applicant stops use of an older intake facility that does more harm than the proposed one. One commenter stated that restoration methods must reproduce the ecological value of lost organisms and that they have not seen restoration projects adequately successful in this manner in their region of the country. Many commenters pointed out uncertainties associated with compensating for those organisms impacted by a cooling water intake structure through restoration.

Some commenters suggested that, if restoration is allowed, there should be consultation with other State and Federal resource agencies to avoid inconsistent approaches and to provide useful information on the affected waterbody.

Several commenters remarked on EPA's proposal to include requirements for uncertainty analysis, adaptive management plans, and peer review in the final rule. Some commenters were in favor of the requirements and felt that they would enhance restoration measure certainty and performance. Some commenters were concerned that the requirements would be overly burdensome or would overly restrict the restoration measure options available to permit applicants.

EPA has retained restoration in the final rule and believes that the restoration requirements strike an appropriate balance between the need for flexibility and the need to ensure that restoration measures achieve ecological results that are comparable to other technologies on which the performance standards are based. Facilities that propose to use restoration measures, in whole or in part, must demonstrate to the Director that they have evaluated the use of design and construction technologies and/or operational measures and found them to be less feasible, less cost-effective, or less environmentally desirable than meeting the applicable performance standards in whole or in part through the use of restoration measures. The requirement to look at design and construction technologies and/or

operational measures in order to ensure that facilities give due consideration to the technologies on which the performance standards are based.

Facilities must also demonstrate that the use of restoration measures achieves performance levels that are substantially similar to those that would be achieved under the applicable performance standards. To address concerns regarding the uncertainty of restoration measures, EPA has included, among other things, requirements for uncertainty analysis, adaptive management plans, monitoring, and peer review, if requested by the Director. Finally, EPA does not believe the requirements for restoration measures are overly burdensome or prescriptive as there is a need to ensure that these types of measures achieve the anticipated environmental benefit. Moreover, under the rule, facilities are provided at least three and one-half years to submit their restoration plan and complete the required studies.

G. Costs

1. Facility-Level Costs

Generally, commenters were split regarding the national costs of the rule. Industry commenters stated that the cost analysis presented in the proposal underestimated the compliance costs in several facets of the analysis, including capital costs of the technology, the site-specific contingencies associated with retrofitting, and facility down time. Several commenters stated that EPA underestimated the costs for the monitoring requirements for both the characterization study in the permit application and for verification monitoring. Other commenters generally stated the opposite, arguing that EPA overestimated the compliance costs, especially for installing cooling towers. Some commenters stated that costs should not be a consideration in section 316(b) determinations.

The Agency significantly revised the approach to developing costs for the NODA. Those revisions incorporated some of the comments on the costing methodology for technologies that reduce impingement and entrainment. EPA's approach to estimating the costs of the requirements of the final rule reflect the NODA comments on the revised methodology, and additional analyses. EPA, however, did not revise its estimates for cooling towers subsequent to the NODA because it decided not to further pursue this regulatory option for the reasons outlined more specifically in Section VII. EPA believes that our costing of cooling tower technology is appropriate as it is based on vendor and engineering firm experience in developing costs for Phase II facilities.

2. Market-Level Impacts

Numerous industry commenters stated that EPA significantly underestimated the impacts to generators, consumers, reliability, and energy supply. EPA disagrees with these commenters. EPA performed an analysis of facility- and market-level impacts (including impacts to generators, consumers, reliability, and energy supply) using the Integrated Planning Model (IPM®), which has been widely used in air quality regulations and in other public policy arenas affecting the electric power generation industry.

One commenter stated that the IPM analysis does not account for the economic impacts of other regulatory programs. EPA disagrees with this assertion. The IPM base case accounts for costs associated with current federal and state air quality requirements, including future implementation of SO_2 and NO_X requirements of Title IV of the Clean Air Act and the NO_X SIP call as implemented through a cap and trade program. Because of its relative newness, it does not account for costs associated with the Phase I facility regulations.

One commenter stated that EPA justified the rule by using a cost-to-revenue comparison and that this comparison neither measures profitability nor represents the most efficient economic solution for each facility. As discussed in Section VII. above, the economic practicability of the Phase II regulation is based on the electricity market model analyses using the IPM, not the cost-to-revenue ratio. The cost-to-revenue ratio is only one of several additional measures EPA used to assess the magnitude of compliance costs.

Some commenters stated that EPA did not properly take account of differences between utilities, which own and operate rate-based facilities, and nonutilities, which own and operate competitive generating facilities. EPA disagrees with this comment. EPA believes that in a deregulated market, the distinction between utilities and nonutilities is no longer relevant. While such a distinction may have been important in the past, when only a few unregulated nonutilities competed with regulated utilities, this is no longer the case. The share of Phase II facilities that are owned by unregulated entities has increased from 2 percent in 1997 to 31 percent in 2001. By the time the final rule will take effect, even more Phase II facilities that currently operate under a rate-based system will be operating in a competitive market. Furthermore, EPA does not believe that nonutilities will be differentially impacted compared to utilities, even in the case that deregulation might not have taken effect in all markets by the time this rule is implemented. Competitive pressures, even in regulated environments, will reduce the ability of utilities to pass on costs to their consumers.

Some commenters stated that small or publicly owned facilities may be significantly affected. EPA disagrees with this statement. EPA's SBREFA analysis showed that this rule will not lead to a significant economic impact on a substantial number of small entities (See Section XIII.C below). While municipally owned facilities bear a relatively larger compliance cost per MW of generating capacity than do facilities owned by other types of entities, EPA's analyses show that these costs are not expected to lead to significant economic impacts for these facilities.

Some commenters stated that even a requirement to convert all facilities to closed-cycle cooling would not significantly affect energy supply and that the costs to facilities and consumers is small and in some cases, overstated by EPA's analysis. EPA disagrees with this statement. EPA considered several options that would require some or all facilities to install closed-cycle recirculating systems and rejected them on the basis of economic practicability and technological feasibility. See Section VII.B for more detail on why EPA rejected closed-cycle recirculating systems.

H. Benefits

In its analysis for section 316(b) Phase II Proposal, EPA relied on nine case studies to estimate the potential economic benefits of reduced impingement and entrainment. EPA extrapolated facility-specific estimates to other facilities located on the same waterbody type and summed the results for all waterbody types to obtain national estimates. During the comment period on the proposed rule EPA received numerous comments on the valuation approaches applied to evaluate the proposed rule, including commercial and recreational fishing benefits, non-use benefits, benefits to threatened and endangered species (T&E), as well as on the methods used to extrapolate case study results to the national level. EPA tried to address concerns raised by commenters on the proposal in the revised methodology presented in the NODA and the final rule analysis.

1. Benefits Analysis Design

A number of commenters expressed concern about EPA's reliance on a few case studies and the extrapolation method used for estimating benefits at the national level for the proposed rule analysis. The commenters noted that even within the same waterbody type, there are important ecological and socioeconomic differences among different regions of the country. To address this concern, EPA revised the design of its analysis to examine cooling water intake structure impacts at the regional-scale. The estimated benefits were then aggregated across all regions to yield the national benefits estimate. These analytical design changes were presented in the NODA. No major comments were received on EPA's regional benefit approach as described in the NODA.

2. Commercial Fishing Benefits

During the comment period on the proposed rule EPA received a number of comments on the methods used to estimate producer surplus and consumer surplus in the commercial fishing sector. Commenters felt that the methods overestimated benefits. The new methods used by EPA assume that producer surplus is 0% to 40% of gross revenues in the commercial fishing sector. EPA also now assumes that the Phase II rule will not create increases in commercial harvest large enough to impact prices. Thus, no consumer surplus impact is estimated. Commenters on the NODA noted these changes and agreed with them.

3. Recreational Fishing Benefits

A number of comments were received on the recreational fishing benefits estimates EPA included in the proposal, which primarily relied on a benefits transfer approach. Benefit transfer involves adapting research conducted for another purpose in the available literature to address the policy questions in hand. For more detail on the valuation methods used in the final rule analysis, see Chapter A9 of the Regional Analysis document (DCN 6–0003). For three of the nine case studies, this analysis was supplemented by original revealed preference studies. Revealed preference methods use observed behavior to infer users' value for environmental goods and services. Examples of revealed preference methods include travel cost, hedonic pricing, and random utility models (RUM). For more detail on the revealed preference methods used in the final rule analysis, see Chapters A9 and A11 of the Regional Analysis document (DCN 6–0003). Although most commenters agreed that properly executed benefits transfer is an appropriate method for valuing nonmarket goods, they pointed out that original revealed preference studies that provide site-specific recreational fishing benefit estimates provide a superior alternative to benefits transfer. In response to these comments, EPA developed original or used available region-specific recreational angler behavior models, which provide site-specific estimates of willingness-to-pay for improvements in recreational fishing opportunities, to estimate recreational fishing benefits from reduced impingement and entrainment for seven of the eight study regions. Chapter A11 of the Regional Analysis document provides detailed discussion of the methodology used in EPA's RUM analysis (DCN 6–0003). Due to data limitations, EPA used a benefit transfer approach to value recreation fishing benefits from reduced impingement and entrainment in the Inland region.

4. Non-Use Benefits

Numerous comments were received on EPA's proposed non-use benefit estimates. Most commenters agreed that non-use values are difficult to estimate and that EPA's estimates of non-use benefits using the 50% rule was inappropriate because it relies on outdated studies. Commenters, however, disagreed as to whether EPA had vastly overstated or underestimated non-use benefits in the proposed Phase II rule analysis.

Some commenters stated that EPA's approach to estimating non-use benefits of the proposed rule significantly overestimates total benefits and that ecological benefits of the section 316(b) regulation are negligible. Other commenters asserted that EPA's benefits estimates significantly undervalued the total ecological benefits (including use and non-use) of preventing fish kills. These commenters indicated that it would be impossible to claim that the value of the unharvested commercial and recreational and forage species lost to impingement and entrainment was equal to zero. Reasons some commenters gave for the underestimation of total benefits included the following: total losses were underestimated by using outdated monitoring data for periods when population levels (and therefore impingement and entrainment) were much lower than the present; cumulative impacts were not sufficiently considered; recreational and commercial values were underestimated; commercial invertebrate species were ignored; ecological value of forage species was not considered; non-use benefits were underestimated; and secondary economic impacts were not included. Overall these commenters argued that a net benefit underestimation could be corrected by (1) assuming that non-use values were two times the estimated value of recreation, commercial and forage values; and (2) assuming that unharvested fish had a value greater than zero.

In response to public comments regarding the analysis of non-use values in the proposed rule, EPA considered the results of several different approaches to quantifying non-use values. The Agency points out that none of the available methods for estimating either use or non-use values of ecological resources is perfectly accurate; all have shortcomings.

EPA has determined that none of the methods it considered for assessing non-use benefits provided results that were appropriate to include in this final rule, and has thus decided to rely on a qualitative discussion of non-use benefits. The uncertainties and methodological issues raised in the approaches considered could not be resolved in time for inclusion in the rule. EPA continues to evaluate various approaches for evaluating non-use benefits of CWA rules.

5. Habitat Replacement Cost (HRC)

Some commenters argued that the HRC methods are not legitimate valuation methods because they concern costs, not benefits. However, other commenters argued that although HRC analysis is not a benefit's analysis in the strict economic sense it can provide a practical approach to capturing the full range of ecosystem services and, thus, is appropriate for evaluating the benefits of this rule. These commenters further pointed out that "restoration cost is used as a measure of damages under CERCLA for Superfund sites, under the National Marine Sanctuaries Act, and under the oil spill provisions of the Clean Water Act. Use of restoration costs was explicitly upheld in the landmark Ohio vs. Interior court decision of 1989."

EPA has removed the disputed results of the HRC analyses from its benefits estimates for the final rule. For the NODA, EPA revised the HRC analysis presented in the proposed rule (see 67 FR 17191). Instead of the costs of habitat replacement, EPA used estimated willingness-to-pay values for the resource improvements that would be achieved by the habitat replacement/restoration equivalents.

During the comment period on the NODA, EPA received a number of comments on the revised habitat-based valuation method. Specifically, several commenters questioned the appropriateness of using willingness to pay values for habitat restoration as a "proxy" for either the total value or the non-use value of the fishery resources that would be preserved due to reduced impingement and entrainment. EPA explored this approach to estimating non-use values for three case study regions: the North Atlantic, Mid-Atlantic, and Great Lakes Regions. However, due to limitations and uncertainties regarding the application of this methodology, EPA elected not to include benefits based on this approach in the costs and benefits analysis of the final section 316(b) rule.

6. Benefits to Threatened and Endangered Species.

Similarly to the HRC approach, commenters strongly disagreed about the appropriateness of EPA using the societal revealed preference (SRP) method to value benefits from reducing impingement and entrainment of threatened and endangered species because these methods concern costs not benefits. The SRP method uses (1) evidence of actions taken to benefit a resource that were developed, approved, and implemented voluntarily by government and quasi-government agencies and (2) data on anticipated and actual expenditures required to complete the actions. EPA has removed the disputed results of the societal revealed preference analyses from its benefits estimates for the final rule because the uncertainties and methodological issues raised in the approaches considered could not be resolved in time for inclusion in the rule.

Some commenters argued that benefits transfer is the second best approach to estimating benefits from improved protection of threatened and endangered species if conducting an original stated preference study is not feasible. Specifically, the commenters recommended that EPA use benefits transfer for valuing improved protection of threatened and endangered species instead of the societal revealed preference method. In response to these comments, EPA has explored a benefits transfer approach to valuing improved protection of threatened and endangered species due to the final section 316(b) regulation. For detail, see Chapters A13 and B6 of the Regional Analysis document (DCN 6–0003). EPA, however, notes that benefits based on this method were not included in the benefit cost analysis of the final section 316(b) rule due to the uncertainties and limitations discussed in Section A13–6.1 of the Regional Study document (see DCN 6–0003).

7. Timing of Benefits

During the comment period on the proposed rule, EPA received a number of comments on the time at which benefits of the rule accrue to society. The commenters assert that the estimated commercial and recreational fishing benefits are overstated because timing of benefits was not taken into account. Specifically, the commenters argue that benefits could not be fully realized until installation of the cooling technology is completed and enough years pass after that first year of reduced impingement and entrainment mortality such that every fish avoiding impingement and entrainment in that year can be harvested by commercial and recreational fishermen. In response to public comments on the proposed rule analysis, EPA revised recreational and commercial fishing benefits analysis to account for a one-year construction period required to install CWIS technology to reduce impingement and entrainment, and a time lag between impingement and entrainment cessation and the time when recreational and commercial fish species will be large enough to be harvested. In accounting for a delay in benefits, EPA used both a three percent and a seven percent discount rate as recommended by OMB requirements.

I. EPA Legal Authority

1. Authority To Set a National Standard for Cooling Water Intake Structures

Some commenters challenged EPA's authority to set a national standard for cooling water intake structures, arguing that CWA section 316(b) requires EPA to provide a site-specific assessment of "best technology available to minimize adverse environmental impact." These commenters maintain that the language and legislative history of CWA section 316(b), the objectives of the CWA, and prior EPA practice of site-specific application of CWA section 316(b) preclude EPA from setting a national standard under this rule.

EPA is authorized under section 501(a) of the Clean Water Act "to prescribe such regulations as are necessary to carry out [its] functions" under the Clean Water Act. Moreover, EPA interprets CWA section 316(b) to authorize national requirements for cooling water intake structures. CWA section 316(b) applies to sources subject to CWA sections 301 and 306, which authorize EPA to promulgate national categorical effluent limitations guidelines and standards for direct dischargers of pollutants. The reference in CWA section 316(b) to these sections indicates that Congress expected that CWA section 316(b) requirements, like those of CWA sections 301 and 306, could be applied as a national, categorical standard. *Cronin* v. *Browner*, 898 F. Supp. 1052. 1060 (1995) ("EPA was also free to choose, as it did, to implement section 316(b) by issuing one overarching regulation that would apply to all categories of point source subject to sections 301 and 306 that utilize cooling water intake structures."); *see also Virginia Electric Power Co.* v. *Costle*, 566 F. 2d 446 (1977).

2. Authority To Consider Cost in Establishing Performance Standards and Compliance Options

Some commenters objected to EPA's consideration of costs in the determination of BTA. These commenters note that CWA section 316(b) does not expressly mention compliance costs, in contrast to other technology-based provisions of the CWA, which explicitly direct EPA to consider such costs. If Congress had intended that EPA consider costs under section 316(b), they argue, it would have expressly directed the EPA to do so.

EPA believes that it legitimately considered costs in establishing "best technology available" under CWA section 316(b). Although CWA section 316(b) does not define the term "available," it expressly refers to CWA sections 301 and 306—both of which require EPA to consider costs in determining the "availability" of a technology. Specifically, CWA section 301(b)(1)(A) requires certain existing facilities to meet effluent limitations based on "best practicable control technology currently available," which requires "consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application." 33 U.S.C. 1314(b)(1)(B). Similarly, CWA section 301(b)(2)(A) requires application of the "best available technology economically achievable," which in turn requires consideration of "the cost of achieving such effluent reduction." 33 U.S.C. 1314(b)(2)(B). Finally, CWA section 306(b)(1)(B), which governs the effluent discharge standards for new sources, expressly states that in establishing the "best available demonstrated control technology" the Administrator shall take into consideration "the cost of achieving such effluent reduction" 33 U.S.C. 1316(b)(1)(B). Although these standards

are somewhat different, each mandates the consideration of costs in establishing the technology-based standard. Because CWA sections 301 and 306 are expressly cross-referenced in CWA section 316(b), EPA believes that it reasonably interpreted CWA section 316(b) as authorizing consideration of the same factors considered under CWA sections 301 and 306, including cost. EPA's interpretation of section 316(b) as authorizing a consideration of costs was explicitly upheld in litigation on the Phase I new facilities rule. *Riverkeeper* v. *EPA,* slip op. at 28 (2nd Cir., Feb. 3, 2004).

EPA's interpretation is supported by the legislative history of CWA section 316(b): " 'best technology available' should be interpreted as best technology available at an economically practicable cost." *See* 118 Cong. Rec. 33,762 (1972), *reprinted in* 1 Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. at 264 (Comm. Print 1973) (Statement of Representative Don H. Clausen). EPA's interpretation of CWA section 316(b) is also consistent with judicial interpretations of the section. *See, e.g., Seacoast Anti-Pollution League* v. *Costle,* 597 F.2d 306, 311 (1st Cir. 1979) ("The legislative history clearly makes cost an acceptable consideration in determining whether the intake design 'reflect[s] the best technology available' "); *Hudson Riverkeeper Fund, Inc.* v. *Orange & Rockland Util., Inc.* 835 F. Supp. 160, 165–66 (S.D.N.Y. 1993).

3. Authority To Allow Site-Specific Determination of BTA To Minimize AEI Based on a Cost-Cost Comparison

The final rule allows a facility to pursue a site-specific determination of "best technology available to minimize adverse environmental impact" where the facility can demonstrate that its costs of compliance under the compliance alternatives in §125.94(a)(2) through (4) would be significantly greater than the costs considered by the Administrator for a like facility in establishing the performance standard.

Some commenters argue that CWA section 316(b) does not authorize EPA to provide for a site-specific assessment of "best technology available." These commenters argued that EPA was required under CWA section 316(b) to set a national standard for "best technology available" (BTA), at least as stringent as the national standard for "best available technology" (BAT) under CWA section 301. These commenters asserted that the similar wording of the BTA and BAT requirements, and the fact that CWA section 316(b) explicitly references CWA section 301 as the basis for its application, indicates legislative intent to equate BTA with BAT and thus requires a national—not site-specific—standard.

EPA disagrees. The CWA section 316(b) authorizes a site-specific determination of BTA. Although, the CWA section 316(b) authorizes EPA to promulgate national categorical requirements, EPA also notes that the variety of factors to be considered in determining these requirements—such as location and design—indicate that site-specific conditions can be highly relevant to the determination of BTA to minimize adverse environmental impact. In addition to specifying "best technology available" in relation to a national categorical performance standard, today's rule also authorizes a site-specific determination of BTA when conditions at the site lead to a more costly array of controls than EPA had expected would be necessary to achieve the applicable performance standards.

This site-specific compliance option is similar to the "fundamentally different factors" provision in CWA section 301(n), which authorizes alternative requirements for sources subject to national technology-based standards for effluent discharges, if the facility can establish that it is fundamentally different with respect to factors considered by EPA in promulgating the national standard. The fundamentally different factors provision was added to the CWA in 1987, but prior to the amendment, both the Second Circuit and the Supreme Court upheld EPA's rules containing provisions for alternative requirements as reasonable interpretations of the statute. *NRDC* v. *EPA,* 537 F.2d 642, 647 (2d Cir. 1976) ("the establishment of the variance clause is a valid exercise of the EPA's rulemaking authority pursuant to section 501(a) which authorizes the Administrator to promulgate regulations which are necessary and proper to implement the Act"); *EPA* v. *National Crushed Stone Ass'n,* 449 U.S. 64 (1980) (approving EPA's alternative requirements provision in a standard adopted pursuant to CWA section 301(b)(1), even though the statute did not expressly permit a variance.) EPA's alternative site-specific compliance option in this rule is similarly a reasonable interpretation of section 316(b) and a valid exercise of its rulemaking authority under CWA section 501.

Based on this interpretation, EPA and State permitting authorities have been implementing CWA section 316(b) on a case by case basis for over 25 years. Such a case-by-case determination of BTA has been recognized by courts as being consistent with the statute. See *Hudson Riverkeeper Fund* v. *Orange and Rockland Util,* 835 F. Supp. 160, 165 (S.D.N.Y. 1993) ("This leaves to the permit writer an opportunity to impose conditions on a case by case basis, consistent with the statute").

Some commenters specifically challenged EPA's authority to consider costs in its site-specific assessment of best technology available. However, as discussed earlier, EPA reasonably interprets CWA section 316(b) to authorize it to consider costs of compliance in determining best technology "available." Therefore, where EPA fails to consider a facility's unusual or disproportionate costs in setting the national requirements for "best technology available," it reasonably authorizes permit authorities to set site-specific alternative limits to account for these costs. See *Riverkeeper* v. *EPA,* slip op. at 25 (2nd Cir. Feb. 3, 2004) (upholding site-specific alternative limits under the Phase I rule for new facilities where a particular facility faces disproportionate compliance costs.)

In addition, EPA notes that—contrary to some commenters' assertions—the rule does not in fact authorize permitting authorities to consider a facility's "ability to pay" in its site-specific assessment of BTA. It only allows consideration of whether the facility has unusual or disproportionate compliance costs relative to those considered in establishing the performance standards—not whether the facility has the financial resources to pay for the required technology. Moreover, in setting the alternative BTA requirements, the permit authorities may depart from the rule's national technology-based standards only insofar as necessary to account for the unusual circumstances not considered by the Agency during its rulemaking.

4. Authority To Allow Site-Specific Assessment of BTA Where Facility's Costs of Compliance Are Significantly Greater Than Benefits of Compliance

Some commenters objected to the second site specific regulatory option—authorizing a site-specific determination of best technology available where the facility can demonstrate that its costs of compliance under §125.94(a)(2) through (4) would be significantly greater than the benefits of complying with the applicable performance requirements at the facility. These commenters argue that a cost-benefit decision making criterion is not authorized under the CWA. Many of these commenters assert

that while it may be reasonable for EPA to exclude technologies if their costs are "wholly disproportionate" to the benefits to be achieved, EPA lacks the statutory authority to conduct a formal cost/benefit analysis to determine the best technology available on a site-specific basis.

EPA believes that the Clean Water Act authorizes a site-specific determination of the best technology available to *minimize* adverse environmental impact where the costs of compliance with the rule's performance standards are significantly greater than its benefits. This authority stems from the statutory language of CWA section 316(b). As discussed in Section III above, Section 316(b) requires that cooling water intake structures reflect the best technology available for minimizing adverse environmental impact. The object of the "best technology available" is explicitly articulated by reference to the receiving water: to minimize adverse environmental impact in the waters from which cooling water is withdrawn. In contrast, under section 301 the goal of BAT is explicitly articulated by reference to a different purpose, to make reasonable further progress toward the national goal of eliminating the discharge of all pollutants (section 301(b)(2)(A)). Similarly, under section 304, the goal of BPT and BCT is explicitly articulated by reference to the degree of effluent reduction attainable. (section 304(b)(1)(A) and section 304(b)(4)(A)). EPA has previously considered the costs of technologies in relation to the benefits of minimizing adverse environmental impact in establishing 316(b) limits, which historically have been done on a case-by-case basis. *See, e.g., In Re Public Service Co. of New Hampshire*, 10 ERC 1257 (June 17, 1977); *In Re Public Service Co. of New Hampshire*, 1 EAD 455 (Aug. 4, 1978); *Seacoast Anti-Pollution League* v. *Costle*, 597 F. 2d 306 (1st Cir. 1979). Under CWA section 316(b), EPA may consider the benefits that the technology-based standard would produce in a particular waterbody, to ensure that it will "minimize adverse environmental impact." EPA believes that the technology-based standards established in this final rule will, as a national matter, "minimize adverse environmental impact." However, the degree of minimization contemplated by the national performance standards may not be justified by site-specific conditions. In other words, depending on the circumstances of the receiving water, it may be that application of less stringent controls than those that would otherwise be required by the performance standards will achieve the statutory requirement to "minimize" adverse environmental impact, when considered in light of economic practicability. An extreme example is a highly degraded ship channel with few fish and shellfish, but such situations can only be identified and addressed through a site-specific assessment.

For these reasons, EPA reasonably interprets the phrase "minimize adverse environmental impact" in section 316(b) to authorize a site-specific consideration of the benefits of the technology-based standard on the receiving water. EPA continues to believe that any impingement or entrainment would be an adverse environmental impact, but has determined that 316(b) does not require minimization of adverse environmental impact beyond that which can be achieved at a cost that is economically practicable. EPA believes that the relationship between costs and benefits is one component of economic practicability for purposes of section 316(b), and as noted previously, the legislative history indicates that economic practicability may be considered in determining what is best technology *available* for purposes of 316(b). EPA believes that allowing a relaxation of the performance standards when costs significantly exceed benefits, but only to the extent justified by the significantly greater costs, is a reasonable way of ensuring that adverse environmental impact be minimized at an economically practicable cost. This does not mean that there is a need to make a finding of "adverse environmental impact" before performance standard based CWA section 316(b) requirements would apply. Rather, EPA is authorizing an exception to performance standard based requirements on a site-specific basis in limited circumstances: when the costs of complying with the national performance standards are significantly greater than the benefits of compliance at a particular site.

5. Authority To Allow Restoration To Comply With the Rule Requirements

The final rule authorizes the use of restoration measures that produce and result in increases of fish and shellfish in a facility's watershed in place of, or as a supplement to, installing design and control technologies and/or operational measures that reduce impingement mortality and entrainment. Restoration measures can include a wide range of activities including measures to enhance fish habitat and reduce stresses on aquatic life; creation of new habitats to serve as spawning or nursery areas, and creation of a fish hatchery and/or restocking of fish being impinged and entrained with fish that perform a substantially similar function in the aquatic community.

While the Phase I rule also authorized use of restoration measures, today's rule includes additional regulatory controls on the use of restoration measures to ensure that they are used appropriately to comply with the applicable performance requirements or site specific alternative requirements. For example, restoration measures are authorized only after a facility demonstrates to the permitting authority that it has evaluated other design and construction technologies and operational measures and determined that they are less feasible, less cost-effective, or less environmentally desirable than meeting the performance standards or alternative site-specific requirements in whole or in part through the use of restoration measures. The facility must also demonstrate that the proposed restoration measures will produce ecological benefits (*i.e.*, the production of fish and shellfish for the facility's waterbody or watershed, including maintenance of community structure and function) at a level that is substantially similar to the level a facility would achieve through compliance with the applicable performance standards or alternative site-specific requirements. Further, the permitting authority must review and approve the restoration plan to determine whether the proposed restoration measures will meet the applicable performance standards or site specific alternative requirements. Consequently, the restoration provisions of today's rule are designed to minimize adverse environmental impact to a degree that is comparable to the other technologies on which the rule is based.

The use of restoration to meet the requirements of section 316(b) is consistent with the goals of the Clean Water Act: measures that restore fish and shellfish to compensate for those that are impinged and entrained further the objective of the Clean Water Act "to restore, maintain, and protect the biological integrity of the nation's waters." 33 U.S.C. 1251(a) (emphasis added). It is also consistent with EPA's and States' past practices in implementing section 316(b) in individual permit decisions. For at least twenty years, EPA and States have authorized existing facilities to comply with section 316(b) requirements, at least in part, through the use of restoration measures. For example, the Chalk Point Generating Station, located on the Patuxent River in Prince George's

County, Maryland constructed a fish rearing facility in partial compliance of its 316(b) obligations (DCN–1–5023–PR).

Although the United States Court of Appeals for the Second Circuit recently remanded the portion of EPA's Phase I new facility rule that authorized restoration measures to meet that rule's requirements, EPA believes that portion of the decision should not apply to this Phase II rulemaking. Indeed, the Second Circuit explicitly stated that "[i]n no way [does it] mean to predetermine the factors and standard applicable to Phase II and III of the rulemaking." *Riverkeeper* v. *EPA*, slip op. at 12, note 13 (2nd Cir. Feb. 3, 2004). This is probably because there are important differences between new and existing facilities that warrant interpreting section 316(b) more broadly to give existing facilities additional flexibility to comply with section 316(b). As noted above, restoration measures have been used to comply with section 316(b) limits at existing facilities for several years because of the more limited availability of other technologies for existing facilities. Costs to retrofit an existing facility to install a "hard" technology can be much higher than costs to install one at the time a facility is constructed, and those costs can vary considerably from site to site. Thus, the range of technologies that are "available" to existing facilities to meet the performance standards is narrower than the range of technologies available to new facilities.

In recognition of the vast differences between existing and new facilities, Congress established separate sections in the Clean Water Act for establishing discharge limitations on existing and new facilities. Effluent limitations guidelines for existing facilities are established under sections 301 and 304, whereas new source performance standards are established under section 306. Those sections set out two distinct sets of factors for developing effluent limitations guidelines for existing facilities and new source performance standards for new facilities. Notably, there are only two factors explicitly stated in section 306 for the Administrator to consider in establishing new source performance standards—cost and non-water quality impacts, whereas for existing facilities Congress calls upon EPA to consider a much broader range of factors in section 304(b)(2)(b):

> the age of equipment and facilities involved, the process employed, the engineering aspects . . . of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impacts (including energy requirements), and such other factors as [EPA] deems appropriate.

This list reflects the wide range of facility characteristics and circumstances that can influence the feasibility and availability of a particular technology across a particular industry. Existing facilities generally face more and different problems than new facilities because of the technological challenges and high costs associated with retrofitting as compared to building a new facility. Indeed, by including the phrase "and such other factors as [EPA] deems appropriate," Congress made certain that EPA would have sufficient flexibility in establishing limitations for existing facilities to consider all relevant factors.

For several other reasons, EPA believes the Second Circuit decision is not binding on this Phase II rule. First, section 316(b) requires the design of a cooling water intake structure to reflect the best technology available to "minimize adverse environmental impact." The phrase "minimize adverse environmental impact "is not defined in section 316(b). For the Phase II rule, EPA interprets this phrase to allow facilities to minimize adverse environmental impact by reducing impingement and entrainment, or to minimize adverse environmental impact by compensating for those impacts after the fact. Section 316(b) does not explicitly state when the adverse environmental impact of cooling water structures must be minimized—that is whether they must be prevented from occurring in the first place or compensated for after the fact or where the minimization most occurs—at the point of intake or at some other location in the same watershed. Therefore, under *Chevron*, EPA is authorized to define "minimize" to authorize restoration at existing facilities to minimize the effects of adverse environmental impact.

In another context under the Clean Water Act, EPA has interpreted authority to "minimize adverse effects" as including authority to require environmental restoration. Section 404 of the CWA authorizes the Army Corps of Engineers to issue permits for discharges of dredged or fill material into waters of the United States. EPA was granted authority to establish regulations containing environmental guidelines to be met by the Corps in issuing section 404 permits. See CWA section 404(b)(1). Current regulations, in place since 1980, prohibit a discharge unless, among other requirements, all practicable steps are taken to avoid, minimize and mitigate for the environmental effects of a discharge. See 40 CFR 230.10. Of particular relevance here, the regulations require that steps be taken to "minimize potential adverse effects of the discharge on the aquatic ecosystem" 40 CFR 230.10(d). EPA has specifically defined minimization steps to include environmental restoration. See 40 CFR 230.75(d) ("Habitat development and restoration techniques can be used to minimize adverse impacts and to compensate for destroyed habitat").

Moreover, at the time of the Phase I litigation, EPA had not interpreted the term "reflect" in section 316(b), and therefore, the Second Circuit did not consider its meaning in determining whether restoration could be used as a design technology to meet the Phase I rule requirements. Section 316(b) requires that "the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." (emphasis supplied). The term "reflect" is significant in two respects. First, it indicates that the design, location, construction and capacity of the cooling water intake structure itself must be based on the best technology available for such structures. This authorizes EPA to identify technologies that can be incorporated into the physical structure of the intake equipment. It also indicates that the choice of what actually is the best physical configuration of a particular cooling water intake structure can take into account, *i.e.*, reflect, other technologies—and their effects—that are not incorporated into the structure itself. For example, barrier nets are not incorporated into the physical design of the cooling water intake structure, but their use—and effectiveness—influences the physical design of the cooling water intake structure. Another relevant example is the technology known as "closed-cycle" cooling. Although this technology is physically independent of the cooling water intake structure, it directly influences decisions regarding the design capacity of the cooling water intake structure: as more cooling water is recycled, less needs to be withdrawn. Both barrier nets and closed-cycle cooling are considered "design" technologies. Similarly, properly designed restoration measures can be best technologies available that can influence the design of the physical cooling water intake structure. To put it another way, for purposes of minimizing adverse environmental impact, requirements for cooling water intake structures reflect a variety of best technologies available, which EPA

construes to include restoration measures. A dry cooling system is another example of a technology that although physically independent of the cooling water intake structure is nonetheless considered an acceptable method to minimize adverse environmental impacts. In fact, since a dry cooling system uses air as a cooling medium, it uses little or no water, dispensing altogether with the need for a cooling water intake structure.

EPA has discretion to characterize restoration measures as technologies for purposes of section 316(b). Section 316(b) does not define either the phrase "cooling water intake structure" or the term "technology" and, therefore, leaves their interpretation to EPA. EPA has defined the phrase cooling water intake structure in today's rule to mean the total physical structure and any associated waterways used to withdraw cooling water from waters of the United States. This definition embraces elements both internal and external to the intake equipment. EPA did not define the term technology in today's rule, but looked for guidance to section 304(b), which the Second Circuit has recognized can help illuminate section 316(b). Section 301(b)(2) best available technology limitations are based on factors set forth in section 304(b). Section 304(b), while not using the term technology, discusses the "application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives." This is a broad, non-exclusive list. Indeed, BAT effluent limitations guidelines under this authority have been based on a vast array of treatment techniques, operation practices (including chemical substitution), and management practices. See 40 CFR Part 420 (effluent guidelines for concentrated animal feeding operations); 40 CFR Part 430, Subparts B & E (effluent guideline for pulp and paper industry); See also 62 FR 18504 (April 15, 1998).

Employing this broad concept of technology, in today's rule EPA has determined that the design of cooling water intake structures may reflect technologies relating to the restoration of fish and shellfish in the waters from which cooling water is withdrawn. Restoration is not included in the definition of "design and construction technology" in today's rule so as to distinguish restoration from "hard" technologies for purposes of the rule. Under the regulatory scheme of the final rule, restoration is treated differently than other technologies for several purposes, all of which are to help ensure that restoration projects achieve substantially similar performance as design and construction technologies and/or operational measures. When these restoration technologies are used they must produce ecological benefits (the production of fish and shellfish for a facility's waterbody or watershed, including maintenance of community structure and function) at a level that is substantially similar to the level the facility would achieve by using other design and construction technologies and/or operational measures to achieve the applicable performance standards or alternative site-specific performance requirements in § 125.94. In other words, the operation of the cooling water intake structure together with these restoration technologies will achieve the overall performance objective of the statute: to minimize the adverse environmental impact of withdrawing cooling water. For facilities using this authority, their hardware decisions for the cooling water intake structure thus take into account—or reflect—the impacts of restoration technology.

EPA acknowledges that in 1982, when Congress was considering substantial amendments to the Clean Water Act, EPA testified in support of a proposed amendment to CWA section 316(b) that would have expressly authorized the use of restoration measures as a compliance option, suggesting that EPA may have interpreted section 316(b) at that time as not authorizing restoration measures to minimize the adverse environmental impact of cooling water intake structures. In EPA's view, the Second Circuit gave undue weight to that testimony, particularly because it was provided before the Supreme Court's decision in *Chevron U.S.A.* v. *Natural Resources Defense Council,* 467 U.S. 837 (1984), which gave administrative agencies latitude to fill in the gaps created by ambiguities in statutes the agencies have been charged by Congress to implement. For at least twenty years, EPA and States have authorized existing facilities to comply with section 316(b) requirements, at least in part, through the use of restoration measures. Additionally, since 1982 EPA has gathered substantially more data to inform its judgment regarding cooling water intake structures, the environmental impact resulting from them, and various technologies available to reduce impingement and entrainment. Finally, EPA notes that, in contrast to water quality based effluent limitations that are included in NPDES permits to meet water quality standards, the required performance of restoration measures under this final rule is not tied to conditions in the water body. Rather it is tied directly to the performance standards, just as is the performance of the other technologies that facilities may use to meet the standards. While the design and operation of restoration measures will necessarily be linked to conditions in the waterbody (as is also the case for "hard" technologies) the performance standards that restoration measures must meet are not.

6. Authority To Apply CWA Section 316(b) Requirements to Existing Facilities

Some commenters argued that CWA § 316(b) does not apply to existing facilities, but rather authorizes only a one-time, pre-construction review of cooling water intake structure location, design, construction and capacity.

EPA disagrees with this assertion. CWA section 316(b) applies to "any standard established pursuant to section 1311 [CWA section 301] or section 1316 [CWA section 306]." CWA section 301 establishes the statutory authority for EPA to promulgate technology-based standards for effluent discharges from existing sources. Therefore, CWA section 316(b) requirements can, and indeed must, apply to existing facilities. Given that section 316(b) requirements apply to existing facilities, such requirements cannot reasonably be viewed as mandating only a one-time, pre-construction review. Moreover, as the court noted in *Riverkeeper* v. *EPA*, slip op. at 44–45 (2nd Cir. Feb. 3, 2004), "if Congress intended to grandfather in new or modified intake structures as well as the related point sources that discharge heat, it could have done so in section 316(c)."

7. Authority To Regulate "Capacity" of the "Intake Structure" Through Restrictions on Flow Volume

Some commenters asserted that EPA was not authorized to require closed-cycle cooling systems, pointing out that CWA section 316(b) addresses cooling water "intake structures," not cooling systems or cooling operations. EPA's performance standards based on closed-cycle cooling, they argued, constitutes an impermissible restriction of the cooling system or operation, which is not part of the "intake structure" itself. Others asserted that the term "capacity," as used in CWA section 316(b), refers to the size of the cooling water intake structure, not the volume of flow through the intake. They therefore questioned EPA's authority to regulate flow volume by requiring the use of closed-cycle cooling systems.

The rule does not in fact require the use of closed-cycle cooling systems. Rather, the rule provides facilities with five different compliance options, only one of which is based on closed-cycle cooling technology. Moreover, EPA is authorized to set performance standards based on closed-cycle cooling technology, as it did in the Phase I rule, which was upheld in *Riverkeeper* v. *EPA*, slip op. (2nd Cir. Feb. 3, 2004). See also Section III.

8. Authority To Determine That Technologies Short of Closed-cycle Cooling Constitute "Best Technology Available To Minimize Adverse Environmental Impact"

Many commenters asserted that closed-cycle cooling is the "best technology available to minimize adverse environmental impact," and that EPA must therefore require facilities to reduce their cooling water intake capacity to a level commensurate with closed-cycle cooling. According to these commenters, this rule violates CWA section 316(b) by adopting performance standards less protective than "best technology available."

EPA reasonably rejected closed-cycle cooling systems as "best technology available" based on consideration of relevant factors, including the costs of closed-cycle cooling, the energy impacts, the relative effectiveness of closed-cycle cooling in minimizing impingement and entrainment in variable waterbodies, and the availability of other design and control technologies that can be effective in significantly reducing environmental impacts. As the court held in *Riverkeeper* v. *EPA*, slip op. at 29 (2nd Cir. Feb. 3, 2004), "the Clean Water Act allows EPA to make a choice among alternatives based on more than impingement and entrainment." In short, EPA has discretion to consider a variety of factors besides the efficacy of technologies, including cost, and to compare the relative effectiveness of technologies that reduce impingement and entrainment. EPA's weighing of the factors is entitled to a high degree of deference. See also Section III and VII.

9. Authority To Require Implementation of CWA Section 316(b) Through NPDES Permits

Some commenters argued that EPA lacks authority to include section 316(b) requirements in section 402 NPDES permits, because—unlike sections 301, 306, and 402—section 316(b) regulates "intakes" and not "discharges."

EPA disagrees with this comment. This rule properly requires implementation of CWA section 316(b) standards through CWA section 402 NPDES permits. CWA section 402(a)(1) authorizes the issuance of NPDES permits for discharges that comply with effluent guidelines limitations under CWA sections 301 and 306. CWA section 316(b) requirements can be implemented through CWA section 402 because they apply to all point sources subject to standards issued under CWA sections 301 and 306. *See, U.S. Steel Corp* v. *Train*, 556 F.2d 822, 850 (7th Cir. 1977) (finding that CWA section 402 implicitly requires that CWA section 316(b) be implemented through NPDES permits). EPA's choice of NPDES permits, which already reflect CWA sections 301 and 306 effluent limitations, is reasonable.

10. Authority To Implement CWA Section 316(b) Requirements Without Compensating Regulated Entities for "Taking" of Property

Several commenters suggest that this rule authorizes an impermissible regulatory taking. Specifically, they argue that the rule requires facilities to limit their intake flows, thus impairing their property rights to the water and entitling them to compensation under the Fifth Amendment to the U.S. Constitution.

EPA notes, however, that the rule does not in fact require a facility to limit its intake flows. Rather, it provides a facility with a variety of compliance options, only one of which is based on flow limitations. While a facility could choose to comply with the section 316(b) requirements by reducing its intake flow to a level commensurate with a closed-cycle cooling system (the first compliance option), it could also select one of the other compliance options that does not require flow restrictions. EPA therefore believes that this rule does not authorize a compensable "taking" of property within the meaning of the Fifth Amendment.

IX. Implementation

As in the Phase I rule, section 316(b) requirements for Phase II existing facilities will be implemented through the NPDES permit program. Today's final rule establishes application requirements in §§ 122.21 and 125.95, monitoring requirements in § 125.96, and record keeping and reporting requirements in § 125.97 for Phase II existing facilities. The final regulations also require the Director to review application materials submitted by each regulated facility and include monitoring and record keeping requirements in the permit (§ 125.98). EPA will develop a model permit and permitting guidance to assist Directors in implementing these requirements. In addition, the Agency will develop implementation guidance for owners and operators that will address how to comply with the application requirements, the sampling and monitoring requirements, and the record keeping and reporting requirements in these final regulations.

In this final rule, an existing facility may choose one of five compliance alternatives for establishing best technology available for minimizing adverse environmental impact at the site:

(1) Demonstrate that it will reduce or has reduced its intake flow commensurate with a closed-cycle recirculating system and is therefore deemed to have met the impingement mortality and entrainment performance standards, or that it will reduce or has reduced the design intake velocity of its cooling water intake structure to 0.5 feet per second (ft/s) and is therefore deemed to have met the impingement mortality performance standards;

(2) Demonstrate that its existing design and construction technologies, operational measures, and/or restoration measures meet the performance standards and/or restoration requirements;

(3) Demonstrate that it has selected and will install and properly operate and maintain design and construction technologies, operational measures, and/or restoration measures that will, in combination with any existing design and construction technologies, operational measures, and/or restoration measures, meet the specified performance standards and/or restoration requirements;

(4) Demonstrate that it meets the applicability criteria for a rule-specified technology or a technology that has been pre-approved by the Director and that it has installed, or will install, and will properly operate and maintain the technology; or,

(5) Demonstrate that it is eligible for a site-specific determination of best technology available to minimize adverse environmental impact and that it has selected, installed, and is properly operating and maintaining, or will install and properly operate and maintain design and construction technologies, operational measures, and/or restoration measures that the Director has determined to be the best technology available to minimize adverse environmental impact for the facility.

The application, monitoring, record keeping, and reporting requirements for

each of the compliance alternatives are detailed in the following sections.

A. When Does the Final Rule Become Effective?

This rule becomes effective sixty (60) days after the date of publication in the **Federal Register**. After the effective date of the regulation, existing facilities will need to comply when an NPDES permit containing requirements consistent with Subpart J is issued to the facility (see § 125.92). Under current NPDES program regulations, this will occur when an existing NPDES permit is reissued or, when an existing permit is modified or revoked and reissued. Under today's rule, a facility that is required to comply with this rule within the first four years after the publication date of this rule may request that the Director approve an extended schedule for submitting its Comprehensive Demonstration Study. This schedule must be as expeditious as practicable and not extend beyond three years and 180 days after the publication date of the final rule. The Comprehensive Demonstration Study, once submitted, forms the basis for the Director's determination of specific requirements consistent with Subpart J to be included in the permit. EPA has included this provision to afford facilities time to collect information and perform studies, including pilot studies where necessary, needed to support the development of the Comprehensive Demonstration Study.

Between the time the existing permit expires and the time an NPDES permit containing requirements consistent with this subpart is issued to the facility, permit requirements reflecting the best technology available to minimize adverse environmental impact will continue to be determined based on the Director's best professional judgement.

B. What Information Must I Submit to the Director When I Apply for My Reissued NPDES Permit?

The NPDES regulations governing the permit application process at 40 CFR 122.21 require that facilities currently holding a permit submit an application for permit renewal 180 days prior to the end of the current permit term, which is five years (see § 122.21(d)(2)). If you are the owner or operator of a facility that is subject to this final rule, you will be required to submit the information specified at 40 CFR 122.21(r)(2), (3), and (5) and all applicable sections of § 125.95, except for the Proposal for Information Collection, with your application for permit reissuance.

The Proposal for Information Collection component of § 125.95 should be submitted to the Director for review and comment prior to the start of information collection activities. For a typical facility that plans to install a technology, it is estimated that a facility would need to submit this Proposal for Information Collection about fifteen (15) months prior to the submission of the remainder of the required information, which is about twenty-one (21) months prior to the expiration of your current permit. This approximate timing is based on the sequential Comprehensive Demonstration Study requirements and the estimated level of effort required to complete the studies and allow time for the Director's review and approval. The timing provided in this section is for illustrative purposes only and represents a schedule that the average facility may need to follow to meet the deadlines established in today's rule. Some facilities may require more, or less time to perform the studies and prepare the application requirements. All facilities, except those that choose to comply with the rule by reducing intake capacity to a level commensurate with a closed-cycle recirculating system in accordance with § 125.94(a)(1)(i), or by adopting a pre-approved technology in accordance with § 125.94(a)(4) must submit a Proposal for Information Collection for review and comment by the Director (§ 125.95(b)(1)). Facilities that comply with impingement mortality requirements by reducing intake velocity to 0.5 ft/s or less in accordance with § 125.95(a)(1)(ii) will only need to submit a Comprehensive Demonstration Study, including a Proposal for Information Collection, for entrainment reduction requirements, if applicable. The Proposal for Information Collection requirements are detailed later in this section. Figure 1 presents an example of a possible timeframe a facility may follow in preparing and submitting application components.

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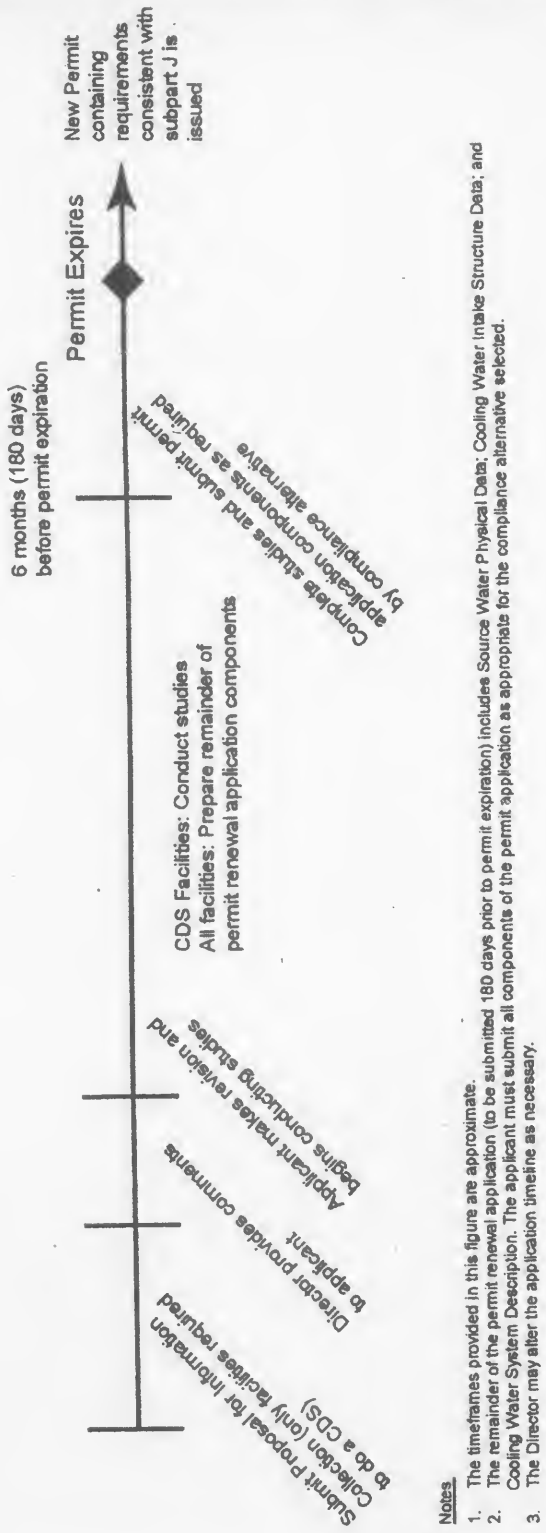

Figure 1. Sample Application Timeline

Following submission of the Proposal for Information Collection, the Director will review and provide comments on the proposal. During this time, the facility may proceed with planning, assessment, and data collection

activities in fulfillment of Comprehensive Demonstration Study requirements. The Director is encouraged to provide comments expeditiously (*i.e.*, within 60 days) so the permit applicant can make responsive modifications to its information gathering activities.

It is assumed that most facilities would need approximately one year to complete the studies outlined in the Proposal for Information Collection. These must be completed at least 180 days prior to the end of the current permit term, by which time the remainder of required application information must be submitted. If the facility requires more than one year to complete studies described in the Proposal for Information Collection, the facility are encouraged to consult with the Director. Facilities are also encouraged to consult with the Director regarding their schedule for study completion.

After the first permit containing requirements consistent with Subpart J is issued, facilities may submit a request to their Director soliciting a reduced information collection effort for subsequent permit applications in accordance with § 125.95(a)(3), which allows facilities to demonstrate that the conditions at their facility and within the waterbody in which their intake is located remain substantially unchanged since their previous permit application. The request for reduced cooling water intake structure and waterbody application information must contain a list and justification for each information item in §§ 122.21(r) and 125.95(b) that has not changed since the previous permit application. The applicant must submit this request at least one year prior to the expiration of the current permit term and the Director is required to act on the request within 60 days.

The Director must review and approve the information you provide in your permit application, confirm whether your facility should be regulated as an existing facility under these final regulations, or under Phase III regulations for existing facilities that will be developed in the future, or as a new facility under regulations that were published on December 19, 2001 (66 FR 65256), and confirm the compliance alternative selected (compliance alternatives 1, 2, 3, 4, or 5). Following review and approval of your permit application, the Director will develop a draft permit for public notice and comment. The comment period will allow the facility and other interested parties to review the draft permit conditions and provide comments to the Director. The Director will consider all public comments received on the draft permit and develop a final permit based upon the application studies submitted and other information submitted during the comment period, as appropriate. The Director will incorporate the relevant requirements for the facility's cooling water intake structure(s) into the final permit.

Today's final rule modifies regulations at 40 CFR 122.21(r) to require Phase II existing facilities to prepare and submit some of the same information required for new facilities. Phase II existing facilities are required to submit two general categories of information when they apply for a reissued NPDES permit: (1) Physical data to characterize the source waterbody in the vicinity where the cooling water intake structures are located (40 CFR 122.21(r)(2)), and (2) data to characterize the design and operation of the cooling water intake structures (40 CFR 122.21(r)(3)). Unlike new facilities, however, Phase II existing facilities are not required to submit the Source Water Baseline Biological Characterization Data required under 40 CFR 122.21(r)(4). Today's final rule adds a new requirement at 40 CFR 122.21(r)(5) to require a facility to submit information describing the design and operating characteristics of its cooling water system(s) and how it/they relate to the cooling water intake structure(s) at the facility.

In addition, today's final rule requires all Phase II existing facilities to submit the information required under § 125.95 consistent with the compliance alternative selected. In general, the final application requirements in § 125.95 require most Phase II existing facility applicants to submit some or all of the components of a Comprehensive Demonstration Study (§ 125.95(b), see also Exhibit II in section V). As noted in section V, facilities that do not need to conduct a Comprehensive Demonstration Study are those that (1) reduce their flow commensurate with a closed cycle, recirculating cooling system, (2) install a rule-specified or Director-approved technology in accordance with § 125.99 (except that these facilities must still submit a Technology Installation and Operation Plan and Verification Monitoring Plan), or (3) reduce intake velocity to 0.5 ft/s or less (except that these facilities must still submit a Comprehensive Demonstration Study for entrainment requirements, if applicable).

Each component of the Comprehensive Demonstration Study and its applicability is described later in this section. In addition, the requirements for each of the five compliance alternatives are detailed, with respect to which components are required for each alternative.

1. Source Water Physical Data (40 CFR 122.21(r)(2))

Under the final requirements at 40 CFR 122.21(r)(1)(ii), Phase II existing facilities subject to this final rule are required to provide the source water physical data specified at 40 CFR 122.21(r)(2) in their application for a reissued permit. These data are needed to characterize the facility and evaluate the type of waterbody and species potentially affected by the cooling water intake structure. The Director is expected to use this information to evaluate the appropriateness of the design and construction technologies, operational measures, and/or restoration measures proposed by the applicant.

The applicant is required to submit the following specific data: (1) A narrative description and scaled drawings showing the physical configuration of all source waterbodies used by the facility, including areal dimensions, depths, salinity and temperature regimes, and other documentation that supports the facility's determination of the waterbody type where each cooling water intake structure is located; (2) an identification and characterization of the source waterbody's hydrological and geomorphological features, as well as the methods used to conduct any physical studies to determine the intake's area of influence within the waterbody and the results of such studies; and (3) locational maps.

2. Cooling Water Intake Structure Data (40 CFR 122.21(r)(3))

Under the final requirements at 40 CFR 122.21(r)(1)(ii), Phase II existing facilities are required to submit the data specified at 40 CFR 122.21(r)(3) to characterize the cooling water intake structure which should assist in the evaluation of its potential for impingement and entrainment of aquatic organisms. Information on the design of the intake structure and its location in the water column, in conjunction with biological information, will allow the permit writer to evaluate which species, or life stages of a species, are potentially subject to impingement and entrainment. A diagram of the facility's water balance should be used to identify the proportion of intake water used for cooling, make-up, and process water. The water balance diagram also provides a picture of the total flow in and out of the facility,

allowing the permit writer to evaluate the suitability of proposed design and construction technologies and/or operational measures.

The applicant is required to submit the following specific data: (1) A narrative description of the configuration of each of its cooling water intake structures and where they are located in the waterbody and in the water column; (2) latitude and longitude in degrees, minutes, and seconds for each of its cooling water intake structures; (3) a narrative description of the operation of each of the cooling water intake structures, including design intake flows, daily hours of operation, number of days of the year in operation, and seasonal operation schedules, if applicable; (4) a flow distribution and water balance diagram that includes all sources of water to the facility, recirculating flows, and discharges; and (5) engineering drawings of the cooling water intake structure(s).

3. Cooling Water System Data (40 CFR 122.21(r)(5))

Under the final requirements at 40 CFR 122.22(r)(1)(ii), Phase II existing facilities are required to submit the cooling water system data specified at 40 CFR 122.21(r)(5) to characterize the operation of cooling water systems and their relationship to the cooling water intake structure(s) at the facility. Also required is a narrative description of the proportion of design intake flow that is used in the system, the number of days of the year that the cooling water system is in operation, and any seasonal changes in the operation of the system, if applicable. The facility must also submit design and engineering calculations prepared by a qualified expert, such as a professional engineer, and supporting data to support the narrative description. This information is expected to be used by the applicant and the Director in determining the appropriate standards that can be applied to the Phase II facility.

4. Comprehensive Demonstration Study (§ 125.95(b))

Final requirements at § 125.95(b) require all existing facilities, except those deemed to have met the performance standards by reducing intake capacity to a level commensurate with the use of a closed-cycle, recirculating cooling water system, or by reducing intake velocity to 0.5 ft/s or less (impingement mortality standards only), or facilities that select an approved technology in accordance with § 125.94(a)(4), to perform and submit to the Director all applicable components of a Comprehensive Demonstration Study, including data and detailed analyses to demonstrate that they will meet applicable requirements in § 125.94(b). As noted in section V, Comprehensive Demonstration Study requirements vary depending on the compliance alternative selected.

The Comprehensive Demonstration Study has seven components:

- Proposal for Information Collection;
- Source Waterbody Flow Information;
- Impingement Mortality and/or Entrainment Characterization Study;
- Technology and Compliance Assessment Information;
- Restoration Plan;
- Information to Support Site-specific Determination of Best Technology Available for Minimizing Adverse Environmental Impact; and
- Verification Monitoring Plan.

All Phase II existing facilities, except those mentioned above, are required to submit at a minimum the following: a Proposal for Information Collection (§ 125.95(b)(1)); Source Waterbody Flow Information (§ 125.95(b)(2)); an Impingement Mortality and/or Entrainment Characterization Study (§ 125.95(b)(3)); and a Verification Monitoring Plan (§ 125.95(b)(7)). Note that facilities selecting restoration measures provide a monitoring plan as part of their Restoration Plan, in accordance with § 125.95(b)(5)(v), rather than a Verification Monitoring Plan in accordance with § 125.95(b)(7). The requirements in these two provisions are similar, but tailored specifically to the monitoring needs of restoration projects, and design and construction technologies and operational measures, respectively. Phase II existing facilities that have reduced their intake velocity to less than or equal to 0.5 ft/s but are still required to reduce entrainment (if the standard applies), must submit only those components of the Impingement Mortality and/or Entrainment Characterization Study pertaining to entrainment, in addition to the other required components of the Comprehensive Demonstration Study. Facilities that are required to meet only the impingement mortality reduction requirements in § 125.94(b), are required to submit a study only for the impingement reduction requirements.

Facilities that comply with applicable requirements either wholly or in part through the use of existing or proposed design and construction technologies or in part through the use of existing or proposed design and construction technologies, and/or operational measures must submit the Technology and Compliance Assessment Information in § 125.95(b)(4), consisting of a Design and Construction Technology Plan (§ 125.95(b)(4)(i)) and a Technology Installation and Operation Plan (§ 125.95(b)(4)(ii)). (Facilities that use a pre-approved technology in accordance with § 125.94(b)(4) need only submit the Technology Installation and Operation Plan.) The Technology Installation and Operation Plan explains how the facility intends to install, operate, maintain, monitor, and adaptively manage the selected technologies to meet the applicable performance standards or site-specific technology requirements, and in most cases will provide the basis for determining compliance with § 125.94(b).

Only those Phase II existing facilities that propose to use restoration measures wholly or in part to meet the performance standards in § 125.94(b) or site-specific requirements developed pursuant to § 125.94(a)(5) are required to submit the Restoration Plan (§ 125.95(b)(5)). This Plan serves an analogous function for restoration measures to that served by the Technology and Compliance Assessment Information for design and construction technologies and operational measures, in that it shows the design of the measures, explains how the facility will construct, maintain, monitor, and adaptively manage the measures to meet applicable performance standards and/or site specific requirements, and serves as a basis for determining compliance.

Only those Phase II existing facilities who request a site-specific determination of the best technology available are required to submit Information to Support Site-specific Determination of Best Technology Available for Minimizing Adverse Environmental Impact (§ 125.95(b)(6)). Facilities that select the compliance alternative at § 125.94(a)(4) (Approved Technology), are required to submit only two items: the Technology Installation and Operation Plan (§ 125.95(b)(4)(ii)) and the Verification Monitoring Plan (§ 125.95(b)(7)).

a. Proposal for Information Collection

As a facility, you are required to submit to the Director for review and comment, a proposal stating what information will be collected to support the Comprehensive Demonstration Study (see § 125.95(b)(1)). This proposal must provide the following:

- A description of the proposed and/or implemented technology(ies) and/or restoration measures to be evaluated in the study (§ 125.95(b)(1)(i));

- A list and description of any historical studies characterizing impingement and entrainment and/or the physical and biological conditions in the vicinity of the cooling water intake structures and their relevance to this proposed study (§ 125.95(b)(1)(ii)). If you propose to use existing data, you must demonstrate the extent to which the data are representative of current conditions and that the data were collected using appropriate quality assurance/quality control procedures;
- A summary of any past, ongoing, or voluntary consultations with appropriate Federal, State, and Tribal fish and wildlife agencies that are relevant to this study and a copy of written comments received as a result of such consultation (§ 125.95(b)(1)(iii));
- A sampling plan for any new field studies you propose to conduct in order to ensure that you have sufficient data to develop a scientifically valid estimate of impingement and entrainment at your site (§ 125.95(b)(1)(iv)). The sampling plan must document all methods and quality assurance/quality control procedures for sampling and data analysis. The sampling and data analysis methods you propose must be appropriate for a quantitative survey and must take into account the methods used in other studies performed in the source waterbody. Also, the methods must be consistent with any methods required by the Director. The sampling plan must include a description of the study area (including the area of influence of the cooling water intake structure(s)), and provide taxonomic identifications of the sampled or evaluated biological assemblages (including all life stages of fish and shellfish) to the extent this is known in advance and relevant to the development of the plan.

In addition, the proposal should provide other information, where available, that would aid the Director in reviewing and commenting on your plans for conducting the Comprehensive Demonstration Study (*e.g.*, information on how you plan to conduct a Benefits Valuation Study, or gather additional data to support development of a Restoration Plan). EPA recognizes that in some cases collection and analysis of information will be an iterative process and plans for information collection may change as new data needs are identified. For example, a facility may not be able to design a Benefits Valuation Study and determine what additional data are needed (*e.g.*, quantified information on non-use benefits) until it has first collected and analyzed the data for its Impingement Mortality and/or Entrainment Characterization Study. While the Proposal for Information Collection is only required to be submitted once, EPA encourages permit applicants to consult with the Director as appropriate after the proposal has been submitted, in order to ensure that the Director has complete and appropriate information to develop permit conditions once the permit is submitted.

As stated previously, the proposal for information collection must be submitted prior to the start of information collection activities and should allow sufficient time for review and comment by the Director, although facilities are permitted to begin data collection activities before receiving the Director's comments. Directors are encouraged to provide their comments expeditiously (*i.e.*, within 60 days) to allow facilities time to make responsive modifications in their information collection plans. Adequate time for data collection efforts identified in the proposal for information collection prior to the due date for the permit application should also be scheduled.

b. Source Waterbody Flow Information

Under the requirements at § 125.95(b)(2)(i), Phase II existing facilities (except those that comply with the rule under § 125.94(a)(1)(i) with cooling water intake structures that withdraw cooling water from freshwater rivers or streams are required to provide the documentation showing the mean annual flow of the waterbody and any supporting documentation and engineering calculations that allow a determination of whether they are withdrawing less than or greater than five (5) percent of the annual mean flow. This will provide information needed to determine whether the entrainment performance standards of § 125.94(b)(2) apply to the facility. Two potential sources of the documentation are publicly available flow data from a nearby U.S. Geological Survey (USGS) gauging station or actual instream flow monitoring data collected by the facility. Representative historical data (from a period of time up to 10 years, if available) must be used to make this determination.

Under § 125.95(b)(2)(ii), Phase II existing facilities with cooling water intake structures that withdraw cooling water from a lake (other than one of the Great Lakes) or reservoir and that propose to increase the facility's design intake flow are required to submit a narrative description of the thermal stratification of the waterbody and any supporting documentation and engineering calculations showing that the increased total design intake flow meets the requirement to not disrupt the natural thermal stratification or turnover pattern (where present) of the source water in a way that adversely impacts fisheries, including the results of any consultations with Federal, State, or Tribal fish or wildlife management agencies. Typically, this natural thermal stratification will be defined by the thermocline, which may be affected to a certain extent by the withdrawal of cooler water and the discharge of heated water into the system. If increased total design intake flow is proposed, and disruption of the natural thermal stratification is a positive or neutral impact, the facility should include this information with the data submitted in this section.

c. Impingement Mortality and/or Entrainment Characterization Study (§ 125.95(b)(3))

The final regulations require that you submit the results of an Impingement Mortality and/or Entrainment Characterization Study in accordance with § 125.95(b)(3). If your facility has reduced its design, through-screen intake velocity to less than or equal to 0.5 ft/s, you are not required to submit the impingement mortality component of this study (§ 125.94(a)(1)(ii)). Facilities whose capacity utilization rate is less than 15 percent, facilities that withdraw cooling water only from a lake or reservoir other than one of the Great Lakes, and those facilities that withdraw less than 5 percent of the mean annual flow of a freshwater river or stream would only be required to submit the impingement mortality component of this study because no performance standards for entrainment apply. This Impingement Mortality and Entrainment characterization must include the following: (1) Taxonomic identifications of all life stages of fish, shellfish, and any species protected under Federal, State, or Tribal Law (including threatened or endangered species) that are in the vicinity of the cooling water intake structure(s) and are susceptible to impingement and entrainment; (2) a characterization of all life stages of fish, shellfish, and any species protected under Federal, State, or Tribal Law (including threatened or endangered species) identified in the taxonomic identification noted above, including a description of the abundance and temporal and spatial characteristics in the vicinity of the cooling water intake structure(s), based on sufficient data to characterize annual, seasonal, and diel variations in impingement mortality and entrainment (*e.g.*, related to climate and weather differences, spawning, feeding and water column migration); and (3)

documentation of the current impingement mortality and entrainment of all life stages of fish, shellfish, and any species protected under Federal, State, or Tribal Law (including threatened or endangered species) identified above and an estimate of impingement mortality and entrainment to be used as the calculation baseline. The documentation may include historical data that are representative of the current operation of your facility and of biological conditions at the site. This information must be provided in sufficient detail to support development of the other elements of the Comprehensive Demonstration Study. Thus, while the taxonomic identification in item 1 will need to be fairly comprehensive, the quantitative data required in items 2 and 3 may be more focused on species of concern, and/or species for which data are available.

Impingement mortality and entrainment samples to support the calculations required by the Design and Construction Technology Plan and Restoration Plan must be collected during periods of representative operational flows for the cooling water intake structure and the flows associated with the samples must be documented. EPA recommends that the facility coordinate a review of its list of threatened, endangered, or other protected species with the U.S. Fish and Wildlife Service, National Marine Fisheries Service, or other relevant agencies to ensure that potential impacts to these species have been evaluated.

d. Technology and Compliance Assessment Information (§ 125.95(b)(4))

The Technology and Compliance Assessment Information required under § 125.95(b)(4) is comprised of two parts: (1) The Design and Construction Technology Plan; and (2) the Technology Installation and Operation Plan. If you plan to utilize the compliance alternative in § 125.94(a)(4), you need only submit the Technology Installation and Operation Plan. If you plan to utilize the compliance alternative in § 125.94(a)(2) or (3) using design and construction technologies and/or operational measures (either existing or new), you must submit both parts. Note that facilities seeking a site-specific determination of BTA in accordance with § 125.94(a)(5), must submit a Site-Specific Technology Plan in accordance with § 125.95(b)(6)(iii) rather than a Design and Construction Technology Plan. The two plans contain similar requirements, but are tailored to the compliance alternative selected. Facilities seeking a site-specific determination of the best technology available must submit a Technology Installation and Operation Plan along with their Site-Specific Technology Plan.

The Design and Construction Technology Plan must explain the technologies or operational measures selected by a facility to meet the requirements in § 125.94(a)(2) and (3). The Agency recognizes that selection of the specific technology or group of technologies for your site will depend on individual facility and waterbody conditions. Examples of appropriate technologies may include, but are not limited to, wedgewire screens, fine mesh screens, fish handling and return systems, barrier nets, aquatic filter barrier systems, and enlargement of the cooling water intake structure to reduce velocity. Examples of operational measures include, but are not limited to, seasonal shutdowns or reductions in flow, and continuous or more frequent rotation of travelling screens. Information required as part of your Design and Construction Technology Plan includes the following: (1) capacity utilization rate for your facility (or for individual intake structures where appropriate) and supporting data, including average annual net generation of the facility in megawatt hours (MWh) as measured over a five-year period (if available) of representative operating conditions and the total net capacity of the facility in megawatts (MW) and calculations (§ 125.95(b)(4)(i)); (2) a narrative description of the design and operation of all design and construction technologies and/or operational measures that you have or will put into place to meet the performance standards for reduction of impingement mortality of those species most susceptible to impingement, and information that demonstrates the efficacy of those technologies and/or operational measures for those species; (3) a description of the design and operation of all design and construction technologies or operational measures that you have or will put into place, to meet the performance standards for reduction of entrainment for those species most susceptible to entrainment, if applicable to your facility, and information that demonstrates the efficacy of those technologies and/or operational measures for those species; (4) calculations of the reduction in impingement mortality and/or entrainment of all life stages of fish and shellfish that would be achieved by the technologies and/or operational measures you have selected based on the Impingement Mortality and/or Entrainment Characterization Study in § 125.95(b)(3); and (5) design and engineering calculations, drawings, and estimates to support the narrative descriptions required in the Design and Construction Technology Plan prepared by a qualified expert such as a professional engineer.

If your facility has multiple intake structures and each is dedicated exclusively to the cooling water needs of one of more generating units, you may calculate the capacity utilization rate separately for each structure, for purposes of determining whether entrainment reduction performance standards are applicable. Note that you would still be required to consider the total design intake flow at all structures combined in determining whether your design intake flow exceeds 5 percent of the mean annual flow of a freshwater river or stream. If your capacity utilization rate, for either a single intake structure or the facility as a whole, is 15 percent or greater based on the historical 5 year annual average, but you make a binding commitment to the Director to maintain your capacity utilization rate below 15 percent for the duration of the permit, you may base your capacity utilization rate determination on that commitment.

In determining compliance with any requirements to reduce impingement mortality or entrainment, you must assess the total reduction in impingement mortality and entrainment against the calculation baseline developed under the Impingement Mortality and Entrainment Characterization Study (§ 125.95(b)(3)). The calculation baseline is defined at § 125.93 as an estimate of impingement mortality and entrainment that would occur at your site assuming (1) The cooling water intake system has been designed as a once-through system; (2) the opening of the cooling water intake structure is located at, and the face of the standard ⅜-inch mesh traveling screen is oriented parallel to, the shoreline near the surface of the source waterbody; and (3) the baseline practices, procedures, and structural configuration are those that the facility would maintain in the absence of any structural or operational controls, including flow or velocity reductions, implemented in whole or in part for the purposes of reducing impingement mortality and entrainment. You may also choose to use your facility's current level of impingement mortality and entrainment as the calculation baseline. EPA has previously referred to this as the "as-built approach." Reductions in impingement mortality and entrainment

from the calculation baseline as a result of any design and construction technologies and/or operational measures already implemented at your facility should be added to the reductions expected to be achieved by any additional design and construction technologies and operational measures that will be implemented in order to meet the applicable performance standards (§ 125.95(b)(4)(i)(C)). In this case, the calculation baseline could be estimated by evaluating existing data from a facility nearby without impingement and/or entrainment control technology (if relevant) or by evaluating the abundance of organisms in the source waterbody in the vicinity of the intake structure that may be susceptible to impingement and/or entrainment. Additionally, if a portion of the total design intake flow is water withdrawn for a closed-cycle, recirculating cooling system (but flow is not sufficiently reduced to satisfy the compliance option in § 125.94(a)(1)(i)), such facilities may use the reduction in impingement mortality and entrainment that is attributed to the reduction in flow in meeting the performance standards in § 125.94(b). The calculation baseline may be estimated using: historical impingement mortality and entrainment data from your facility or from another facility with comparable design, operational, and environmental conditions; current biological data collected in the waterbody in the vicinity of your cooling water intake structure; or current impingement mortality and entrainment data collected at your facility. A facility may request that the calculation baseline be modified to be based on a location of the opening of the cooling water intake structure at a depth other than at or near the surface if they can demonstrate to the Director that the other depth would correspond to a higher baseline level of impingement mortality and/or entrainment.

The Technology Installation and Operation Plan is required for all facilities that choose the compliance alternative in § 125.94(a)(2), (3), (4), or (5), propose to use design and construction technologies and/or operational measures (either existing or new) to meet performance standards or site specific requirements. Such facilities must submit the following information to the Director for review and approval: (1) A schedule for the installation and maintenance of any new design and construction technologies; (2) a list of the operational parameters that will be monitored, including the location and the frequency at which you will monitor them; (3) a list of activities you will undertake to ensure to the degree practicable the efficacy of the installed design and construction technologies and operational measures, and the schedule for implementing them; (4) a schedule and methodology for assessing the efficacy of any installed design and construction technologies and operational measures in achieving applicable performance standards, including an adaptive management plan for revising design and construction technologies and/or operational technologies if your assessment indicates that applicable performance standards are not being met; and (5) for facilities that select a pre-approved technology in accordance with § 125.94(a)(4), documentation that appropriate site conditions (as specified by EPA or the Director in accordance with § 125.99) exist at your facility. In developing the schedule for installation and maintenance of any new design and construction technologies in item 1, you should schedule any downtime to coincide with otherwise necessary downtime (*e.g.*, for repair, overhaul, or routine maintenance of the generating units) to the extent practicable. Where additional downtime is required, you may coordinate scheduling of this downtime with the North American Electric Reliability Council and/or other generators in your area to ensure that impacts to energy reliability and supply are minimized. The Director should approve any reasonable scheduling provision included for this purpose. Those facilities that propose to use restoration measures must submit the Restoration Plan required at § 125.95(b)(5).

Today's final rule requires the Director to evaluate, using information submitted in your application, bi-annual status reports, and any other available information, the performance of any technologies, operational measures, and/or restoration measures you may have implemented in previous permit terms. Additional or different design and construction technologies, operational measures, and/or restoration measures may be required if the Director determines that the initial technologies, operational measures, and/or restoration measures you selected and implemented will not meet the requirements of § 125.94(b) and (c), as provided in § 125.98(b)(1)(i). The rule also requires that your permit contain a condition requiring your facility to reduce impingement mortality and entrainment commensurate with the efficacy of the installed design and construction technologies and/or operational measures. This is designed to ensure that technologies are operated and maintained to ensure their efficacy to the degree practicable, and not merely to meet the low end of the applicable performance standard range, if better performance is practicable. The Technology Installation and Operation Plan is one of the most important pieces of documentation for implementing the requirements of this final rule. It serves to (1) guide facilities in the installation, operation, maintenance, monitoring, and adaptive management of selected design and construction technologies and/or operational measures; (2) provide a schedule and methodology for assessing success in meeting applicable performance standards and site-specific requirements; and (3) provide a basis for determining compliance with the requirements of § 125.94(a)(2)–(5). Facilities and Directors are encouraged to take appropriate care in developing, reviewing and approving the plan. Note that for facilities employing restoration measures, the Restoration Plan serves the same required functions.

e. Restoration Plan (§ 125.95(b)(5))

EPA views restoration measures as part of the "design" of a cooling water intake structure, and considers restoration measures one of several technologies that may be employed, in combination with others, to minimize adverse environmental impact. The consideration of restoration measures is relevant to the section 316(b) determination of the requisite design of cooling water intake structures because restoration measures help minimize the adverse environmental impact attributable to such structures. Facilities may use restoration measures that produce and/or result in levels of fish and shellfish in the facility's waterbody or watershed that are substantially similar to those that would result through compliance with the applicable performance standards or alternative site-specific requirements. In order to employ restoration measures, the facility must demonstrate to the Director that it has evaluated the use of design and construction technologies and/or operational measures and determined that the use of restoration measures is appropriate because meeting the applicable performance standards or site-specific requirements through the use of design and construction technologies and/or operational measures alone is less feasible, less cost-effective or less environmentally desireable than meeting the standards in whole or in part through the use of restoration measures. Facilities must

also demonstrate to the Director that the restoration measures, alone or in combination with any feasible design and construction technologies and/or restoration measures, will produce ecological benefits and maintain fish and shellfish in the waterbody, including community structure and function, at a substantially similar level to that which would be achieved by meeting the applicable performance standards at § 125.94(b) or the site-specific requirements developed pursuant to § 125.94(a)(5). The Director must approve any use of restoration measures.

To help all parties review the proposed or existing restoration measures and to help ensure adequate performance of those measures, § 125.95(b)(5) requires facilities proposing to use restoration measures to submit a Restoration Plan with their applications to the Director for review and approval. In the submittal, the facility must address species identified, in consultation with Federal, State, and Tribal fish and wildlife management agencies with responsibility for fisheries and wildlife potentially affected by its the facility's cooling water intake structures, as species of concern. The level of complexity of the Restoration Plan likely will be commensurate with the restoration measures considered or proposed.

First, the facility must demonstrate that it has evaluated the use of design and construction technologies and/or operational measures and explain how it determined that the use of restoration measures would be more feasible, cost-effective, or environmentally desirable than meeting the applicable performance standards or site-specific requirements wholly through the use of design and construction technologies, and/or operational measures.

Second, the facility must submit a narrative description of the design and operation of all restoration measures the facility has in place or has selected and proposes to implement to produce fish and shellfish. If the ecological benefits from an existing restoration project are required to compensate for some environmental impact other than the impact from impingement and entrainment by the cooling water intake structure (*e.g.*, a wetland created to satisfy section 404 of the Clean Water Act requirements), those ecological benefits should not be counted towards meeting the applicable performance standards or site-specific requirements. The narrative description should identify the species targeted under any restoration measures.

Third, the facility must submit a quantification of the ecological benefits of the existing and/or proposed restoration measures. The facility must estimate the reduction in fish and shellfish impingement mortality and entrainment that would be necessary to comply with applicable performance standards or site-specific requirements, using information from the Impingement Mortality and Entrainment Characterization Study and any other available and appropriate information. The facility must then calculate the production of fish and shellfish from existing and proposed restoration measures. The quantification must also include a discussion of the nature and magnitude of uncertainty associated with the performance of the restoration measures and a discussion of the time frame within which ecological benefits are expected to accrue from the restoration project.

Fourth, the facility must provide design calculations, drawings, and estimates documenting that the proposed restoration measures, in combination with design and construction technologies and/or operational measures, or alone, will meet the requirements for production of fish and shellfish. Production of fish and shellfish as a result of relevant restoration measures already implemented at the facility should be added to the production expected to be achieved by the additional restoration measures. If the restoration measures address the same fish and shellfish species identified in the Impingement Mortality and Entrainment Characterization Study (in-kind restoration), the facility must demonstrate that the restoration measures will produce a level of these fish and shellfish substantially similar to that which would result from meeting applicable performance standards or site-specific requirements. In this case, the calculations should include a site-specific evaluation of the suitability of the restoration measures based on the species that are found at the site. If the restoration measures address fish and shellfish species different from those identified in the Impingement Mortality and Entrainment Characterization Study (out-of-kind restoration), the facility must demonstrate that the restoration measures produce ecological benefits substantially similar to or greater than those that would be realized through in-kind restoration. Such a demonstration should be based on a watershed approach to restoration planning and consider applicable multi-agency watershed restoration plans, site-specific peer-reviewed ecological studies, and/or consultation with appropriate Federal, State, and Tribal natural resource agencies. While both in-kind and out-of-kind restoration require a quantification of the levels of fish and shellfish the restoration measures are expected to produce, out-of-kind restoration may include a qualitative demonstration that these ecological benefits are substantially similar to or greater than those that would be realized through in-kind restoration, because different species are being produced that may not be directly comparable to those identified in the Impingement Mortality and/or Entrainment Characterization Study.

Fifth, the facility must submit a plan utilizing an adaptive management method for implementing, maintaining, and demonstrating the efficacy of the restoration measures it has selected and for determining the extent to which restoration measures, or the restoration measures in combination with design and construction technologies and operational measures, have met the applicable performance standards or site-specific requirements. Adaptive management is a process in which a facility chooses an approach for meeting a project goal, monitors the effectiveness of that approach, and then, based on monitoring and any other available information, makes any adjustments necessary to ensure continued progress toward the project's goal. This cycle is repeated as necessary until the goal is met.

The adaptive management plan must include (1) A monitoring plan that includes a list of the restoration parameters that the facility will monitor, the frequency at which they will be monitored, and the success criteria for each parameter; (2) a list of activities the facility will undertake to ensure the efficacy of the restoration measures, a description of the linkages between these activities and the items described in the monitoring plan, and an implementation schedule for the activities; and (3) a process for revising the restoration plan as new information, including monitoring data, becomes available, and if the applicable performance standards or site-specific requirements are not being met.

Sixth, the facility must submit a summary of any past or ongoing consultation with Federal, State, and Tribal fish and wildlife management agencies on its use of restoration measures, including any written comments received as a result of such consultations.

Seventh, if requested by the Director, the facility must conduct a peer review

of items to be submitted as part of the Restoration Plan. Written comments from peer reviewers must be submitted to the Director and made available to the public as part of the permit application. Peer reviewers must be selected in consultation with the Director who may consult with EPA, Federal, State and Tribal fish and wildlife management agencies with responsibility for fish and wildlife potentially affected by the facility's cooling water intake structure(s). Peer reviewers must have appropriate qualifications (*e.g.*, in the fields of geology, engineering and/or biology) depending upon the materials to be reviewed.

Finally, the facility must include in the Plan a description of information to be included in a status report to the Director every two years. The final regulations at § 125.98(b)(1)(ii) require that this information be reviewed by the Director to determine whether the proposed restoration measures, in conjunction with (or in lieu of) design and construction technologies and/or operational measures, will meet the applicable performance standards or site-specific requirements, or, if the restoration is out-of-kind, will produce ecological benefits (fish and shellfish) including maintenance or protection of community structure and function in your facility's waterbody or watershed.

f. Compliance Using a Pre-approved Technology (§ 125.94(a)(4))

If you choose to comply with the fourth compliance alternative, you must submit documentation to the Director that your facility meets the appropriate site conditions and you have installed and will properly operate and maintain submerged cylindrical wedgewire screen technology (as described in § 125.99(a)(1)) or other technologies as approved by the Director under § 125.99(b)). If you are subject to impingement mortality performance standards only, and plan to install wedgewire screens with a maximum through-screen design intake velocity of 0.5 ft/s or less, you should choose the compliance alternative in § 125.94(a)(1)(i), and do not need to demonstrate that you meet the other criteria in § 125.99(a)(1) or prepare a Technology Installation and Operation Plan or Verification Monitoring Plan.

Facilities subject to entrainment performance standards seeking compliance under this alternative must submit a Technology Installation and Operation Plan and a Verification Monitoring Plan that address entrainment reduction, and document that all of the appropriate site conditions in § 125.99(a)(1) exist at their facility. To qualify for compliance using the cylindrical wedgewire screen technology, your facility must meet the following conditions: (1) Your cooling water intake structure is located in a freshwater river or stream; (2) your cooling water intake structure is situated such that sufficient ambient counter-currents exist to promote cleaning of the screen face; (3) your maximum through-screen design intake velocity is 0.5 ft/s or less; (4) the slot size is appropriate for the size of eggs, larvae, and juveniles of all fish and shellfish to be protected at the site; and (5) your entire main condenser cooling water flow is directed through the technology. Note that small flows totalling less than 2 MGD for auxiliary plant cooling do not necessarily have to be included. Facilities should demonstrate that they meet these criteria in the Technology Installation and Operation Plan.

In addition, any interested person may submit a request that a technology be approved for use in accordance with the compliance alternative in § 125.94(a)(4). If the Director approves, the technology may be used by all facilities that have similar site conditions under the Director's jurisdiction. To do this, the interested person must submit the following as required by § 125.99(b): (1) A detailed description of the technology; (2) a list of design criteria for the technology and site characteristics and conditions that each facility must have in order to ensure that the technology can consistently meet the appropriate impingement mortality and entrainment performance standards in § 125.94(b); and (3) information and data sufficient to demonstrate that all facilities under the jurisdiction of the Director can meet the applicable impingement mortality and entrainment performance standards in § 125.94(b) if the applicable design criteria and site characteristics and conditions are present at the facility.

EPA has adopted this compliance alternative in response to comments suggesting that EPA provide an additional, more streamlined compliance option under which a facility could implement certain specified technologies that are deemed highly protective in exchange for reducing the scope of the Comprehensive Demonstration Study. (See, 68 FR 13522, 13539; March 19, 2003).

g. Verification Monitoring Plan (§ 125.95(b)(7))

Finally, § 125.95(b)(7) requires all Phase II existing facilities complying under §§ 125.94(a)(2), (3), (4), or (5) using design and construction technologies and/or operational measures, to submit a Verification Monitoring Plan to measure the efficacy of the implemented design and construction technologies and/or operational measures. The plan must include at least two years of monitoring to verify the full-scale performance of the proposed or already implemented design and construction technologies and/or operational measures. Note that verification monitoring is also required for restoration measures but the requirements for this monitoring are included as part of the Restoration Plan in § 125.95(b)(5)(v). Components of the Verification Monitoring Plan must include:

(i) Description of the frequency and duration of monitoring, the parameters to be monitored, and the basis for determining the parameters and the frequency and duration of monitoring. The parameters selected and the duration and frequency of monitoring must be consistent with any methodology for assessing success in meeting applicable performance standards in your Technology Installation and Operation Plan as required by § 125.95(b)(4)(ii);

(ii) A proposal on how naturally moribund fish and shellfish that enter the cooling water intake structure would be identified and taken into account in assessing success in meeting the performance standards in § 125.94(b); and,

(iii) A description of the information to be included in a bi-annual status report to the Director.

The facility and the Director will use the results of verification monitoring to assess the facility's success in meeting the performance standards for impingement mortality and entrainment reduction or alternate site-specific requirements and to guide adaptive management in accordance with the requirements in the facility's Technology Installation and Operation Plan. Restoration monitoring is discussed separately under § 125.95(b)(5)(v). Verification monitoring is required to begin once the technologies and/or operational measures are implemented and continue for a sufficient period of time (but at least two years) to assess success in reducing impingement mortality and entrainment.

C. How Will the Director Determine the Appropriate Cooling Water Intake Structure Requirements?

Initially, the Director must determine whether the facility is covered by this rule. If the answer to all the following

questions is yes, the facility will be required to comply with the requirements of this final rule (§ 125.91).

- Is the facility a point source?
- Does the facility use or propose to use a cooling water intake structure(s) with a total design intake flow of 50 million gallons per day (MGD) or more to withdraw cooling water from waters of the United States?
- As its primary activity, does the facility both generate and transmit electric power or generate electric power but sell it to another entity for transmission?
- Is at least 25 percent of the water withdrawn used solely for cooling purposes?

In the case of a Phase II existing facility that is co-located with a manufacturing facility, only that portion of the cooling water intake flow that is used by the Phase II facility to generate electricity for sale to another entity will be considered for purposes of determining the 50 MGD and 25 percent criteria.

Use of a cooling water intake structure includes obtaining cooling water by any sort of contract or arrangement with one or more independent suppliers of cooling water if the supplier withdraws water from waters of the United States (except as provided below) but is not itself a Phase II existing facility. This provision is intended to prevent circumvention of these requirements by creating arrangements to receive cooling water from an entity that is not itself a Phase II existing facility. However, for purposes of this provision, a public water system or any entity that sells treated effluent to be used as cooling water is not a "supplier." Thus, obtaining cooling water from a public water system or treated effluent used as cooling water does not constitute use of a cooling water intake structure. This rule is not intended to discourage the beneficial reuse of treated effluent, nor is it intended to impose requirements on public water systems.

Permit Application Review

The Director must review the application materials submitted under § 122.21(r) and § 125.95 and determine the appropriate performance standards to apply to the facility and approve a set of design and construction technologies, operational measures, and/or restoration measures to meet these standards. The first step is to review the Proposal for Information Collection and determine if the technologies, operational measures, and/or restoration measures to be evaluated seem appropriate for the site and if the data gathering activities (including the sampling plan) seem adequate to support the development of the other components of the Comprehensive Demonstration Study, including impingement mortality and entrainment estimates. The Director will also review any existing data submitted. The Director must review and provide comment on the Proposal for Information Collection; however, a facility may proceed with planning, assessment, and data collection activities in fulfillment of Comprehensive Demonstration Study requirements prior to receiving comments from the Director. The Director is encouraged to provide comments expeditiously (*i.e.*, within 60 days) so the facility can make responsive modifications to its information collection plans.

If a facility submits a request in accordance with § 125.95(a)(3) to reduce information about its cooling water intake structures and the source waterbody required to be submitted in its permit application (other than for the first permit term after promulgation of this rule, for which complete information is required), the Director must approve the request within 60 days if conditions at the facility and in the waterbody remain substantially unchanged since the facility's previous application.

The Director must also review all information submitted under § 122.21(r)(2), (3), and (5) and § 125.95, as appropriate, to determine appropriate permit conditions based on the requirements in this subpart. At each permit renewal, or more frequently as appropriate, the Director must assess success in meeting applicable performance standards, restoration requirements, and/or alternate site-specific requirements.

At each permit renewal, the Director must review the application materials and monitoring data to determine whether additional requirements should be included in the permit to meet the applicable performance standards. Additional requirements may include, but are not limited to, additional design and construction technologies, operational measures, and/or restoration measures, improved operation and maintenance of existing technologies and measures, and/or increased monitoring.

Permitting Requirements

Following consideration of the information submitted by the Phase II existing facility in its NPDES permit application, the Director must determine the appropriate requirements and conditions to include in the permit based on the compliance alternatives in § 125.94(a) for establishing best technology available chosen by the facility. The following requirements must be included in each permit:

(1) *Cooling Water Intake Structure Requirements.* Requirements that implement the applicable provisions of § 125.94 must be included in the permit conditions. To accomplish this, the Director must evaluate the performance of the design and construction technologies, operational measures, and/or restoration measures proposed and implemented by the facility and require additional or different design and construction technologies, operational measure, and/or restoration measures, and/or improved operation and maintenance of existing technologies and measures, if needed to meet the applicable impingement mortality and entrainment performance standards, restoration requirements for fish and shellfish production, or alternate site-specific requirements.

In determining compliance with the performance standards for facilities proposing to increase withdrawals of cooling water from a lake (other than a Great Lake) or a reservoir in § 125.94(b)(3), the Director must consider anthropogenic factors (those not considered "natural") unrelated to the Phase II existing facility's cooling water intake structures that can influence the occurrence and location of a thermocline. Anthropogenic factors may include source water inflows, other water withdrawals, managed water uses, wastewater discharges, and flow/level management practices (*e.g.*, some reservoirs release water from deeper bottom layers). The Director must coordinate with appropriate Federal, State, or Tribal fish and wildlife agencies to determine if any disruption of the natural thermal stratification resulting from the increased withdrawal of cooling water does not adversely affect the management of fisheries.

To develop appropriate requirements for the cooling water intake structure(s), the Director must do the following:

(i) Review and approve the Design and Construction Technology Plan required in § 125.95(b)(4) to evaluate the suitability and feasibility of the design and construction technology and/or operational measures proposed to meet the performance standards of § 125.94(b), or site-specific requirements developed pursuant to § 125.94(a)(5);

(ii) If the facility proposes restoration measures in accordance with § 125.94(c), review and approve the Restoration Plan required under § 125.95(b)(5) to determine whether the proposed measures, alone or in

combination with design and construction technologies and/or operational measures, will meet the requirements under § 125.94(c);

(iii) In each reissued permit, include a condition in the permit requiring the facility to reduce impingement mortality and entrainment (or to increase fish and shellfish production, if applicable) commensurate with the efficacy at the facility of the installed design and construction technologies, operational measures, and/or restoration measures;

(iv) If the facility implements design and construction technologies and/or operational measures and requests that compliance with the requirements of § 125.94 be measured for the first permit (or subsequent permit terms, if applicable) employing the Technology Installation and Operation Plan in accordance with § 125.95(b)(4)(ii), the Director must review and approve the plan and require the facility to meet the terms of the plan including any revisions to the plan that may be necessary if applicable performance standards or site-specific requirements are not being met. If the facility implements restorations measures and requests that compliance with the requirements in § 125.94 be measured for the first permit term (or subsequent permit terms, if applicable) employing a Restoration Plan in accordance with § 125.95(b)(5), the Director must review and approve the plan and require the facility to meet the terms of the plan including any revision to the plan that may be necessary if applicable performance standards or site-specific requirements are not being met. In determining whether to approve a Technology Installation and Operation Plan or Restoration Plan, the Director must evaluate whether the design and construction technologies, operational measures, and/or restoration measures the facility has installed, or proposes to install, can reasonably be expected to meet the applicable performance standards in § 125.94(b), restoration requirements in § 125.94(c)(2), and/or alternative site-specific requirements established pursuant to § 125.94(a)(5), and whether the Technology Installation and Operation Plan and/or Restoration Plan complies with the applicable requirements of § 125.95(b). In reviewing the Technology Installation and Operation Plan, the Director must approve any reasonable scheduling provisions that are designed to ensure that impacts to energy reliability and supply are minimized, in accordance with § 125.95(b)(4)(ii)(A). If the facility does not request that compliance with the requirements in § 125.94 be measured employing a Technology Installation and Operation Plan and/or Restoration Plan, or the facility has not been in compliance with the terms of its current Technology Installation and Operation Plan and/or Restoration Plan during the preceding permit term, the Director must require the facility to comply with the applicable performance standards in § 125.94(b), restoration requirement in § 125.94(c)(2), and/or alternative site-specific requirements developed pursuant to § 125.94(a)(5). In considering a permit application, the Director must review the performance of the design and construction technologies, operational measures, and/or restoration measures implemented and require additional or different design and construction technologies, operational measures, and/or restoration measures, and/or improved operation and maintenance of existing technologies and measures, if needed to meet the applicable performance standards, restoration requirements, and/or alternative site-specific requirements.

(v) Review and approve the proposed Verification Monitoring Plan submitted under § 125.95(b)(7) (for design and construction technologies) and/or monitoring provisions of the Restoration Plan submitted under § 125.95(b)(5)(v) and require that the monitoring continue for a sufficient period of time to demonstrate whether the design and construction technology, operational measures, and/or restoration measures meet the applicable performance standards in § 125.94(b), restoration requirements in § 125.94(c)(2) and/or site-specific requirements established pursuant to § 125.94(a)(5);

(vi) If a facility requests requirements based on a site-specific determination of best technology available for minimizing adverse environmental impact, the Director must review the application materials submitted under § 125.95(b)(6) and any other information submitted, including quantitative and qualitative benefits, that would be relevant to a determination of whether alternative requirements are appropriate for the facility. If a facility submits a study to support entrainment survival at the facility, the Director must review and approve the results of that study. If the Director determines that alternative requirements are appropriate, the Director must make a site-specific determination of best technology available for minimizing adverse environmental impact in accordance with § 125.94(a)(5). The Director may request revisions to the information submitted by the facility in accordance with § 125.95(b)(6) if it does not provide an adequate basis to make this determination. Any site-specific requirements established based on new and/or existing design and construction technologies, operational measures, and/or restoration measures, must achieve an efficacy that is, in the Director's judgement, as close as practicable to the applicable performance standards without resulting in costs that are significantly greater than the costs considered by the Administrator for a like facility to achieve the applicable performance standards or the benefits of complying with the applicable performance standards in § 125.94(b);

(vii) The Director must review information on the proposed methods for assessing success in meeting applicable performance standards and/or restoration requirements submitted by the facility under § 125.95(b)(4)(ii)(D) and/or (b)(5)(v)(A), evaluate those and other available methods, and specify how success in meeting the performance standards and/or restoration requirements must be determined including the averaging period for determining the percent reduction in impingement mortality and entrainment and/or the production of fish and shellfish. Compliance for facilities who request that compliance be measured employing a Technology Installation and Operation Plan and/or Restoration Plan must be determined in accordance with § 125.98(b)(1)(iv).

(2) *Monitoring Conditions.* The Director must require the facility to perform monitoring in accordance with the Technology Installation and Operation Plan in § 125.95(b)(4)(ii), the Restoration Plan required by § 125.95(b)(5), if applicable, and the Verification Monitoring Plan required by § 125.95(b)(7). In determining any additional applicable monitoring requirements in accordance with § 125.96, the Director must consider the monitoring facility's Verification Monitoring, Technology Installation and Operation, and/or Restoration Plans, as appropriate. The Director may modify the monitoring program based on changes in physical or biological conditions in the vicinity of the cooling water intake structure.

(3) *Record Keeping and Reporting.* At a minimum, the permit must require the facility to report and keep records specified in § 125.97.

(4) *Pre-Approved Design and Construction Technologies.* Section 125.94(a)(4) offers facilities the choice of adopting a protective, pre-approved design and construction technology, and preparing a significantly streamlined Comprehensive Demonstration Study. Section 125.99 lists one pre-approved

technology (wedgewire screens) and provides an opportunity for the Director to pre-approve other technologies.

For a facility that chooses to demonstrate that they have installed and properly operate and maintain a design and construction technology approved in accordance with § 125.99, the Director must review and approve the information submitted in the Technology Installation and Operation Plan in § 125.95(b)(4)(ii) and determine if they meet the criteria in § 125.99.

If a person/facility requests approval of a technology under § 125.99(b), the Director must review and approve the information submitted and determine its suitability for widespread use at facilities with similar site conditions in its jurisdiction with minimal study. The Director must evaluate the adequacy of the technology when installed in accordance with the required design criteria and site conditions to consistently meet the performance standards in § 125.94(b). The Director may only approve a technology following public notice and consideration of comment regarding such approval.

(5) *Bi-Annual Status Report.* The Director must specify monitoring data and other information to be included in a status report every two years. The other information may include operation and maintenance records, summaries of adaptive management activities, or any other information that is relevant to determining compliance with the terms of the facility's Technology Installation and Operation Plan and/or Restoration Plan.

D. What Will I Be Required To Monitor?

Section 125.96 of today's final rule provides that Phase II existing facilities must perform monitoring in accordance with the Verification Monitoring Plan required by § 125.95(b)(7), the Technology Installation and Operation Plan required by § 125.95(b)(4)(ii), if applicable, the Restoration Plan required by § 125.95(b)(5), and any additional monitoring specified by the Director to demonstrate compliance with the applicable requirements of § 125.94. In developing monitoring conditions, the Director should consider the need for biological monitoring data, including impingement and entrainment sampling data sufficient to assess the presence, abundance, life stages (including eggs, larvae, juveniles, and adults), and mortality of aquatic organisms (fish and shellfish or other organisms required to be monitored by the Director) impinged or entrained during operation of the cooling water intake structure. This type of data may be used to develop permit conditions to implement the requirements of this rule. The Director should ensure, where appropriate, that any required monitoring will allow for the detection of any annual, seasonal, and diel variations in the species and numbers of individuals that are impinged or entrained.

The Director may modify the monitoring program based on changes in physical or biological conditions in the vicinity of the cooling water intake structure. The Director may also require monitoring of operational parameters for facilities that employ a Technology Installation and Operation Plan or Restoration Plan to comply with the requirements of § 125.94. The Director must specify what monitoring or other data is to be included in a status report every two years.

E. How Will Compliance Be Determined?

This final rule will be implemented by the Director placing conditions consistent with the requirements of this part in NPDES permits. A facility may demonstrate compliance by meeting the performance standards in § 125.94(b) applicable to the facility. The application information, including components of the Comprehensive Demonstration Study, as appropriate, should demonstrate that the facility is already meeting the performance standards, or that it will install and properly operate and maintain design and construction technologies, operational measures, and/or restoration measures to meet the performance standards, or that a site-specific determination of best technology available is necessary. To support this demonstration, the facility should submit the following information to the Director:

- Data submitted with the NPDES permit application to show that the facility meets location, design, construction, and capacity requirements consistent with the compliance alternative selected;
- Data to demonstrate that the facility is meeting the performance standards consistent with the compliance alternative selected;
- Compliance monitoring data and records as prescribed by the Director.

The specifics of how success in meeting the performance standards shall be measured (i.e, the number of species, whether critical species or all species) and the method of measurement (*e.g.,* total biomass, total counts, etc.) must be determined by the Director based on review of the proposed methodology submitted by the facility in its Technology Installation and Operation Plan and/or Restoration Plan, and any other methods the Director considers appropriate.

Alternatively, the facility may request that compliance be determined based on whether it has complied with the construction, operational, maintenance, monitoring, and adaptive management requirements of its Technology Installation and Operation Plan (for design and construction technologies and/or operational measures) or Restoration Plan (for restoration measures). In this case, the facility must still assess success in meeting applicable performance standards or restoration requirements but this assessment serves to guide the adaptive management process rather than as a basis for determining compliance. After the first permit term following promulgation of this subpart, facilities are only eligible for this compliance determination alternative if they have been in compliance with the terms of their Technology Installation and Operation Plan and/or Restoration Plan during the preceding permit term. Under this compliance determination alternative, the Technology Installation and Operation Plan or Restoration Plan must specify construction, operational, maintenance, monitoring, and adaptive management requirements that can reasonably be expected to achieve success in meeting the applicable performance standards, restoration requirements and/or site-specific requirements. These construction, operational, maintenance, monitoring, and adaptive management requirements must also be approved by the Director, who will also specify what monitoring data and other information must be included in the facility's biannual status report.

The required elements of the Technology Installation and Operation Plan include (1) a schedule for installation and maintenance of any new technologies; (2) operational parameters to be monitored; (3) activities to ensure the efficacy of technologies and measures; (4) a schedule and methodology for assessing the efficacy of installed technologies and measures in meeting the performance standards; (5) an adaptive management plan; and (6) for facilities using a pre-approved compliance technology, documentation that they meet the conditions for its use. The Restoration Plan requires corresponding information as appropriate for restoration measures.

EPA believes that it is important for facilities to consider and document each of the components of the Technology

Installation and Operation Plan, regardless of which compliance determination approach is used. However, the level of detail appropriate for some of the components may be different for the two different approaches. For facilities that comply by demonstrating success in meeting performance standards, particularly in cases where they are already meeting the standards and no significant changes in technologies or operations are needed, brief summaries may be sufficient for most components, though they will still need detailed documentation of their schedule and methodology for assessing efficacy of installed technologies and measures for meeting the standards. Conversely, for facilities where compliance is determined based on whether they have complied with the construction, operation, maintenance, monitoring, and adaptive management approaches required in the Technology Installation and Operation Plan or Restoration Plan, a fairly detailed specification of these requirements will be appropriate. The Director should ensure that the level of detail in the Technology Installation and Operation Plan or Restoration Plan is sufficient to support whichever compliance determination approach is selected.

Section 125.97 requires existing facilities to keep records and report monitoring data and other information specified by the Director in a bi-annual status report although Directors may require more frequent reports. Facilities must also keep records of all data used to complete the permit application and show compliance with the requirements of § 125.94, any supplemental information developed under § 125.95, and any compliance monitoring data submitted under § 125.96, for a period of at least three (3) years from date of permit issuance. The Director may require that these records be kept for a longer period.

F. What Are the Respective Federal, State, and Tribal Roles?

Today's final regulations amend 40 CFR 123.25(a)(36) to add a requirement that authorized State and Tribal programs have sufficient legal authority to implement today's requirements (40 CFR part 125, subpart J). Therefore, today's final rule affects authorized State and Tribal NPDES permit programs. Under 40 CFR 123.62(e), any existing approved section 402 permitting program must be revised to be consistent with new program requirements within one year from the date of promulgation, unless the NPDES-authorized State or Tribe must amend or enact a statute to make the required revisions. If a State or Tribe must amend or enact a statute to conform with today's final rule, the revision must be made within two years of promulgation. States and Tribes seeking new EPA authorization to implement the NPDES program must comply with the requirements when authorization is approved. This final regulation does not alter State authority under section 510 of the Clean Water Act.

EPA recognizes that some States have invested considerable effort in developing and implementing section 316(b) regulatory programs. This final regulation allows States to use these programs to fulfill section 316(b) requirements where the State demonstrates to the Administrator that such programs will achieve comparable environmental performance. Specifically, the final rule allows any State to demonstrate to the Administrator that it has adopted alternative regulatory requirements in its NPDES program that will result in environmental performance within each relevant watershed that is comparable to the reductions in impingement mortality and entrainment that would otherwise be achieved under § 125.94.

In addition to updating their programs to be consistent with today's final rule, States and Tribes authorized to implement the NPDES program are required under NPDES State program requirements to implement the cooling water intake structure requirements of subpart J following promulgation of the final regulations. The permit requirements in this final rule must be implemented upon the first issuance or reissuance of permits following promulgation.

Duties of an authorized State or Tribe under this regulation may include:

- Review and verification of permit application materials, including a permit applicant's determination of source waterbody classification and the flow of a freshwater river or stream at the point of the intake;
- Determination of the performance standards in § 125.94(b) that apply to the facility;
- Verification of a permit applicant's determination of whether it meets or exceeds the applicable performance standards;
- Verification that a permit applicant's Technology and Compliance Assessment Information, including the Design and Construction Technology Plan and Technology Installation and Operation Plan, demonstrates that the proposed technologies and measures will reduce the impacts to fish and shellfish to levels required;
- Verification that a permit applicant is eligible for site-specific requirements, and if so, development of site-specific requirements that achieve an efficacy as close as practicable to the applicable performance standards;
- Verification that the Technology Installation and Operation Plan can reasonably be expected to meet performance standards or alternative site-specific requirements;
- Verify that the facility meets the requirements of the approved compliance alternative it selected;
- Verify that any Restoration Plan meets all applicable requirements;
- Verify that the Verification Monitoring Plan is sufficient to assess technology efficacy;
- Development of draft and final NPDES permit conditions for the applicant implementing applicable section 316(b) requirements pursuant to this rule including whether compliance with the requirements of § 125.94 will be determined based on success in meeting applicable performance standards or based on complying with a Technology Installation and Operation Plan or Restoration Plan; and,
- Ensuring compliance with permit conditions based on section 316(b) requirements.

EPA will implement these requirements where States or Tribes are not authorized to implement the NPDES program. EPA also will implement these requirements where States or Tribes are authorized to implement the NPDES program but do not have sufficient authority to implement these requirements.

G. Are Permits for Existing Facilities Subject to Requirements Under Other Federal Statutes?

EPA's NPDES permitting regulations at 40 CFR 122.49 contain a list of Federal laws that might apply to Federally issued NPDES permits. These include the Wild and Scenic Rivers Act, 16 U.S.C. 1273 *et seq.;* the National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.;* the Endangered Species Act, 16 U.S.C. 1531 *et seq.;* the Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.;* and the National Environmental Policy Act, 42 U.S.C. 4321 *et seq. See* 40 CFR 122.49 for a brief description of each of these laws. In addition, the provisions of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.,* relating to essential fish habitat might be relevant. Nothing in this final rulemaking authorizes activities that are not in compliance

with these or other applicable Federal laws (*e.g.*, Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.*, and Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.*).

H. Alternative Site-Specific Requirements

Under § 125.94(a)(5), an existing facility may demonstrate to the Director that it has selected, installed, and is properly operating and maintaining, or will install and properly operate and maintain, design and construction technologies, operational measures, and/or restoration measures that the Director determines to be the best technology available to minimize adverse environmental impact for the facility based on the cost-cost test specified in sub-section (a)(5)(i) or the cost-benefit test specified in (a)(5)(ii) of the rule.

Section 125.94(a)(5)(i) provides that an existing facility may demonstrate that the costs of compliance under the compliance alternatives in § 125.94(a)(2) through (4) of the rule would be significantly greater than the costs considered by the Administrator for a like facility in establishing the applicable performance standards. In such cases, the Director must make a site-specific determination of the best technology available for minimizing adverse environmental impact. The Director must establish site-specific alternative requirements based on new and/or existing design and construction technologies, operational measures, and/or restoration measures that achieve an efficacy that is, in the judgment of the Director, as close as practicable to the applicable performance standards in § 125.94(b) of the rule.

Section 125.94(a)(5)(ii) provides that an existing facility may demonstrate that the costs of compliance under alternatives in § 125.94(a)(2) through (4) of the rule would be significantly greater than the benefits of complying with the applicable performance standards at that facility. In such cases, the Director must make a site-specific determination of best technology available for minimizing adverse environmental impact. The Director must establish site-specific alternative requirements based on new and/or existing design and construction technologies, operational measures, and/or restoration measures that achieve an efficacy that, in the judgment of the Director, is as close as practicable to the applicable performance standards in § 125.94(b) of the rule.

1. Facility's Costs Significantly Greater Than Costs Considered by EPA

If the Director determines that data specific to your facility indicate that the costs of compliance under § 125.94(a)(2) through (4) would be significantly greater than the costs considered by the Administrator for a facility like yours in establishing the applicable performance standards in § 125.94(b) you may request a site-specific determination of best technology available for minimizing adverse environmental impacts. A facility requesting this determination must submit a Comprehensive Cost Evaluation Study (§ 125.94(b)(6)(i)) and a Site Specific Technology Plan (§ 125.94(b)(6)(iii)). The Comprehensive Cost Evaluation Study must include engineering cost estimates in sufficient detail to document the costs of implementing design and construction technologies, operational measures, and/or restoration measures at the facility that would be needed to meet the applicable performance standards of § 125.94(b); a demonstration that the documented costs significantly exceed the costs considered by EPA for a facility like yours in establishing the applicable performance standards; and engineering cost estimates in sufficient detail to document the costs of implementing alternative design and construction technologies, operational measures, and/or restoration measures in the facility's Site-Specific Technology Plan developed in accordance with § 125.95(b)(6)(iii).

To make the demonstration that compliance costs are significantly greater than those considered by EPA, the facility must first determine its actual compliance costs. To do this, the facility first should determine the costs for any new design and construction technologies, operational measures, and/or restoration measures that would be needed to comply with the requirements of § 125.94(a)(2) through (4), which may include the following cost categories: The installed capital cost of the technologies or measures, the *net* operation and maintenance (O&M) costs for the technologies or measures (that is, the O&M costs for the final suite of technologies and measures once all new technologies and measures have been installed less the O&M costs of any existing technologies and measures), the *net* revenue losses (lost revenues minus saved variable costs) associated with *net* construction downtime (actual construction downtime minus that portion which would have been needed anyway for repair, overhaul or maintenance) and any pilot study costs associated with on-site verification and/or optimization of the technologies or measures. Costs should be annualized using a 7 percent discount rate, with an amortization period of 10 years for capital costs and 30 years for pilot study costs and construction downtime net revenue losses. Annualized costs should be converted to 2002 dollars ($2002), using the engineering news record construction cost index (see *Engineering News-Record*. New York: McGraw Hill. Annual average value is 6538 for year 2002). Costs for permitting and post-construction monitoring should not be included in this estimate, as these are not included in the EPA-estimated costs against which they will be compared, as described below. Because existing facilities already incur monitoring and permitting costs, and these are largely independent of the specific performance standards adopted and technologies selected to meet them, EPA believes it is both simpler and more appropriate to conduct the cost comparison required in this provision using direct compliance costs (capital, net O&M, net construction downtime, and pilot study) only. Adding permitting and monitoring costs to both sides of the comparison would complicate the methodology without substantially changing the results.

To calculate the costs that the Administrator considered for a like facility in establishing the applicable performance standards, the facility must follow the steps laid out below, based on the information in the table provided in Appendix A: Costs considered by EPA in Establishing Performance Standards. A sample of the table is provided below (see sample table). Note that those facilities that claimed the flow data that they submitted to EPA, and which EPA used to calculate compliance costs, as confidential business information (CBI), are not listed in the table provided in Appendix A, unless the total calculated compliance costs were zero. If these facilities wish to request a site-specific determination of best technology available based on significantly greater compliance costs, they will need to waive their claim of confidentiality prior to submitting the Comprehensive Cost Evaluation Study so that EPA can make the necessary data available to the facility, Director, and public.

SAMPLE TABLE.—COSTS CONSIDERED BY EPA IN ESTABLISHING PERFORMANCE STANDARDS ($2002)

Facility ID	Intake ID	EPA assumed design intake flow, gpm (X_{epa})	Capital cost	Baseline O&M annual cost	Post construction O&M annual cost	Annualized capital [3] + net O&M using EPA design intake flow [2] (y_{epa})	Net revenue losses from net construction downtime	Pilot study costs	Annualized downtime and pilot study costs [2,4]	Performance standards on which EPA cost estimates are based	EPA modeled technology code	Design flow adjustment slope (m) [1]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13
Fac 1 ID												
Fac 2 ID												
Fac 3 ID [5]	Intake 1											
Fac 3 ID [5]	Intake 2											
Etc.												

[1] The design flow adjustment slope (m) represents the slope that corresponds to the particular facility using the technology in column 12.
[2] Discount rate = 7%
[3] Amortization period for capital costs = 10 years
[4] Amortization period for downtime and pilot study costs = 30 years
[5] Depending on the data provided, some facilities with multiple intakes were costed separately for each intake. In such cases, the facility should calculate the costs considered by EPA for each intake separately using the steps below and sum. Note that some cost components (e.g. construction downtime losses and pilot study costs) are assigned arbitrarily to one of the intakes, since it is difficult to determine how they would be assigned to each intake separately. Since the costs for multiple intakes are summed, this will not affect the results.

The data in Appendix A is keyed to both a facility name and survey ID number. Facilities should be able to determine their ID number from the survey they submitted to EPA during the rule development process.

Step 1: Determine which technology EPA modeled as the most appropriate compliance technology for your facility (§ 125.94(a)(5)(i)(A)). To do this, use the code in column 12 of Appendix A to look up the modeled technology in Table 9–1 below.

TABLE 9–1.—TECHNOLOGY CODES AND DESCRIPTIONS

Technology codes	Technology description
1	Addition of fish handling and return system to an existing traveling screen system.
2	Addition of fine-mesh screens to an existing traveling screen system.
3	Addition of a new, larger intake with fine-mesh and fish handling and return system in front of an existing intake system.
4	Addition of passive fine-mesh screen system (cylindrical wedgewire) near shoreline with mesh width of 1.75 mm.
5	Addition of a fish net barrier system.
6	Addition of an aquatic filter barrier system.
7	Relocation of an existing intake to a submerged offshore location with passive fine-mesh screen inlet with mesh width of 1.75 mm.
8	Addition of a velocity cap inlet to an existing offshore intake.
9	Addition of passive fine-mesh screen to an existing offshore intake with mesh width of 1.75 mm.
10	[Module 10 not used].
11	Addition of dual-entry, single-exit traveling screens (with fine-mesh) to a shoreline intake system.
12	Addition of passive fine-mesh screen system (cylindrical wedgewire) near shoreline with mesh width of 0.76 mm.
13	Addition of passive fine-mesh screen to an existing offshore intake with mesh width of 0.76 mm.
14	Relocation of an existing intake to a submerged offshore location with passive fine-mesh screen inlet with mesh width of 0.76 mm.

Step 2: Using EPA's costing equations, calculate the annualized capital and net operation and maintenance costs for a facility with your design flow using this technology (§ 125.94(a)(5)(i)(B)). To do this, you should use the following formula, which is derived from the results of EPA's costing equations for a facility like yours using the selected technology:

$$y_f = y_{epa} + m * \left(x_f - x_{epa}\right), (1)$$

Where:

y_f = annualized capital and net O&M costs using actual facility design intake flow,

x_f = actual facility design intake flow (in gallons per minute),

x_{epa} = EPA assumed facility design intake flow (in gallons per minute) (column 3),

y_{epa} = Annualized capital and net O&M costs using EPA design intake flow (column 7),and

m = design flow adjustment slope (column 13).

Rather than providing the detailed costing equations that EPA used to calculate annualized capital and net O&M costs for facilities to use each of the 14 modeled technologies, EPA has provided the simplified formula above, which collapses the results of those equations for the particular facility and technology into a single result (y_{epa}) and then allows the facility to adjust this result to reflect its actual design intake flow, using a technology specific slope for a facility like yours that is derived from the costing equations. This allows facilities to perform the flow adjustment required by § 125.94(a)(5)(i)(B) in a straightforward and transparent manner. Facilities, Directors, or members of the public who wish to review the detailed costing equations should consult the Technical Development Document, Chapter 3.

EPA has provided some additional information in Appendix A, beyond that which is needed to perform the calculations in § 125.95(a)(5)(ii), to facilitate comparison of the results obtained using formula 1 to the detailed costing equations in the TDD, for those who wish to do so. EPA does not expect facilities or permit writers to do this, and has in fact provided the simplified formula to preclude the need for doing so, but is providing the additional information to increase transparency. Thus, for informational purposes, the total capital cost (not annualized), baseline O&M cost, and post construction O&M cost from which the annualized capital and net O&M costs using EPA design intake flow (y_{epa} in column 7) are derived are listed separately in columns 4 through 6. To calculate y_{epa}, EPA annualized the total capital cost using a 7 percent discount rate and 10 year amortization period, and added the result to the difference between the post construction O&M costs and the baseline O&M costs.

Note that some entries in Appendix A have NA indicated for the EPA assumed design intake flow in column 2. These are facilities for which EPA projected that they would already meet otherwise applicable performance standards based on existing technologies and measures. EPA projected zero compliance costs for these facilities, irrespective of design intake flow, so no flow adjustment is needed. These facilities should use $0 as their value for the costs considered by EPA for a like facility in establishing the applicable performance standards. EPA recognizes that these facilities will still incur permitting and monitoring costs, but these are not included in the cost comparison for the reasons stated above.

Step 3: Determine the annualized net revenue loss associated with net construction downtime that EPA modeled for the facility to install the technology (§ 125.94(a)(5)(i)(C)) and the annualized pilot study costs that EPA modeled for the facility to test and optimize the technology (§ 125.94(a)(5)(i)(D)). The sum of these two figures is listed in column 10. For informational purposes, the total (not annualized) net revenue losses from construction downtime, and total (not annualized) pilot study costs are listed separately in columns 8 and 9. These two figures were annualized using a 7 percent discount rate and 30 year amortization period and the results added together to get the annualized facility downtime and pilot study costs in column 10.

Step 4: Add the annualized capital and O&M costs using actual facility design intake flow (y_f from step 2), and the annualized facility downtime and pilot study costs (column 10 from step 3) to get the preliminary costs considered by EPA for a facility like yours (§ 125.94(a)(5)(i)(E)).

Step 5: Determine which performance standards in § 125.94(b)(1) and (2) (*i.e.*, impingement mortality only, or impingement mortality and entrainment) are applicable to your facility, and compare these to the performance standards on which EPA's cost estimates are based, listed in column 11 (§ 125.94(a)(5)(i)(F)). If the applicable performance standards and those on which EPA's cost estimates are based are the same, then the preliminary costs considered by EPA for a facility like yours are the final costs considered by EPA for a facility like yours. If only the impingement mortality performance standards are applicable to your facility, but EPA based its cost estimates on

impingement mortality and entrainment performance standards, then you should divide the preliminary costs by a factor of 2.148 to get the final costs. If impingement mortality and entrainment performance standards are applicable to your facility, but EPA based its cost estimates on impingement mortality performance standards only, then you should multiply the preliminary costs by 2.148 to get the final costs. In calculating compliance costs, EPA projected what performance standards would be applicable to the facility based on available data. However, because of both variability and uncertainty in the underlying parameters that determine which performance standards apply (*e.g.*, capacity utilization rate, mean annual flow), it is possible that in some cases the performance standards that EPA projected are not correct. The adjustment factor of 2.148 was determined by taking the ratio of median compliance costs for facilities to meet impingement mortality and entrainment performance standards over median compliance costs for facilities to meet impingement mortality performance standards only. While using this adjustment factor will not necessarily yield the exact compliance costs that EPA would have calculated had it had current information, EPA believes the results are accurate enough for determining whether a facility's actual compliance costs are "significantly greater than" the costs considered by EPA for a like facility in establishing the applicable performance standards. EPA believes it is preferable to provide a simple and transparent methodology for making this adjustment that yields reasonably accurate results, rather than a much more complex methodology that would be difficult to use and understand (for the facility, Director, and public), even if the more complex methodology would yield slightly more accurate results.

The Site-Specific Technology Plan is developed based on the results of the Comprehensive Cost Evaluation Study and must contain the following information:

- A narrative description of the design and operation of all existing and proposed design and construction technologies, operational measures, and/or restoration measures that you have selected in accordance with § 125.94(a)(5);
- An engineering estimate of the efficacy of the proposed and/or implemented design and construction technologies or operational measures, and/or restoration measures. This estimate must include a site-specific evaluation of the suitability of the technologies or operational measures for reducing impingement mortality and/or entrainment (as applicable) of all life stages of fish and shellfish based on representative studies (*e.g.*, studies that have been conducted at cooling water intake structures located in the same waterbody type with similar biological characteristics) and, if applicable, site-specific technology prototype or pilot studies. If restoration measures will be used, you must provide a Restoration Plan that includes the elements described in § 125.95 (b)(5);
- A demonstration that the proposed and/or implemented design and construction technologies, operational measures, and/or restoration measures achieve an efficacy that is as close as practicable to the applicable performance standards of § 125.94(b) without resulting in costs significantly greater than either the costs considered by the Administrator for a facility like yours in establishing the applicable performance standards, or as appropriate, the benefits of complying with the applicable performance standards at your facility; and,
- Design and engineering calculations, drawings, and estimates prepared by a qualified professional to support the elements of the Plan.

2. Facility's Costs Significantly Greater Than the Benefits of Complying With Performance Standards

A facility demonstrating that its costs are significantly greater than the benefits of complying with performance standards must perform and submit a Comprehensive Cost Evaluation Study, a Benefits Valuation Study, and a Site-Specific Technology Plan.

The Comprehensive Cost Evaluation Study is discussed in the previous section. It requires the same information for a cost-benefit site-specific determination as for a cost-cost site-specific determination, except that the demonstration in § 125.95(b)(6)(i)(B) must show that the facility's actual compliance costs significantly exceed the benefits of meeting the applicable performance standards at the facility.

The Benefits Valuation Study requires that a facility use a comprehensive methodology to fully value the impacts of impingement mortality and entrainment at its site and the benefits of complying with the applicable performance standards. In addition to the valuation estimates, the benefit study must include the following:

- A description of the methodology(ies) used to value commercial, recreational, and ecological benefits (including any non-use benefits, if applicable);
- Documentation of the basis for any assumptions and quantitative estimates. If you plan to use an entrainment survival rate other than zero, you must submit a determination of entrainment survival at your facility based on a study approved by the Director;
- An analysis of the effects of significant sources of uncertainty on the results of the study;
- If requested by the Director, a peer review of the items you submit in the Benefits Valuation Study. You must choose the peer reviewers in consultation with the Director who may consult with EPA and Federal, State, and Tribal fish and wildlife management agencies with responsibility for fish and wildlife potentially affected by your cooling water intake structure. Peer reviewers must have appropriate qualifications depending upon the materials to be reviewed.
- A narrative description of any non-monetized benefits that would be realized at your site if you were to meet the applicable performance standards and a qualitative assessment of their magnitude and significance.

All benefits, whether expressed qualitatively or quantitatively, should be addressed in the Benefits Valuation Study and considered by the Director in determining whether compliance costs significantly exceed benefits.

The benefits assessment should begin with an impingement and entrainment mortality study, which quantifies both the baseline mortality as well as the expected change from rule compliance. The benefits assessment should include a qualitative and/or quantitative description of the benefits that would be produced by compliance with the applicable performance standards at the facility site and, to the extent feasible, monetized (dollar) estimates of all significant benefits categories using well established and generally accepted valuation methodologies. The first benefit category to consider is use benefits, which includes such benefits as those to commercial and recreational fishermen. Well-established revealed preference and market proxy methods exist for valuing use benefits, and these should be used in all cases where the impingement and entrainment mortality study identifies substantial impacts to harvested or other relevant species.

The second benefit category to consider is non-use benefits. Non-use benefits may arise from reduced impacts to ecological resources that the public considers important, such as threatened and endangered species. Non-use benefits can generally only be monetized through the use of stated

preference methods. When determining whether to monetize non-use benefits, permittees and permit writers should consider the magnitude and character of the ecological impacts implied by the results of the impingement and entrainment mortality study and any other relevant information.

- In cases where an impingement mortality and entrainment characterization study identifies substantial harm to a threatened or endangered species, to the sustainability of populations of important species of fish, shellfish or wildlife, or to the maintenance of community structure and function in a facility's waterbody or watershed, non-use benefits should be monetized.[50]
- In cases where an impingement mortality and entrainment characterization study does not identify substantial harm to a threatened or endangered species, to the sustainability of populations of important species of fish, shellfish or wildlife, or to the maintenance of community structure and function in a facility's waterbody or watershed, monetization is not necessary.

Permittees should consult with their permitting authority regarding their plans for assessing ecological and non-use benefits, including whether they plan to conduct a stated preference study and if so, the basic design of the study, including such items as target population, sampling strategy, approximate sample size, general survey design, and other relevant information. When conducting quantitative benefits assessments, permittees should carefully review and follow accepted best practices for such studies. A discussion of best practices regarding valuation can be found in EPA's Guidelines for Preparing Economic Analyses (EPA 2000, EPA 240–R–00–003, September 2000) and OMB Circular A–4: Regulatory Analysis (September 17, 2003, *www.whitehouse.gov/omb/inforeg/circular_a4.pdf*). In their benefits assessment, the permittee should present the results, as well as clearly describe the methods used, the assumptions made, and the associated uncertainties.

It is recommended that the permittee and Director seek peer review of the major biological and economic aspects of the final benefits assessment. The goal of the peer review process is to ensure that scientific and technical work products receive appropriate levels of critical scrutiny from independent scientific and technical experts as part of the overall decision-making process. In designing and implementing peer reviews, permittees and permit writers can look to EPA's Science Policy Council Handbook—Peer Review (EPA 100–B–98–00, January 1998, *www.epa.gov*) for guidance.

The Site-Specific Technology Plan is described in the previous section. It requires the same information for a cost-benefit site-specific determination as for a cost-cost site-specific determination, except that the demonstration in § 125.95(b)(6)(iii)(C) must show that the proposed and/or implemented technologies and measures achieve an efficacy that is as close as practicable to the applicable performance standards without resulting in costs significantly greater than the benefits of complying with the applicable performance standards at your facility.

X. Engineering Cost Analysis

A. Technology Cost Modules

In the Notice of Data Availability (NODA) (68 FR 13522, March 19, 2003), the Agency presented an approach for developing compliance costs that included a broad range of compliance technologies for calculating compliance costs as opposed to the approach used for the proposal, which was based on a limited set of technologies. In response to comments, EPA revised the costing modules that were presented in the NODA and used to develop the engineering costs for the final rule. Modifications made include adding a new set of costing modules to address the installation of fine-mesh wedgewire screens with open mesh sizes less than 1 mm in width; revising construction down time needed to relocate cooling water intake structures offshore; and reconsidering the applicability of the double-entry, single-exit technology and its ability to compensate for through-screen velocity issues for fine-mesh applications.

The following modules were used to develop compliance costs for the Agency's engineering cost analysis for the final rule:

- Addition of fish handling and return system to an existing traveling screen system;
- Addition of fine-mesh screens (both with and without a fish handling and return system) to an existing traveling screen system;
- Addition of a new, larger intake in front of an existing intake screen system;
- Addition of passive fine-mesh screen system (cylindrical wedgewire) near shoreline with mesh width of 1.75 mm;
- Addition of passive fine-mesh screen system (cylindrical wedgewire) near shoreline with mesh width of 0.76 mm;
- Addition of a fish net barrier system;
- Addition of an aquatic filter barrier system;
- Relocation of an existing intake to a submerged offshore location (with velocity cap inlet, passive fine-mesh screen inlet with mesh width of 1.75 mm, passive fine-mesh screen inlet with mesh width of 0.76 mm, or onshore traveling screens);
- Addition of a velocity cap inlet to an existing offshore intake;
- Addition of passive fine-mesh screen to an existing offshore intake with mesh width of 1.75 mm;
- Addition of passive fine-mesh screen to an existing offshore intake with mesh width of 0.76 mm;
- Addition or modification of a shoreline-based traveling screen for an offshore intake system; and
- Addition of dual-entry, single-exit traveling screens (with fine-mesh) to a shoreline intake system.

Further explanation and derivation of each of these costing modules and their application for the purposes of assessing costs is discussed in the Technical Development Document. For explanation of how the Agency applied these technology cost modules to determine compliance costs, see section X.B below.

B. Model Facility Cost Development

In order to implement the technology costing modules discussed in section X.A, the Agency used the same basic approach which was described in the NODA for the estimation of costs at the model facility level. This approach focuses as much as possible on site-specific characteristics for which the Agency obtained data through the section 316(b) questionnaires. In addition, EPA used available geographic information, including detailed topographic mapping and overhead satellite imagery, to better utilize site-specific characteristics of each model facility's intake(s) to determine the appropriate costing modules for that facility. The Agency also utilized facility-specific information collected for the regional benefits studies to further inform the selection of compliance technology at model facilities. The Technical Development Document provides the background and a more detailed explanation of the

[50] In cases where harm cannot be clearly explained to the public, monetization is not feasible because stated preference methods are not reliable when the environmental improvement being valued cannot be characterized in a meaningful way for survey respondents.

Agency's approach to model facility level costing, which has not changed dramatically from that published in the NODA (68 FR 13522).

EPA's approach to model facility-level costing may be described as follows. In order to project upgrades to technologies as a result of compliance with today's final rule, the Agency utilized as much information as was available about the characteristics of the facilities expected to be within the scope of the rule. By incorporating as many site-specific features as possible into the design and implementation of its costing approach, the Agency has been able to capture a representative range of compliance costs at what it deems "model facilities." However, it is infeasible for the Agency to visit and study in detail all of the engineering aspects of each facility complying with this rule (over 400 facilities could incur technology-related compliance costs as a result of this rule). Therefore, although the Agency has developed costs that represent EPA's best effort to develop a site-specific engineering assessment for a particular facility, this assessment does not address any site-specific characteristics that only long-term study of each facility would reveal. Hence, the Agency refers to its approach as a "model" facility approach.

In selecting technology modules for each model facility, EPA, to a degree departed from its traditional least cost approach. The least cost approach, traditionally utilized for estimating compliance technology choices, relies on the principle that the complying plant will choose to install the least cost technology that meets the minimum standard. While the Agency is confident that the suite of available technologies can achieve the performance standards on § 125.94(b) generally, EPA lacks sufficient data to determine the precise performance of each technology on a site-specific basis for over 400 different applications. The Agency thus selected, based on criteria published in the NODA, one of a set of best performing technologies (rather than the least costly technology) that was suitable for each model facility (or intake), in order to ensure that the technology on which costs were based would in fact achieve compliance at that model site. The criteria for selecting the best performing technology for a model facility (or intake) utilized questionnaire data as the primary tool in the assessment. For those facilities utilizing recirculating cooling systems in-place, the Agency assigned no compliance actions as they met the standards at baseline. The Agency then determined those intakes (facilities) that met compliance requirements with technologies in-place. These facilities received no capital or annual operating and maintenance compliance upgrade costs (although they may receive administrative or monitoring costs). The Agency categorized facilities according to waterbody type from which they withdraw cooling water. The Agency then sorted the intakes (facilities) within each waterbody type based on their configuration as reported in the questionnaires. Generally, the categories of intakes within one waterbody type are as follows: canal/channel, bay/embayment/cove, shoreline, and offshore. Once the intake (facility) is classified to this level the Agency examines the type of technology in-place and compares that against the compliance requirements of the particular intake (facility). For the case of entrainment requirements, the intake technologies (outside of recirculating cooling) that qualify to meet the requirements at baseline are fine mesh screen systems, and combinations of far-offshore inlets with passive intakes or fish handling/return systems. A small subset of intakes has entrainment qualifying technologies in-place at baseline (for the purposes of this costing effort). Therefore, in the case of entrainment requirements, most facilities with the requirement would receive technology upgrades. The methodology for choosing these entrainment technologies is explained further on in this discussion. For the case of impingement requirements, there are a variety of intake technologies that qualify (for the purposes of this costing effort) to meet the requirements at baseline. The intake types meeting impingement requirements at baseline include the following: barrier net (the only fish diversion system which qualifies), passive intakes (of a variety of types), and fish handling and return systems. A significant number of intakes (facilities) have impingement technology in-place that meets the qualifications for this costing effort. Therefore, some intakes (facilities) require no technology upgrades when only impingement requirements apply. For facilities that do not pre-qualify for impingement and/or entrainment technology in-place (for the purposes of this costing effort), the Agency focuses next on questionnaire data relating to the intake type—canal/channel, bay/embayment/cove, shoreline, and offshore. Within each intake type, the Agency further classifies according to certain specific characteristics. For the case of bays, embayments, and coves, the Agency determined if the intake is flush, protruding, or recessed from shoreline. For the case of canals and channels, the Agency similarly focuses on whether the intake is flush, protruding, or recessed from a shoreline. For the case of shoreline intakes, the Agency necessarily assessed whether the intake is flush, protruding, or recessed. For the case of offshore intakes, the Agency examines whether or not the intake has an onshore terminus (or well) and assesses the characteristics of the onshore system. The information the Agency gathers up to this point is sufficient to narrow down the likely technology applications for each intake (facility). However, in order to determine the best technology application, the Agency also utilizes commercially available satellite images and maps where available. The use of the satellite images and maps aided the Agency in determining the potential for the construction of expanded intakes in-front of existing intakes and the potential for an intake modification to protrude into the waterbody (such as a near-shore t-screen) due to the degree of navigational traffic in the near vicinity of the intake and whether a protrusion might be tolerated, the possibility of installing a barrier net system, obvious signs of strong currents, the relative distance of a potentially relocated intake inlet, the possibility for fish return installations of moderate length, etc. The Agency was able to collect satellite images for most intakes (facilities) for which it required the resource. However, in some cases (especially those in the rural, mid-western U.S.), only maps were available. Hence, for the case of a significant number facilities located near small freshwater rivers/streams and lakes/reservoirs, the Agency utilized only the questionnaire data and the overhead maps available.

Once the Agency gathered the intake (facility) specific information to this degree, the applicable list of technologies for each intake was small (and in some cases only one technology would apply). Therefore, the Agency examined any other sources of information, such as those obtained for the regional benefits studies, to further narrow down the best technology to meet the requirements of the rule for each model intake (facility). Often, the decision was between just two or three potential technologies. If there was no evidence in the Agency's possession to suggest that the least-cost technology would not function, then the Agency would select this technology. However, should evidence imply that the least cost technology not be able to function reliably or have a feasibility issue

related to site deployment (for example, a barrier net across a navigable waterway or a fish handling and return system with an extremely long return trough), then the Agency departed from the "least-cost" decision process and assigned the "best-performing" technology. In cases where more than one technology still remained after ruling out a least-cost alternative due to evidence (which was a rare occurrence), then the Agency attempted to balance the application of the remaining technologies about a median, thereby assigning moderately high costs for some cases and moderately low costs in others. Therefore, for the case of national costs, the Agency's application of technology cost modules reflect a reasonable national average.

C. Facility Flow Modifications

In developing costs and benefits for the NODA, the Agency revised intake flow information for a small subset of inscope facilities in an effort to ensure the accuracy and quality of the data. In developing costs and benefits for the final rule, the Agency has further refined the intake flow information used.

Since the NODA, the Agency re-evaluated its original decision to use the reported 1998 (the most recent of three years collected) annual flows for Detailed Questionnaire (DQ) recipients for the calculation of benefits. This, in turn, had an impact on the development of estimated design intake flows for short-technical questionnaire (STQ) recipients. As presented in the NODA, the Agency estimated design intake flows for STQ facilities using a statistical methodology based on linear regression of DQ recipients' annual intake flows and DQ recipients' design intake flows to assess the design intake flow information for facilities that responded to the short technical questionnaire. Because the Agency asked STQ respondents for only their actual annual intake flow for the 1998 reporting year only (or a typical operational year), it was necessary to calculate design intake flow information for the purpose of accurately assessing compliance costs. Therefore, for the NODA and proposal, the Agency calculated design intake flows for STQ facilities based on a model derived from only the 1998 DQ flow data. In retrospect, the Agency determined that a more robust approach would be to use all three years of annual DQ flows collected (1996—1998) and to take advantage of the statistical abilities afforded by the expanded data set (that is, to determine and exclude outliers). Hence, for this final rule, the Agency has estimated the costs and benefits of the rule using improved flow data over the NODA and proposal. For the case of STQ facilities, the Agency has utilized an improved data set for the calculation of design intake flows, and, in turn, the calculation of compliance costs.

XI. Economic Analysis

A. Final Rule Costs

EPA estimates that the final rule will have total annualized social (pre-tax) costs of $389 million ($2002). Of this total, $385 million are direct costs incurred by facilities and $4 million are implementation costs incurred by State and Federal government. On a post-tax basis, direct costs incurred by facilities subject to the final rule are expected to be $249 million, including one-time technology costs of complying with the rule, a one-time cost of installation downtime, annual operating and maintenance costs, and permitting costs (initial permit costs, annual monitoring costs, and permit reissuance costs).

These cost estimates include compliance costs for eight facilities that are projected to be base case closures.[51] Excluding compliance costs for projected base case closure facilities would result in annualized pre-tax facility compliance costs of approximately $376 million and annualized post-tax facility compliance costs of approximately $244 million. The equivalent annualized post-tax facility compliance costs were $178 million at proposal and $265 million for the NODA preferred option. The cost difference between proposal and the NODA is due primarily to the expanded range of technology options considered for the NODA and the "best performing technology" selection criteria used to assign cost modules to model facilities (*see* section IV of the NODA, 68 FR 13522, 13526).

In selecting technology modules for each model facility, EPA, to a degree departed from its traditional least cost approach. The least cost approach, traditionally utilized for estimating compliance technology choices relies on the principle that the complying plant will choose to install the least cost technology that meets the minimum standard. While the Agency is confident that the suite of available technologies can achieve compliance with the proposed performance requirements (60–90% reduction in entrainment and 80–95% reduction in impingement mortality relative to the calculation baseline), EPA lacks sufficient data and resources to determine the precise performance of each technology on a site-specific basis for over 400 different applications. The Agency thus selected, for subset of sites where multiple technologies could be under consideration to meet the requirements, a best performing technology (rather than the least costly technology of the choices). The best performing technology concept, when necessary to apply, relied on assigning technologies about a median cost, with some choices above and below. Therefore, for each model facility (or intake), in order to ensure that the technology on which costs were based would in fact achieve compliance at that model site, the Agency could not rely on a one-size fits all, least-cost approach. The cost difference between the NODA and the final rule is primarily a result of decreases in capital and permitting cost estimates.

Capital and O&M costs changed between NODA and final primarily due to three factors. The Agency revised its application of certain technology cost modules (especially the dual-entry, single-exist traveling screen module) between NODA and final, in response to comments received. The Agency revised its costs for some passive screen technology costs utilizing finer mesh screens, in response to comments received. In addition, the Agency credited facilities with far offshore intakes plus certain impingement controls in-place (such as fish handling or passive inlet screens) as having met the requirements for entrainment reduction at baseline. This final change was also in response to comments that recommended that the Agency correlate the benefits assessment more closely with the engineering cost estimates. The overall net result of these changes was to slightly decrease total capital and total O&M costs of the rule. However, on the basis of facilities expected to upgrade technologies to meet the rule requirements, the capital and O&M costs did increase slightly.

There are many uncertainties surrounding any forecast. The national annualized costs estimated for today's rule were necessarily developed using several major assumptions which are subject to uncertainty. The Agency attempted to develop a plausible range of costs focusing on four major cost assumptions surrounding the direct private cost of $385 million that may be incurred when facilities implement this rule. Uncertainty factors were analyzed for the cost assumptions affecting technology capital, technology O&M, downtime for connection outages, initial permitting, and pilot studies. This

[51] There are eight base case closures in 2008, the first model run year of the IPM. *See* section XI.B.1 for further discussion of analyses using the IPM.

uncertainty analysis provided a range of costs for the national private (direct) annualized compliance costs of $377 to $437 million. This range was developed by examining the effect of capacity utilization assumptions on technology capital and O&M costs; the effects of annualization time frame for initial permitting and downtime connection outages; the effects of sampling frequency and data analysis on pilot study costs; and excluding costs for facilities that have partial recirculating systems. For more information on the Agency's analysis of this issue, see DCN 6–5045.

Cost assumption	Base case facility compliance cost estimate	Sensitivity estimate
Annualization time frame for initial permitting and downtime.	30 years	20 years.
Partial recirculation system credit	No	Yes.
Capacity utilization rate used to estimate technology capital and O&M.	Based on 2008 IPM Forecast	Based on historic utilization.
Pilot study costs	Moderate sampling frequency	High sampling frequency.

B. Final Rule Impacts

1. Energy Market Model Analysis

At proposal and for the NODA, EPA used an electricity market model, the Integrated Planning Model (IPM®), to identify potential economic and operational impacts of various regulatory options considered for the Phase II regulation.[52] Electric reliability impact analyses could not be performed using the IPM model. EPA does recognize that due to down time or connection outages estimated to install several of the technologies, and the number of facilities that will need to come into compliance over the first few years after today's rule is promulgated, there may be short-term electric reliability issues unless care is taken within each region to coordinate outages with the North American Electric Reliability Council (NERC) and where possible with normal scheduled maintenance operations. Noting this, EPA has provided flexibility in today's rule so that facilities can develop workable construction schedules with their permit writers and coordinate with NERC to appropriately schedule down times (*see* § 125.95(b)(4)(ii)). As noted in the NERC 2003 Long-term Reliability Assessment, the overall impact on reliability of any new environmental requirements will "* * * depend on providing sufficient time to make the necessary modifications and the commercial availability of control technologies."[53] EPA conducted impact analyses at the market level, by NERC region,[54] and for facilities subject to the Phase II regulation. Analyzed characteristics include changes in electricity prices, capacity, generation, revenue, cost of generation, and income. These changes were identified by comparing two scenarios: (1) The base case scenario (in the absence of any section 316(b) Phase I and Phase II regulation) and (2) the post compliance scenario (after the implementation of the new section 316(b) Phase II regulations). At proposal, EPA used the results of these comparisons to assess the impacts of the proposed rule and two of the five alternative compliance options considered by EPA: (1) The "Intake Capacity Commensurate with Closed-Cycle, Recirculating Cooling System based on Waterbody Type/Capacity" option and (2) the "Intake Capacity Commensurate with Closed-Cycle, Recirculating Cooling System for All Facilities" option. For the NODA, EPA assessed the impacts of the preferred option and the "Intake Capacity Commensurate with Closed-Cycle, Recirculating Cooling System based on Waterbody Type/Capacity" option, making several changes to the analysis (major changes included changes in IPM model aggregation, capacity utilization assumptions, and treatment of installation downtime; see section V.A of the NODA).

Since publication of the NODA, EPA has conducted further IPM analyses. The following sections present a discussion of changes to the analysis since the NODA and the results of the re-analysis of the final rule.

a. Changes to the IPM analyses since the NODA. EPA did not change its IPM assumptions and modeling procedures for this final rule. EPA continued to use the 2000 version of the IPM model to perform the final rule analysis. In the 2003 current version of the IPM, the model has been updated to include, among other things, effects of the State Multi-Pollutant regulations and the New Source Review settlements on environmental compliance costs associated with the IPM base case. Further, the 2003 version of the IPM model includes updated costs for existing facilities such as life extension costs. However, a few general changes affect the results presented in the following subsection. These changes are outlined in section VI.A and include the following: An increase in the estimated number of in-scope Phase II facilities from 551 to 554; revisions of technology, operating and maintenance, and permitting/monitoring costs; and changes to the assumption of construction downtimes for compliance technologies other than recirculating cooling towers.

b. Revised results for the Final Rule. This section presents the revised impact analysis of the final rule. The impacts of compliance with the final rule are defined as the difference between the modeling results for the base case scenario and the modeling results for the post-compliance scenario. Two base case scenarios were used to analyze the impacts associated with the final rule. The first base case scenario was developed using EPA's electricity demand assumption. Under this assumption, demand for electricity is based on the Annual Energy Outlook (AEO) 2001 forecast adjusted to account for efficiency improvements not factored into AEO's projections of electricity sales. The second base case was developed using the unadjusted electricity demand from the AEO 2001. The results presented in this section use the first, EPA-adjusted base case.

[52] For a detailed description of the IPM see Chapter B3 of the Economic and Benefits Analysis (EBA) document in support of the proposed rule (DCN 4–0002; *http://www.epa.gov/ost/316b/econbenefits/b3.pdf*).

[53] North American Electric Reliability Council (NERC). 2003. 2003 Long-term Reliability Assessment: The Reliability of Bulk Electric Systems in North America; prepared December 2003.

[54] The IPM models the ten NERC regions that cover the continental U.S.: ECAR (East Central Area Reliability Coordination Agreement), ERCOT (Electric Reliability Council of Texas), FRCC (Florida Reliability Coordinating Council), MAAC (Mid-Atlantic Area Council), MAIN (Mid-America Interconnected Network, Inc.), MAPP (Mid-Continent Area Power Pool), NPCC (Northeast Power Coordination Council), SERC (Southeastern Electricity Reliability Council), SPP (Southwest Power Pool), and WSCC (Western Systems Coordinating Council). Electric generators in Alaska and Hawaii are not interconnected with these regions and are not modeled by the IPM.

Results using the second base case are presented in the Appendix of Chapter B3 of the final EBA.

EPA analyzed impacts of the final rule using data from model run year 2010. Model run year 2010 was chosen to represent the effects of the final rule for a typical year in which all facilities are expected to be in compliance (for this analysis, EPA assumed that facilities come into compliance between 2005 and 2009; in reality, compliance is expected to begin in 2008).[55] The analysis was conducted at two levels: the market level including all facilities (by NERC region) and the Phase II facility level (including analyses of the in-scope Phase II facilities as a group and of individual Phase II facilities). The results of these analyses are presented in the following subsections.

i. Market-level impacts of the Final Rule. The market-level analysis includes results for all generators located in each NERC region including facilities both in-scope and out-of-scope of the proposed Phase II rule. Exhibit XI–1 presents five measures used by EPA to assess market-level impacts associated with the final rule, by NERC region: (1) Incremental capacity closures, calculated as the difference between capacity closures under the final rule and capacity closures under the base case; (2) incremental capacity closures as a percentage of baseline capacity; (3) post-compliance changes in variable production costs per MWh, calculated as the sum of total fuel and variable O&M costs divided by total generation; (4) post-compliance changes in energy price, where energy prices are defined as the wholesale prices received by facilities for the sale of electric generation; and (5) post-compliance changes in pre-tax income, where pre-tax income is defined as total revenues minus the sum of fixed and variable O&M costs, fuel costs, and capital costs. Additional results are presented in Chapter B3: Electricity Market Model Analysis (section B3–4.1) of the Economic and Benefits Analysis (EBA) in support of the final rule (DCN 6–0002). Chapter B3 also presents a more detailed interpretation of the results of the market-level analysis.

EXHIBIT XI–1.—MARKET-LEVEL IMPACTS OF THE FINAL RULE (2010)

NERC region	Baseline capacity (MW)	Incremental closures		Change in variable production cost per MWh (percent)	Change in energy price per MWh (percent)	Change in pre-tax income ($2002) (percent
		Capacity (MW)	% of baseline capacity			
ECAR	118,529	.....	−0.0	0.1	0.3	−0.8
ERCOT	75,290	.....	−0.0	0.0	5.8	−5.6
FRCC	50,324	.....	−0.0	0.4	0.6	−3.0
MAAC	63,784	.....	−0.0	0.4	0.1	−0.9
MAIN	59,494	94	0.2	0.1	−0.3	−0.3
MAPP	35,835	.....	−0.0	−0.1	−0.3	0.1
NPCC	72,477	.....	−0.0	−0.5	−0.1	−1.9
SERC	194,485	.....	−0.0	0.0	−0.1	−0.5
SPP	49,948	.....	−0.0	−0.1	−0.2	−0.4
WSCC	167,748	58	0.0	0.0	0.0	−0.5
Total	887,915	152	0.0	0.0	n/a	−1.0

Two of the ten NERC regions modeled, MAIN and WSCC, are estimated to experience economic closures of existing capacity as a result of the final rule. These closures represent negligible percentages of regional baseline capacity (0.2% in MAIN and less than 0.1% in WSCC) and of total U.S. baseline capacity (less than 0.1%). EPA estimates that four NERC regions will experience increases in variable production costs per MWh, although the largest increase will not exceed 0.4 percent. In addition, four NERC regions will experience an increase in energy prices under the final rule. Of these, only ERCOT is estimated to experience an increase of more than 1.0 percent (5.8 percent). Pre-tax incomes are estimated to decrease in all but one region, but the majority of these changes will be less than 1.0 percent. ERCOT is estimated to experience the largest decrease in pre-tax income (−5.6 percent). Only one region, MAPP, will experience an increase in market-level pre-tax income (0.1 percent).

ii. Facility-level impacts of the Final Rule. The results from model run year 2010 were used to analyze impacts on Phase II facilities at two levels: (a) Potential changes in the economic and operational characteristics of the group of in-scope Phase II facilities as a whole and (b) potential changes to individual facilities within the group of Phase II facilities. Exhibit XI–2 presents five measures used by EPA to assess impacts to the group of Phase II facilities associated with the final rule, by NERC region: (1) Incremental capacity closures, calculated as the difference between capacity closures under the final rule and capacity closures under the base case; (2) incremental capacity closures as a percentage of baseline capacity; (3) post-compliance changes in variable production costs per MWh, calculated as the sum of total fuel and variable O&M costs divided by total generation; (4) post-compliance changes in electricity generation; and (5) post-compliance changes in pre-tax income, where pre-tax income is defined as total revenues minus the sum of fixed and variable O&M costs, fuel costs, and capital costs. Additional results are presented in section B3–4.2 of the final EBA. Chapter B3 also presents a more detailed interpretation of the results of the analysis of Phase II facilities as a group.

[55] EPA also analyzed potential market-level impacts of the final rule for a year during which some Phase II facilities experience installation downtimes. This analysis used output from model run year 2008. See Chapter B3, section B3–4.3 of the final EBA for the results of this analysis.

EXHIBIT XI–2.—IMPACTS ON PHASE II FACILITIES OF THE FINAL RULE (2010)

NERC region	Baseline capacity (MW)	Incremental closures		Change in variable production cost per MWh (percent)	Change in generation (percent)	Change in pre-tax income (percent)
		Capacity (MW)	% of baseline capacity			
ECAR	82,313	0	0.0	0.0	−0.2	−1.0
ERCOT	43,522	0	0.0	−0.7	−1.8	−10.4
FRCC	27,537	0	0.0	0.3	−0.8	−4.0
MAAC	34,376	0	0.0	0.0	0.2	−1.4
MAIN	36,498	94	0.3	0.1	−0.3	−0.6
MAPP	15,749	0	0.0	−0.1	0.0	−0.3
NPCC	37,651	0	0.0	−1.7	−3.6	−4.3
SERC	107,450	0	0.0	−0.3	−0.2	−0.7
SPP	20,471	0	0.0	−0.4	−0.7	−1.0
WSCC	28,431	58	0.2	−0.9	−4.3	−10.4
Total	433,998	152	0.0	−0.6	−0.8	−1.8

Identical to the market-level results, EPA estimates that 152 MW, or less than 0.1%, of capacity at Phase II facilities will close as a result of the final rule. (If the AEO's higher demand forecast is utilized, it would result in a larger capacity of early closures of 493 MW or more than 0.1%. *See* EBA B3 appendix Table B3–A–3.) MAIN (94 MW) and WSCC (58 MW) are the only regions that are estimated to experience incremental capacity closures. In both regions, these incremental closures represent less than 0.3% of baseline capacity at Phase II facilities. Variable production costs per MWh at Phase II facilities increase in two regions and decrease in six regions under the final rule. No region experiences an increase in Phase II facility production costs that exceeds 0.5 percent, while Phase II facilities in NPCC and WSCC see reductions of 1.7 percent and 0.9 percent, respectively. Phase II facilities in three NERC regions are estimated to experience decreases in generation in excess of 1.0 percent as a result of the final rule. The largest is estimated to be in WSCC, where Phase II facilities experience a 4.3 percent reduction in generation. Overall, EPA estimates that pre-tax income will decrease by 1.8 percent for the group of Phase II facilities. The effects of this change are concentrated in a few regions: WSCC and ERCOT each experience reductions in pre-tax income of 10.4 percent, which is driven by a reduction in revenues (not presented in this exhibit) rather than an increase in costs. NPCC and FRCC are estimated to experience a reduction of 4.3 and 4.0 percent, respectively.

Results for the group of Phase II facilities as a whole may mask shifts in economic performance among individual facilities subject to this rule. To assess potential distributional effects, EPA analyzed facility-specific changes between the base case and the post-compliance case in (1) capacity utilization, defined as generation divided by capacity times 8,760 hours, (2) electricity generation, (3) revenue, (4) variable production costs per MWh, defined as variable O&M cost plus fuel cost divided by generation, and (5) pre-tax income, defined as total revenues minus the sum of fixed and variable O&M costs, fuel costs, and capital costs.

Exhibit XI–3 presents the total number of Phase II facilities with estimated degrees of change due to the final rule. This exhibit excludes 17 in-scope facilities with estimated significant status changes in 2010: Ten facilities are base case closures, one facility is a full closure as a result of the final rule, and six facilities changed their repowering decision between the base case and the post-compliance case. These facilities are either not operating at all in either the base case or the post-compliance case, or they experience fundamental changes in the type of units they operate; therefore, the measures presented in Exhibit XI–3 would not be meaningful for these facilities. In addition, the change in variable production cost per MWh of generation could not be developed for 57 facilities with zero generation in either the base case or post-compliance scenario. For these facilities, the change in variable production cost per MWh is indicated as "n/a."

EXHIBIT XI–3.—OPERATIONAL CHANGES AT PHASE II FACILITIES FROM THE FINAL RULE (2010) [a]

Economic measures	Reduction			Increase			No change	N/A
	</=1%	1–3%	> 3%	</=1%	1–3%	> 3%		
Change in Capacity Utilization [b]	6	21	25	7	7	11	441	0
Change in Generation	4	6	46	11	5	18	428	0
Change in Revenue	83	30	45	142	8	16	194	0
Change in Variable Production Costs/MWh	38	16	9	145	11	17	225	57
Change in Pre-Tax Income	115	109	213	44	11	15	11	0

[a] For all measures percentages used to assign facilities to impact categories have been rounded to the nearest 10th of a percent.
[b] The change in capacity utilization is the difference between the capacity utilization percentages in the base case and post-compliance case. For all other measures, the change is expressed as the percentage change between the base case and post-compliance values.

EPA estimates that the majority of Phase II facilities will not experience changes in capacity utilization or generation due to compliance with the final rule. Of those facilities with changes in post-compliance capacity utilization and generation, most will experience decreases in these measures. Exhibit XI–3 also indicates that the majority of facilities with changes in variable production costs will experience increases. However, about 85

percent of those increases are estimated to be 1.0 percent or less. Changes in revenues at a majority of Phase II facilities will also not exceed 1.0 percent. The largest effect of the final rule is estimated to be on facilities' pre-tax income: the model projects that over 80 percent of facilities will experience a reduction in pre-tax income, with about 40 percent of the overall total experiencing a reduction of 3.0 percent or greater.

2. Other Economic Analyses

EPA updated its other economic analyses conducted at proposal and for the NODA to determine the effect of changes made to the assumptions for the final rule on steam electric generating facilities. This section discusses changes made to EPA's methodology and assumptions and presents the updated results. For complete results of this analysis, refer to Chapter B2 of the final EBA. For complete results of the proposal and the NODA analyses, refer to the chapters in Part B of the EBA document in support of the proposed rule at *http://www.epa.gov/waterscience/316b/econbenefits/* and DCN 5–3004 of the NODA docket.

It should be noted that the measures presented in this section are provided in addition to the economic impact measures based on the Integrated Planning Model (IPM®) analyses (*see* section XI.B.1). The following measures are used to assess the magnitude of compliance costs; they are not used to predict closures or other types of economic impacts on facilities subject to Phase II regulation.

a. Cost-to-revenue measure.

i. Facility-level analysis. EPA examined the annualized post-tax compliance costs of the final rule as a percentage of baseline annual revenues, for each of the 554 facilities expected to be subject to Phase II of the section 316(b) regulation. This measure allows for a comparison of compliance costs incurred by each facility with its revenues in the absence of the Phase II regulation. The revenue estimates are facility-specific baseline projections from the IPM base case for 2008 (*see* section XI.B.1 for a discussion of EPA's analyses using the IPM).[56]

Similar to the findings at proposal and for the NODA preferred option, EPA estimates that a majority of the facilities subject to the final rule, 413 out of 554 (75 percent), will incur annualized costs of less than one percent of revenues. Of these, 314 facilities incur compliance costs of less than 0.5 percent of revenues. In addition, 94 facilities (17 percent) are estimated to incur costs of between one and three percent of revenues, and 39 facilities (7 percent) are estimated to incur costs of greater than three percent. Eight facilities are estimated to be base case closures.

ii. Firm-level analysis. The firms owning the facilities subject to Phase II regulation may experience greater impacts than individual in-scope facilities if they own more than one facility with compliance costs. EPA therefore also analyzed the cost-to-revenue ratios at the firm level. EPA identified the domestic parent entity of each in-scope facility and obtained their sales revenue from publicly available data sources (the Dun and Bradstreet database for parent firms of investor-owned utilities and nonutilities; and Form EIA–861 for all other parent entities). This analysis showed that 126 unique domestic parent entities own the facilities subject to Phase II regulation. EPA compared the aggregated annualized post-tax compliance costs for each facility owned by the 126 parent entities to the firms' total sales revenue.

Since proposal, EPA has updated the parent firm determination for Phase II facilities. EPA also updated the average Form EIA–861 data used for this analysis from 1996–1998 (used at proposal) to 1997–1999 (used for the NODA) and 1999–2001 (used for the final rule). In addition, EPA made one modification to the sources of revenue data used in this analysis: At proposal, EPA used sales volume from Dun and Bradstreet (D&B) for any parent entity listed in the database. If D&B data were not available, EPA used the EIA database or the section 316(b) survey. For the NODA and final rule analyses, EPA used the D&B database for privately-owned entities only. For other entities, EPA used the EIA database. For the final rule analysis, EPA conducted additional research (*e.g.*, Securities and Exchange Commission 10–K filings; company web sites) to collect revenue data for those firms whose revenue was not reported in either D&B or Form EIA 861.

For the final rule, EPA estimates that of the 126 parent entities, 115 entities (91 percent) will incur annualized costs of less than one percent of revenues. Of these, 105 entities incur compliance costs of less than 0.5 percent of revenues. In addition, 10 entities (8 percent) are estimated to incur costs of between one and three percent of revenues, and only one entity (1 percent) is estimated to incur costs of greater than three percent. The highest estimated cost-to-revenue ratio for the final rule is 6.7 percent of the entities' annual sales revenue (for the proposed rule, this value was 5.3 percent; for the NODA preferred option, this value was 7.4 percent).

b. Cost per household. EPA also conducted an analysis that evaluates the potential cost per household, if Phase II facilities were able to pass compliance costs on to their customers. This analysis estimates the average compliance cost per household for each North American Electricity Reliability Council (NERC) region,[57] using two data inputs: (1) The average annual pre-tax compliance cost per megawatt hour (MWh) of total electricity sales and (2) the average annual MWh of residential electricity sales per household. For the proposal and NODA analyses, EPA used 2000 electricity sales information from Form EIA–861 (Annual Electric Power Industry Report); for the final rule, EPA updated the electricity sales information to 2001.

The results of this analysis show that the average annual cost of the final rule per residential household is expected to range from $0.50 in Alaska to $8.18 in Hawaii. The U.S. average is estimated to be $1.21 per household.

c. Electricity price analysis. EPA also considered potential effects of the final Phase II rule on electricity prices. EPA used three data inputs in this analysis: (1) Total pre-tax compliance cost incurred by facilities subject to Phase II regulation, (2) total electricity sales, based on the Annual Energy Outlook (AEO), and (3) prices by end use sector (residential, commercial, industrial, and transportation), also from the AEO. All three data elements were calculated by NERC region. For the proposal and NODA analyses, EPA used the AEO 2002; for the final rule, EPA updated the data with the AEO 2003.

The results of the final rule analysis show that the annualized costs of complying (in cents per KWh sales) range from 0.007 cents in the SPP region to 0.019 cents in the NPCC region. To determine potential effects of these

[56] EPA used 2008 rather than 2010 baseline revenues for this analysis because 2008 is the first model run year specified in the IPM analyses. EPA used the first model run year because it more closely resembles the current operating conditions of in-scope facilities than later run years (over time, facilities may be increasingly affected by factors other than the Phase II regulation).

[57] There are twelve NERC regions: ASCC (Alaska Systems Coordinating Council), ECAR (East Central Area Reliability Coordination Agreement), ERCOT (Electric Reliability Council of Texas), FRCC (Florida Reliability Coordinating Council), HI (Hawaii), MAAC (Mid-Atlantic Area Council), MAIN (Mid-America Interconnected Network, Inc.), MAPP (Mid-Continent Area Power Pool), NPCC (Northeast Power Coordination Council), SERC (Southeastern Electricity Reliability Council), SPP (Southwest Power Pool), and WSCC (Western Systems Coordinating Council).

compliance costs on electricity prices, EPA compared the per KWh compliance cost to baseline electricity prices by end use sector and for the average of the sectors (the detailed results are presented in Chapter B2 of the final EBA). This analysis projects that the greatest increase in electricity prices will be in the WSCC region (0.3 percent). The average increase in electricity prices is estimated to be 0.16 percent (for the proposed rule, this value was 0.11 percent; for the NODA preferred option, this value was 0.17 percent).

XII. Benefits Analysis

A. Introduction

This section presents EPA's estimates of the national environmental benefits of the final section 316(b) regulations for Phase II existing facilities. The assessed benefits occur due to the reduction in impingement and entrainment at cooling water intake structures affected by this rulemaking. Impingement and entrainment kills or injures large numbers of all life stages of aquatic organisms. By reducing the levels of impingement and entrainment, today's final rule will increase the number of fish, shellfish, and other aquatic life in local aquatic ecosystems. This, in turn, directly and indirectly improves use benefits such as those associated with recreational and commercial fisheries. Other types of benefits, including ecological and non-use values, would also be enhanced. Section D provides an overview of the types and sources of benefits anticipated, how these benefits are estimated, the level of benefits achieved by the final rule, and how monetized benefits compare to costs. The analysis was based on impingement and entrainment data from facility studies. Most of these studies counted losses of fish species only and considered only a limited subset of the species impinged and entrained.

To estimate the economic benefits of reducing impingement and entrainment at existing cooling water intake structures, all the beneficial outcomes need to be identified and, where possible, quantified and assigned appropriate monetary values. Estimating economic benefits is challenging because of the many steps necessary to link reductions in impingement and entrainment to changes in impacted fisheries and other aspects of relevant aquatic ecosystems, and then to link these ecosystem changes to the resulting changes in quantities and values for the associated environmental goods and services that ultimately are linked to human welfare. The methodologies used in the estimation of benefits of the final rule are largely built upon those used for estimating use benefits of the proposed rule (*see* 67 FR 17121) and the Notice of Data Availability (*see* 67 FR 38752). The Regional Analysis Document for the Proposed Section 316 (b) Phase II Existing Facilities Rule (*see* DCN 6–0003), hereafter known as the Regional Study or Regional Analysis, provides EPA's complete benefit assessment for the final rule.

National benefit estimates for this rule are derived from a series of regional studies across the country from a range of waterbody types. Section XII.B provides detail on the regional study design. Sections XII.C through XII.E of this preamble describe the methods EPA used to evaluate impingement and entrainment impacts at section 316(b) Phase II existing facilities and to derive an economic value associated with any such losses. Regional benefits are estimated using a set of statistical weights for each in-scope facility that were developed as part of the survey design. National benefit estimates are obtained by summing regional benefits.

B. Regional Study Design

In its analysis for the section 316(b) Phase II proposal, EPA relied on case studies of 19 facilities grouped by waterbody type (oceans, estuaries/tidal rivers, lakes/reservoirs, and rivers/streams) to estimate the potential economic benefits of reduced impingement and entrainment. For the proposal analysis, EPA extrapolated estimates of impingement and entrainment for each of the case study facilities to other facilities located on the same waterbody type, including those in different regions. However, a number of commenters expressed concern about this method of extrapolation, noting that there are important ecological and socioeconomic differences among different regions of the country, even within the same waterbody type. To address this concern, EPA revised the design of its analysis to examine cooling water intake structure impacts and regulatory benefits at the regional level. This involved the evaluation of impingement and entrainment data collected by the industry for another 27 facilities in addition to the 19 facilities evaluated for proposal (for a total of 46 facilities). Regional results were then combined to develop national estimates.

The Agency evaluated the benefits of today's rule in seven study regions (North Atlantic, Mid Atlantic, South Atlantic, Gulf of Mexico, California, Great Lakes, and Inland) based on similarities in the affected ecosystems, aquatic species present, and characteristics of commercial and recreational fishing activities within each of the seven regions (*see* the background chapter of each study region in Parts B-H of the Regional Analysis Document for maps of the study regions). The five coastal regions (California, North Atlantic, Mid-Atlantic, South Atlantic, and Gulf of Mexico) correspond to those of the National Oceanographic and Atmospheric Association (NOAA) Fisheries. The Great Lakes region includes all facilities in scope of the Phase II rule that withdraw water from Lakes Ontario, Erie, Michigan, Huron, and Superior or are located on a waterway with open fish passage to a Great Lake and within 30 miles of the lake. The Inland region includes the remaining facilities that withdraw water from freshwater lakes, rivers, and reservoirs.

Based on comments on the proposal about study gaps, EPA used available life history data to construct representative regional life histories for groups of similar species with a common life history type and groups used by NOAA Fisheries for landings data. Aggregation of species into groups facilitated evaluation of facility impingement and entrainment monitoring data. DCN 6–0003 provides a listing of the species in each life history group evaluated by EPA and tables of the life history data and data sources used for each group.

To obtain regional impingement and entrainment estimates, EPA extrapolated losses from selected facilities with impingement and entrainment data to all other facilities within the same region. Impingement and entrainment data were extrapolated on the basis of operational flow, in millions of gallons per day (MGD), where MGD is the average operational flow over the period 1996–1998 as reported by facilities in response to EPA's Section 316(b) Detailed Questionnaire and Short Technical Questionnaire. Operational flow at each facility was scaled using factors reflecting the relative effectiveness of currently in-place technologies for reducing impingement and entrainment. DCN 6–0003 provides details of the extrapolation procedure. The goal of the analysis was to provide regional and national estimates, so although there may be variability in the actual losses (and benefits) per MGD across particular individual facilities, EPA believes that this method of extrapolation is a reasonable basis for developing an estimate of regional- and national-level

benefits for the purposes of this rulemaking.

C. The Physical Impacts of Impingement and Entrainment

EPA's benefits analysis is based on facility-provided biological monitoring data. Facility data consist of records of impinged and entrained organisms sampled at intake structures. However, factors such as sampling methods and equipment, the number of samples taken, the duration of the sampling period, and the unit of time and volume of intake flow used to express impingement and entrainment, and other aspects of facility sampling programs, are highly variable. The data available covered organisms of all ages and life stages from newly laid eggs to mature adults. Therefore, EPA converted sampling counts into standardized estimates of the annual numbers of fish impinged or entrained and then expressed these estimates in terms of metrics suitable for the environmental assessment and economic benefits analysis.

EPA notes that the facility studies evaluated may under or over estimate impingement and entrainment rates. For example, facility studies typically focus on only a subset of the fish species impacted by impingement and entrainment, resulting in an underestimate of the number of species and total losses. Studies often did not count early life stages of organisms that were hard to identify. In addition, most studies EPA found were conducted over 30 years ago, before activities under the Clean Water Act improved aquatic conditions. In those locations where water quality was degraded relative to current conditions, the numbers and diversity of fish may have been depressed during the monitoring period, resulting in low impingement and entrainment estimates. On the other hand, use of linear methods for projecting losses to fish and shellfish in the waterbody may overstate or understate impacts. Nevertheless, EPA believes that the data from the facility studies were sufficient for developing an estimate of the relative magnitude of impingement and entrainment losses nation-wide.

Using standard fishery modeling techniques,[58] EPA constructed models that combined facility-derived impingement and entrainment counts with relevant life history data to derive estimates of (1) age-one equivalent losses (the number of individuals of different ages impinged and entrained by facility intakes expressed as age-one equivalents), (2) foregone fishery yield (pounds of commercial harvest and numbers of recreational fish and shellfish that are not harvested due to impingement and entrainment), and (3) foregone biomass production (pounds of impinged and entrained forage species that are not commercial or recreational fishery targets but serve as valuable components of aquatic food webs, particularly as an important food supply to other aquatic species, including commercial and recreational species). Estimates of foregone fishery yield include direct and indirect losses of impinged and entrained species that are harvested. Indirect losses represent the yield of these harvested species that is lost due to losses of forage species. Details of the methods used for these analyses are provided in Chapter A5 of Part A of the Regional Analysis document. For all analyses, EPA used the impingement and entrainment estimates provided by the facility and assumed 100% entrainment mortality based on the analysis of entrainment survival studies presented in Chapter A7 of Part A of the Regional Analysis document.

Exhibit XII–1 presents EPA's estimates of the current level of total annual impingement and entrainment in the study regions.

EXHIBIT XII–1.—TOTAL CURRENT ANNUAL IMPINGEMENT AND ENTRAINMENT, BY REGION

Region	Age-one equivalents (millions)	Foregone fishery yield (million lbs)	Biomass production foregone (million lbs)
California	312.94	28.87	43.62
North Atlantic	65.70	1.26	289.12
Mid Atlantic	1,733.14	67.2	110.90
South Atlantic	342.54	18.34	28.31
Gulf of Mexico	191.23	35.81	48.12
Great Lakes	319.11	3.59	19.34
Inland	369	3.53	122.0
Total for 554 facilities[a]	3,449.38	164.97	717.07

[a] National totals are sample-weighted and include Hawaii. Hawaii benefits are calculated based on average loss per MGD in North Atlantic, Mid Atlantic, Gulf of Mexico, California and the total intake flow in Hawaii.

Exhibit XII–2 presents EPA's estimates of annual combined impingement and entrainment reductions associated with the rule, by region.

[58] Ricker, W.E. 1975. Computation and interpretation of biological statistics of fish populations. Fisheries Research Board of Canada, Bulletin 191; Hilborn, R. and C.J. Walters. 1992. Quantitative Fisheries Stock Assessment, Choice, Dynamics and Uncertainty. Chapman and Hall, London and New York.; Quinn, T.J., II. and R.B. Deriso. 1999. Quantitative Fish Dynamics. Oxford University Press, Oxford and New York; Dixon, D.A. 1999. Catalog of Assessment Methods for Evaluating the Effects of Power Plant Operations on Aquatic Communities. Final Report. Report number TR–112013.

EXHIBIT XII–2.—REDUCTIONS IN ANNUAL IMPINGEMENT AND ENTRAINMENT, BY REGION

Region	Age-one equivalents (millions)	Foregone fishery yield (million lbs)	Biomass production foregone (million lbs)
California	66.39	6.10	9.19
North Atlantic	19.34	0.37	84.28
Mid Atlantic	846.37	34.28	54.66
South Atlantic	76.67	5.31	6.31
Gulf of Mexico	89.55	13.84	16.50
Great Lakes	159.52	1.73	8.51
Inland	116.83	1.06	20.90
Total for 554 facilities[a]	1,420.20	64.92	217.09

[a] National totals are sample-weighted and include Hawaii. Hawaii losses are estimates based on average loss rates per MGD at mainland coastal facilities and the total intake flow of the Hawaii facilities.

D. National Benefits of Rule

1. Overview

Economic benefits of today's rule can be broadly defined according to categories of goods and services provided by the species affected by impingement and entrainment at cooling water intake structures (CWIS). The first category includes benefits that pertain to the use (direct or indirect) of the affected fishery resources. The direct use benefits can be further categorized according to whether or not affected goods and services are traded in the market. The "direct use" benefits of the 316(b) regulation include both "market" commodities (*e.g.,* commercial fisheries) and "nonmarket" goods (*e.g.,* recreational angling). Indirect use benefits also can be linked to either market or nonmarket goods and services—for example, the manner in which reduced impingement- and entrainment-related losses of forage species leads through the aquatic ecosystem food web to enhance the biomass of species targeted for commercial (market) and recreational (nonmarket) uses. The second category includes benefits that are independent of any current or anticipated use of the resource; these are known as "non-use" or "passive use" values. Non-use benefits reflect human values associated with existence and bequest motives.

The economic value of benefits is estimated using a range of valuation methods, with the specific approach being dependent on the type of benefit category, data availability, and other suitable factors. Commercial fishery benefits are valued using market data. Recreational angling benefits are valued using a combination of primary and secondary research methods. For four of the seven study regions, EPA developed original Random Utility Models (RUM) of recreational angling behavior to estimate changes in recreational fishing values resulting from improved fishing opportunities due to reductions in impingement and entrainment. For the remaining three study regions (Inland, North Atlantic, and South Atlantic), EPA used secondary nonmarket valuation data (*e.g.,* benefits transfer of nonmarket valuation studies of the value of recreational angling). Because methodologies for estimating use values for recreational and commercial species are well developed, and some of these species have been extensively studied, these values are relatively straightforward to estimate. Sections XII.D.3 and XII.D.4 briefly summarize EPA's approaches to measuring direct use benefits. A detailed description of these approaches can be found in the 316(b) Regional Analysis document.

Estimating benefits from reduced impingement and entrainment of forage species is more challenging because these species are not targeted directly by commercial or recreational anglers and have no direct use values that can be observed in markets or inferred from revealed actions of anglers. To estimate indirect use benefits from reducing impingement and entrainment losses to forage species, EPA used a simple trophic transfer model that translates changes in impingement and entrainment losses of forage fish into changes in the harvest of commercial and recreational species that are subject to impingement and entrainment (*i.e.,* not the whole food web). Agency benefits estimates are based on projected numbers of age 1 equivalent fish saved under the final rule.

Neither forage species nor the unlanded portion of recreational and commercial species have direct uses; therefore, they do not have direct use values. Their potential value to the public is derived from two alternative sources: their indirect use as both food and breeding population for those fish harvested; and, the willingness of individuals to pay for the protection of fish based on a sense of altruism, stewardship, bequest, or vicarious consumption (non-use benefits). To estimate non-use benefits from reducing losses to forage species, and landed and unlanded commercial and recreational species, EPA explored benefits transfer from nonmarket valuation studies of non-use values of aquatic ecosystem improvements. EPA also explored the transfer of secondary nonmarket valuation data to value losses of threatened and endangered species. These efforts generated evidence that non-use values could occur as a result of this rule, but EPA was unable, by the time of publication of this final rule, to estimate reliable valuations for the resource changes associated with the expected results of this rule. EPA also investigated additional approaches to illustrate public willingness-to-pay for potential aquatic resource improvements that might occur because of this rule, but the Agency did not have sufficient time to fully develop and analyze these non-use benefit approaches for the final rule. Section XII.D.5 briefly summarizes the approaches EPA considered for measuring non-use benefits. Additional details about all approaches explored for estimating benefits can be found in Section XII.F and the 316(b) Regional Analysis document (DCN 6–0003).

As a consequence of the challenges associated with estimating benefits, some benefits are described only qualitatively, because it was not feasible, by the time of publication of this final rule, to derive reliable quantitative estimates of the degree of impact and/or the monetary value of reducing those impacts at the national level.

The remaining parts of Section XII.D below discuss details about discounting future benefits, valuation of recreational fishing, valuation of commercial fishing,

potential non-use benefits, and estimation of national benefits.

2. Timing of Benefits

Discounting refers to the economic conversion of future benefits and costs to their present values, accounting for the fact that individuals tend to value future outcomes less than comparable near-term outcomes. Discounting is important when benefits and costs occur in different years, and enables a comparison of benefits to costs across different time periods.

For today's rule, benefits are discounted to calculate benefits in a manner that makes the timing comparable to the annualized cost estimates. The benefits of today's rule are estimated as the typical benefits expected once the rule takes effect. The need to discount arises from two different delays in the realization of benefits.

First, facilities will not immediately achieve compliance. Facilities will face regulatory requirements once the rule takes effect, but it will take time to make the required changes. EPA has assumed, for the purpose of estimating benefits, that it will take one year from the date when installation costs are incurred by a facility until the required cooling water technology is operational. To account for this lag, all benefits are discounted by one year from the date when costs are incurred.

Second, an additional time lag will result between the time of technology implementation and resulting increased fishery yields. This lag stems from the fact that one or more years may pass between the time an organism is spared impingement and entrainment and the time of its ultimate harvest. For example, a larval fish spared from entrainment (in effect, at age 0) may be caught by a recreational angler at age 3, meaning that a 3-year time lag arises between the incurred technology cost and the realization of the estimated recreational benefit. Likewise, if a 1-year old fish is spared from impingement and is then harvested by a commercial waterman at age 2, there is a 1-year lag between the incurred cost and the subsequent commercial fishery benefit. To account for this growth period, EPA applied discounting by species groups in each regional study. EPA conducted this analysis using two alternative discount rates as recommended by OMB: 3% and 7%. The Agency notes that discounting was applied to recreational and commercial fishing benefits only. Non-use benefits are independent of fish age and size and, thus start as soon as impingement and entrainment ceases.

3. Recreational Fishing Valuation

a. Recreational fishery methods for marine regions. For the five coastal regions, EPA's analysis of recreational fishing benefits from reduced impingement and entrainment is based on region-specific random utility models (RUM) of recreational anglers' behavior, combined with benefit function transfer. EPA developed original RUM models for four of the five coastal regions: California, the Mid-Atlantic, the South Atlantic, and the Gulf of Mexico. For the North Atlantic region, EPA used a model developed by the National Marine Fisheries Service (NMFS) by Hicks *et al.* (Hicks, Steinback, Gautam, and Thunberg, 1999. Volume II: The Economic Value of New England and Mid-Atlantic Sportfishing in 1994—DCN 5–1271). Chapter A11 of the Regional Analysis document provides detailed discussion of the methodology used in EPA's RUM analysis.

The regional recreational fishing studies use information on recreational anglers' behavior to infer anglers' economic value for the quality of fishing in the case study areas. The models' main assumption is that anglers will get greater satisfaction, and thus greater economic value, from sites where the catch rate is higher due to reduced impingement and entrainment, all else being equal. This benefit may occur in two ways: first, an angler may get greater enjoyment from a given fishing trip when catch rates are higher, and thus get a greater value per trip; second, anglers may take more fishing trips when catch rates are higher, resulting in greater overall value for fishing in the region. EPA modeled an angler's decision to visit a site as a function of site-specific cost, fishing trip quality, and additional site attributes such as presence of boat launching facilities or fish stocking at the site.

The Agency used 5-year historical catch rates per hour of fishing as a measure of baseline fishing quality in the regional studies. Catch rate is one of the most important attributes of a fishing site from the angler's perspective. This attribute is also a policy variable of concern because catch rate is a function of fish abundance, which is affected by fish mortality caused by impingement and entrainment.

The Agency used the estimated model coefficients in conjunction with the estimated changes in impingement and entrainment in a given region to estimate per-day welfare gain to recreational anglers due to the final rule. For the North Atlantic region, EPA used model coefficients estimated by Hicks *et al.* (1999) (DCN 4–1603).

To estimate the total economic value to recreational anglers for changes in catch rates resulting from changes in impingement and entrainment in a given region, EPA multiplied the total number of fishing days for a given region by the estimated per-day welfare gain due to the regulation. Because of data limitations, EPA was unable to estimate participation models for all regions. For the California and Great Lakes regions, the welfare estimates presented in the following section are based on the estimates of baseline recreational fishing participation provided by NOAA Fisheries. Thus, welfare estimates for these two regions presented in today's rule do not account for changes in recreational fishing participation due to the improved quality of the fishing sites; however, these changes are likely to be small based on results for other regions.

For the North Atlantic, Mid-Atlantic, South-Atlantic, and Gulf regions, estimates are based on an average of baseline and predicted increased fishing days. For these regions, EPA also estimated a trip frequency model, which captures the effect of changes in catch rates on the number of fishing trips taken per recreational season.

b. Recreational Fishery methods for the Great Lakes region. For the Great Lakes region, EPA developed an original RUM model for the state of Michigan, and transferred benefits to other Great Lakes states. EPA's RUM model for the Great Lakes used data from the 2001 Michigan Recreational Anglers survey, and information on historical catch rates at Michigan fishing sites on Lakes Michigan, Huron, Superior, and Erie provided by the Michigan Department of Natural Resources (MDNR, 2002, DCN 4–1863). For the Great Lakes, EPA estimated a single RUM site choice model for boat, shore, and ice-fishing modes. To transfer values from the Michigan study to other Great Lakes states, EPA used harvest information from state-level anglers' creel surveys, and participation information from the U.S. Fish and Wildlife Service's Annual Survey of Fishing, Hunting, and Wildlife-Related Recreation (U.S. Department of the Interior, 2001, DCN 1–3082–BE).

c. Recreational fishery methods for the Inland region. For the Inland region, EPA used a benefit transfer approach to value post regulation recreational impingement and entrainment losses. EPA conducted this analysis for five aggregate species groups: panfish, perch, walleye/pike, bass, and anadromous gamefish. The panfish group includes

species commonly classified as panfish, except perch, and includes species that did not clearly fit in one of the other groups. Using estimates collected from ten studies, the Agency calculated measures of central tendency for the marginal value of catching one additional fish for each species group. For detail see Chapter H4, of the Regional Study Document, DCN 6–0003.

The mean marginal value per additional fish caught is $2.55 for panfish, $0.38 for perch, $6.54 for walleye/pike, $4.18 for bass, and $11.95 for anadromous gamefish. EPA combined these marginal values per fish with estimates of recreational fishing losses that would be prevented by the regulation to calculate the value of post regulation recreational fishing benefits.

d. Results. As noted earlier in this section, anglers will get greater satisfaction, and thus greater economic value, from sites where the catch rate is higher, all else being equal. Decreasing impingement and entrainment increases the number of fish available to be caught by recreational anglers, thus increasing angler welfare.

Exhibit XII–3 shows the benefits that would result from reducing impingement and entrainment losses by installing cooling water intake technology under the final regulation. These values were discounted at a 3 percent discount rate and a 7 percent discount rate to reflect the fact that fish must grow to a certain size before they will be caught by recreational anglers and to account for the one-year lag between the date when installation costs are incurred and technology implementation.

The greatest recreational fishing benefits from reducing impingement and entrainment losses occur in the Mid-Atlantic, South Atlantic, and Great Lakes regions. For more detailed information on the models and results for each region, see Chapter 4 in Parts B through H of the 316(b) Regional Analysis document.

EXHIBIT XII–3.—POST REGULATION RECREATIONAL FISHING BENEFITS FROM REDUCING IMPINGEMENT AND ENTRAINMENT LOSSES

Region	Baseline recreational fishery losses (number of fish)	Reduction in recreational fishery losses (number of fish)	Benefits of final rule (million 2002$)		
			0% Discount rate	3% Discount rate	7% Discount rate
California	5,787,661	1,735,668	$3.01	$2.45	$1.91
North Atlantic	916,396	267,536	1.59	1.38	1.17
Mid Atlantic	20,468,540	9,990,333	47.69	43.37	38.48
South Atlantic	4,314,983	985,769	7.49	6.85	6.17
Gulf of Mexico	3,854,850	1,201,806	6.79	6.18	5.53
Great Lakes	4,743,384	2,283,896	15.51	13.95	12.21
Inland	3,188,097	930,610	3.34	2.98	2.58
Total for 554 facilities[a]	44,513,814	17,908,496	87.83	79.34	69.96

[a] National totals are sample-weighted and include Hawaii. Hawaii benefits are calculated based on average loss per MGD in North Atlantic, Mid Atlantic, Gulf of Mexico, California and the total intake flow in Hawaii.

The total for all regions, discounted at three percent, is $79.3 million; and the total for all regions, discounted at seven percent, is $70.0 million.

e. Limitations and uncertainties. Because of the uncertainties and assumptions of EPA's analysis, the estimates of benefits presented in this section may understate the benefits to recreational anglers. In estimating the benefits of improved recreational angling for the California and Great Lakes regions, the Agency assigned a monetary benefit only to the increases in consumer surplus for the baseline number of fishing days. This approach omits the portion of recreational fishing benefits that arise when improved conditions lead to higher levels of participation. However, EPA's analysis of changes in recreational fishing participation due to the section 316(b) regulation for other coastal regions shows that the practical effect of this omission is likely to be very small with respect to the total recreational benefits assessment.

4. Commercial Fishing Valuation

Reductions in impingement and entrainment at cooling water intake structures are expected to benefit the commercial fishing industry. The effect is straightforward: reducing the number of fish killed will increase the number of fish available for harvest. Measuring the benefits of this effect is less straightforward. The next section summarizes the methods EPA used to estimate benefits to the commercial fishing sector. The following section presents the estimated commercial fishing benefits for each region.

a. Methods. EPA estimated commercial benefits by first estimating the value of total losses under current impingement and entrainment conditions (or the total benefits of eliminating all impingement and entrainment). Then, based on review of the empirical literature, EPA assumed that producer surplus is equal to 0% to 40% of baseline losses. Finally, EPA estimated benefits by applying the estimated percentage reduction in impingement and entrainment to the estimated producer surplus to obtain the estimated increase in producer surplus attributable to the rule. This methodology was applied in each region in the final analysis: the North Atlantic, Mid-Atlantic, South Atlantic, Gulf of Mexico, California, Great Lakes, and Inland. Additional detail on the methods EPA used for this analysis can be found in Chapter A10 "Methods For Estimating Commercial Fishing Benefits" in the Regional Analysis Document.

The process used to estimate regional losses and benefits to commercial fisheries is as follows:

1. Estimate losses to commercial harvest (in pounds of fish) attributable to impingement and entrainment under current conditions. The basic approach is to apply a linear stock-to-harvest assumption, such that if 10% of the current commercially targeted stock were harvested, then 10% of the commercially targeted fish lost to impingement and entrainment would also have been harvested absent impingement and entrainment. The percentage of fish harvested is based on data on historical fishing mortality rates.

2. Estimate gross revenue of lost commercial catch. The approach EPA

uses to estimate the value of the commercial catch lost due to impingement and entrainment relies on landings and dockside price ($/lb) as reported by NOAA Fisheries for the period 1991–2001. These data are used to estimate the revenue of the lost commercial harvest under current conditions (*i.e.*, the increase in gross revenue that would be expected if all impingement and entrainment impacts were eliminated).

3. Estimate lost economic surplus. The conceptually suitable measure of benefits is the sum of any changes in producer and consumer surplus. The methods used for estimating the change in surplus depend on whether the physical impact on the commercial fishery market appears sufficiently small such that it is reasonable to assume there will be no appreciable price changes in the markets for the impacted fisheries.

For the regions and magnitude of losses included in this analysis, it is reasonable to assume no change in price, which implies that the welfare change is limited to changes in producer surplus. The change in producer surplus is assumed to be equivalent to a portion of the change in gross revenues, as developed under step 2. EPA assumes a range of 0% to 40% of the gross revenue losses estimated in step 2 as a means of estimating the change in producer surplus. This is based on a review of empirical literature (restricted to only those studies that compared producer surplus to gross revenue) and is consistent with recommendations made in comments on the EPA analysis at proposal.

4. Estimate increase in surplus attributable to the Phase II regulations. Once the commercial surplus losses associated with impingement and entrainment under baseline conditions have been estimated according to the approaches outlined in steps 2 and 3, EPA estimates the percentage reduction in impingement and entrainment at a regional level.

b. Results. Exhibit XII–4 presents the estimated commercial fishing benefits attributable to today's rule for each region. The results reported include the total reduction in losses in pounds of fish, and the value of this reduction discounted at 0%, 3%, and 7%. Total commercial fishing benefits for the U.S., applying a 3% discount rate, are estimated to range from $0 to $3.5 million. Applying a 7% rate they range from $0 to $3.5 million.

EXHIBIT XII–4.—ANNUAL COMMERCIAL FISHING BENEFITS [a]

Region [c]	Current (baseline) lost yield (million lbs)	Reduction in lost yield (million lbs)	Benefits (millions of 2002$) [b]		
			0% discount rate	3% discount rate	7% discount rate
California	11.5	2.4	0.7	0.5	0.4
North Atlantic	0.6	0.2	0.1	0.1	0.0
Mid Atlantic	48.7	25.3	1.8	1.7	1.5
South Atlantic	9.6	3.5	0.2	0.2	0.2
Gulf of Mexico	7.6	3.6	0.8	0.7	0.6
Great Lakes	1.6	0.8	0.2	0.2	0.2
Inland U.S.	n/a	n/a	n/a	n/a	n/a
Total for 554 facilities	82.8	37.0	4.1	3.5	3.0

[a] Benefits are upper bound benefits based on 40% of gross revenue. The lower bound is $0.
[b] Discounted to account for lag in implementation and lag in time required for fish lost to I&E to reach a harvestable age. Assumed it will take one year from the date when installation costs are incurred to the date of installation. Thus, all benefits are discounted by one year from the date when installation costs are incurred.
[c] Regional totals are unweighted. National total estimates are weighted and include Hawaii.

c. Limitations and uncertainties. Some of the major uncertainties and assumptions of EPA's commercial fishing analysis include:

- Projected changes in harvest may be under-estimated because the cumulative impacts of impingement and entrainment over time are not considered.
- The analysis only includes individuals that are directly killed by impingement and entrainment, not their progeny, though given the complexities of population dynamics, the significance of this omission is not clear.
- Projected changes in harvest may be too high or too low because interactions with other stressors are not considered.
- EPA used impingement and entrainment data provided by the facilities. While EPA used the most current data available, in some cases these data are 20 years old or older. Thus, they may not reflect current conditions.
- EPA assumes a linear stock-to-harvest relationship (*i.e.*, a 13% change in stock would have a 13% change in landings); this may be low or high, depending on the condition of the stocks. Region-specific fisheries regulations also will affect the validity of the linear assumption.
- EPA assumes that NOAA Fisheries landings data are accurate and complete. However, in some cases prices and/or quantities may be reported incorrectly.
- EPA currently estimates that the increase in producer surplus as a result of the rule will be between 0% and 40% of the estimated change in gross revenues. The research used to develop this range is not region-specific; thus the true value may be higher for some regions and species.

5. Non-Use Benefits

As discussed by Freeman (1993), "Non-use values, like use values, have their basis in the theory of individual preferences and the measurement of welfare changes. According to theory, use values and non-use values are additive," and "* * * there is a real possibility that ignoring non-use values could result in serious misallocation of resources." This statement by Freeman aptly conveys the importance of non-use benefits outlined in EPA's own economic valuation guidance documents. A comprehensive estimate of total resource value should include both use and non-use values, so that the resulting appropriate total benefit value estimates may be compared to total social cost.

It is clear that reducing impingement and entrainment losses of fish and shellfish may result in both use and non-use benefits. Of the organisms which are anticipated to be protected by the section 316(b) Phase II rule, it is projected that approximately 1.8 percent will eventually be harvested by commercial and recreational fishers and

therefore can be valued with direct use valuation techniques. The Agency's direct use valuation does not account for the benefits from the remaining 98.2% of the age 1 equivalent aquatic organisms estimated to be protected nationally under today's rule. A portion of the total benefits of these unharvested commercial, recreational, and forage species, can be derived indirectly from the estimated use values of the harvested animals. A percentage of these unlanded organisms become prey or serve as breeding stock in the production of those commercial and recreational species that will eventually be caught, therefore their indirect use value as biological input into the production process is represented in the estimated direct use values of the harvested fish.

EPA was unable to value the non-use benefits associated with this rule. In order to provide an estimate of the quantified (but not monetized) effects of the rule, Exhibit XII–5 summarizes information about total impingement and entrainment losses, and Exhibit XII–6 presents estimates of reductions in impingement and entrainment losses under the final rule.

EXHIBIT XII–5.—DISTRIBUTION OF BASELINE IMPINGEMENT AND ENTRAINMENT

Region[a]	Current I&E of annual age-one equivalents (millions)				I&E of harvested species as a percentage of total I&E
	All species (total)	Forage species	Commercial and recreational species	Harvested commercial and recreational species	
California	312.9	170.6	142.3	14.9	4.8
North Atlantic	65.7	49.7	16.0	0.7	1.0
Mid Atlantic	1,733.1	1,115.6	617.6	28.4	1.6
South Atlantic	342.5	208.1	134.5	6.5	1.9
Gulf of Mexico	191.2	53.5	137.8	8.1	4.2
Great Lakes	319.1	300.8	18.3	0.5	0.2
Inland	369.0	284.8	84.2	0.2	0.1
Total for 554 facilities[a]	3,449.4	2,255.8	1,193.6	62.1	1.8

[a] Regional totals are unweighted. National total estimates are weighted and include Hawaii.

EXHIBIT XII–6.—DISTRIBUTION OF REDUCTIONS IN IMPINGEMENT AND ENTRAINMENT

Region[a]	Reductions in I&E of annual age-one equivalents (millions)				Reduction in I&E of harvested species as a percentage of total reduction in I&E
	All species (total)	Forage species	Commercial and recreational species	Harvested commercial and recreational species	
California	66.4	36.0	30.4	3.2	4.8
North Atlantic	19.3	14.6	4.7	0.2	1.0
Mid Atlantic	846.4	537.5	308.8	13.9	1.6
South Atlantic	76.7	38.5	38.2	1.6	2.0
Gulf of Mexico	89.5	20.5	69.0	3.6	4.0
Great Lakes	159.5	151.7	7.8	0.2	0.1
Inland	116.8	101.2	15.7	0.1	0.1
Total for 554 facilities	1,420.2	928.9	491.3	23.7	1.7

[a] Regional numbers are unweighted. National totals are sample-weighted and include Hawaii.

Lack of direct use values for the unharvested commercial, recreational and forage species means that EPA did not directly value a substantial percentage of the total age-one equivalent impingement and entrainment losses. Given that aquatic organisms without any direct uses account for the majority of cooling water intake structure losses and indirect valuation of these species may only represent a fraction of their total value, comprehensive monetization of the benefits of reduced impingement and entrainment losses is incomplete without developing a reliable estimate of non-use benefits. Although individuals do not use these resources directly, they may value changes in their status or quality. Both users (commercial and recreational fishermen) as well as non-users (those who do not use the resource) may have non-use values for these species. Non-use benefit valuation is challenging, but the existence and potential importance of non-use benefits is supported by EPA's Guidelines for Preparing Economic Analysis (EPA 240–R–00–003) and OMB Circular A–4, Regulatory Analysis, also available as Appendix D of Informing Regulatory Decisions: 2003 Report to Congress on The Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local and Tribal Entities, OMB, 2003, pp 118–165.

Market valuation approaches are used to estimate use benefits. The theory and practice of nonmarket valuation is well developed, and typically plays a pivotal role in benefit-cost analysis conducted by public and private agencies. Non-use values are often considered more difficult to estimate. The preferred technique for estimating non-use values is to conduct original stated preference surveys, but benefit transfer of values from existing stated preference studies can be considered when original studies are not feasible.

Stated preference methods rely on surveys, which ask people to state their willingness-to-pay for particular ecological improvements, such as increased protection of aquatic species or habitats with particular attributes. The Agency was not able to perform an original stated preference study for this regulation, so benefit transfer was explored as an alternative means to estimate non-use benefits. Benefits transfer involves adapting the findings from research conducted for another

purpose to address the policy questions in hand.

One of the specific benefit transfer techniques explored by EPA for estimation of non-use benefits in Phase II of the 316(b) rulemaking was meta regression analysis. Meta regressions are designed to statistically define the relationship between values and a set of resource, demographic and other characteristics compiled from original primary study sources. The resulting mathematical relationship allows the researcher to forecast estimates of non-use values specific to the resource changes projected to occur as a consequence of the final rule. EPA's Guidelines for Preparing Economic Analysis (EPA 240–R–00–003) discusses the use of meta-analysis and notes that this approach is the most rigorous benefit transfer exercise.

The meta analysis conducted by EPA for this rule identifies a set of elements that may influence willingness-to-pay; the analysis found both statistically significant and intuitive patterns that appeared to influence non-use values for water quality improvements in aquatic habitats. However, the Agency encountered various limitations when trying to apply the meta analysis model to this final rule, and these limitations could not be thoroughly analyzed within the publication time-frame established for this rule. EPA therefore does not present estimates of non-use values for this final rule.

Due to the various difficulties associated with estimating indirect and non-use benefits for this rule, final benefits do not reflect reduced impacts to a variety of potential ecological and public services that are a function, in part, of healthy fish stocks and other organisms affected by cooling water intake structures. Examples of other potential ecosystem services that may potentially be adversely affected by impingement and entrainment losses but which could not be monetized include:

- Decreased numbers of ecological keystone, rare, or sensitive species;
- Increased numbers of exotic or disruptive species that compete well in the absence of species lost to I&E;
- Disruption of ecological niches and ecological strategies used by aquatic species;
- Disruption of organic carbon, nutrient, and energy transfer through the food web;
- Decreased local biodiversity;
- Disruption of predator-prey relationships;
- Disruption of age class structures of species; and
- Disruption of public satisfaction with a healthy ecosystem.

The existence and potential magnitude of each of these benefits categories is highly dependent on site-specific factors which could not be assessed.

Today's rule may help preserve threatened and endangered species, but primary research, using stated preference methods, and data collection regarding threatened and endangered species impacts, could not be conducted for the final rule at the national level. As a result, EPA explored other methods for valuing threatened and endangered species. Details about possible non-use benefits valuation approaches are presented in the 316(b) Regional Analysis document (DCN 6–0003).

6. National Monetized Benefits

Quantifying and monetizing reduction in impingement and entrainment losses due to today's final rule is extremely challenging, and the preceding sections discuss specific limitations and uncertainties associated with estimation of commercial and recreational benefits categories (presented in Exhibit XII–7), and non-use benefits. National benefit estimates are subject to uncertainties inherent in valuation approaches used for assessing the three benefits categories. The combined effect of these uncertainties is of unknown magnitude or direction (*i.e.*, the estimates may over or under state the anticipated national-level benefits); however, EPA has no data to indicate that the results for each benefit category are atypical or unreasonable.

Exhibit XII–7 presents EPA's estimates of the total monetized benefits from impingement and entrainment reduction of the final regulation. Although EPA believes non-use benefits exist, the Agency was not able to monetize them. The estimated impingement and entrainment reduction monetized benefits post regulation are $83 million (2002$) per year, discounted at three percent, and $73 million, discounted at seven percent.

EXHIBIT XII–7.—SUMMARY OF MONETIZED SOCIAL BENEFITS

[Millions; 2002$]

Region [a]	Commercial fishing benefits	Recreational fishing benefits	Total value of monetizable impingement and entrainment reductions [b]
Evaluated at a 3 percent discount rate			
California	$0.5	$2.5	$3.0
North Atlantic	0.1	1.4	1.5
Mid-Atlantic	1.7	43.4	45.1
South Atlantic	0.2	6.9	7.1
Gulf of Mexico	0.7	6.2	6.9
Great Lakes	0.2	14.0	14.2
Inland		3.0	3.0
Total for 554 facilities	3.5	79.3	82.5
Evaluated at a 7 percent discount rate			
California	0.4	1.9	2.3
North Atlantic	0.0	1.2	1.2
Mid-Atlantic	1.5	38.5	40.0
South Atlantic	0.2	6.2	6.4
Gulf of Mexico	0.6	5.5	6.1
Great Lakes	0.2	12.2	12.4

EXHIBIT XII–7.—SUMMARY OF MONETIZED SOCIAL BENEFITS—Continued

[Millions; 2002$]

Region [a]	Commercial fishing benefits	Recreational fishing benefits	Total value of monetizable impingement and entrainment reductions [b]
Inland		2.6	2.6
Total for 554 facilities	3.0	70.0	73.0

[a] Regional benefit estimates are unweighted. National benefits are sample-weighted and include Hawaii.
[b] The monetized benefits of the final rule may be significantly under-estimated due to the inability to monetize the non-use values.

E. Other Considerations

This section presents two additional analyses that consider the benefits and costs of the final rule: (1) An analysis of the costs per age-one equivalent fish saved (equivalent to a cost-effectiveness analysis) and (2) a break-even analysis of the minimum non-use benefits required for total annual benefits to equal total annualized costs, on a per household basis. Each measure is presented by study region.

1. Cost Per Age-One Equivalent Fish Saved—Cost-Effectiveness Analysis

EPA also analyzed the cost per organism saved as a result of compliance with the final rule. This analysis estimates the cost-effectiveness of the rule, by study region. Organisms saved are measured as "age-one equivalents." The costs used for the regional comparisons are the annualized pre-tax compliance costs incurred by facilities subject to the final rule, and the cost used for the national comparison is the total social cost of the final rule (including facility compliance costs and administrative costs).

Exhibit XII–8 shows that the estimated cost per age-one equivalent ranges from $0.07 in the Mid Atlantic region to $1.46 in the Inland region. At the national level, the estimated average cost is $0.27 per age-one equivalent saved.

EXHIBIT XII–8.—COST PER AGE-ONE EQUIVALENT SAVED

Study region [a]	Annual social cost [b] (millions; 2002$)	Age-one equivalents (millions)	Cost/age-one equivalent saved
California	$31.7	66.4	$0.48
North Atlantic	13.3	19.3	0.69
Mid Atlantic	62.6	846.4	0.07
South Atlantic	9.0	76.7	0.12
Gulf of Mexico	22.8	89.5	0.25
Great Lakes	58.7	159.5	0.37
Inland	170.4	116.8	1.46
Total for 554 facilities	389.4	1,420	0.27

[a] Regional benefit and cost estimates are unweighted; total national estimates are sample-weighted and include Hawaii.
[b] The regional costs include only annual compliance costs incurred by facilities. The national cost includes the total social cost of the final rule (facility compliance costs and administrative costs).

2. Break-Even Analysis

Due to the uncertainties of providing estimates of the magnitude of non-use values associated with the final rule, this section provides an alternative approach of evaluating the potential relationship between benefits and costs. The approach used here applies a "break-even" analysis to identify what the unmonetized non-use values would have to be in order for the final rule to have benefits that are equal to costs.

The break-even approach uses EPA's estimated or monetized, commercial and recreational use benefits for the rule and subtracts them from the estimated annual compliance costs incurred by facilities subject to the final rule. The resulting "net cost" enables one to work backwards to estimate what the unmonetized non-use values would need to be (in terms of willingness-to-pay per household per year) in order for total annual benefits to equal annualized costs. Exhibit XII–9 provides this assessment for the seven study regions. The exhibit shows benefits values using a 3 percent social discount rate. Use of a 7% discount rate would produce somewhat higher breakeven numbers. Section XII.D.5 presents undiscounted benefits and benefits discounted using a 7 percent discount rate.

EXHIBIT XII–9.—IMPLICIT NON-USE VALUE—BREAK-EVEN ANALYSIS

[Million; 2002$]

Study region [a]	Use benefits [b]	Annual social cost [c]	Annual non-use benefits necessary to break even [d,g]	Number of households (millions) [e]	Annual break-even non-use WTP per household [f]
California	$3.0	$31.7	$28.7	8.1	$3.55
North Atlantic	1.4	13.3	11.9	3.9	3.02

EXHIBIT XII–9.—IMPLICIT NON-USE VALUE—BREAK-EVEN ANALYSIS—Continued

[Million; 2002$]

Study region [a]	Use benefits [b]	Annual social cost [c]	Annual non-use benefits necessary to break even [d,g]	Number of households (millions) [e]	Annual break-even non-use WTP per household [f]
Mid Atlantic	45.0	62.6	17.5	9.6	1.82
South Atlantic	7.1	9.0	1.9	3.8	0.50
Gulf of Mexico	6.9	22.8	15.9	5.4	2.92
Great Lakes	14.1	58.7	44.6	8.6	5.17
Inland	3.0	170.4	167.4	20.9	8.01
Total for 554 facilities	82.9	389.4	306.5	60.4	5.07

[a] Regional benefit and cost estimates are unweighted; total national estimates are sample-weighted and include Hawaii.
[b] Benefits are discounted using a 3 percent discount rate.
[c] The regional costs include only annual compliance costs incurred by facilities. The national cost includes the total social cost of the final rule (facility compliance costs and administrative costs).
[d] Annualized compliance costs minus annual use benefits.
[e] Millions of households, including anglers fishing in the region and households in abutting counties. From U.S. Census 2000 (BLS): *http://factfinder.census.gov.*
[f] Dollars per household per year that, when added to use benefits, would yield a total annual benefit (use plus non-use) equal to the annualized costs.
[g] Non-use benefits may also include unmonetized use benefits, *i.e.*, improvements in bird watching.

As shown in Exhibit XII–9, for total annual benefits to equal total annualized costs, non-use values per household would have to be $0.50 in the South Atlantic region and $8.01 in the Inland region. At the national level, the annual willingness-to-pay per affected household would have to be $5.07 for total annual benefits to equal total annualized costs.

While this approach of backing out the "break-even" non-use value per household does not answer the question of what non-use values might actually be for the final rule, these results do frame the question for policy-making decisions. The break-even approach poses the question: "Is the true per household willingness-to-pay for the non-use amenities (existence and bequest) associated with the final rule likely to be greater or less than the "breakeven" benefit levels displayed in Exhibit XII–9?" Unfortunately, the existing body of empirical research is inadequate to answer this question on behalf of the nation as a whole, but EPA is providing the analysis to aid policy makers and the public in forming their own judgment.

XIII. 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 OMB review and the requirements of the Executive Order. The Order defines a "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 obligations 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 a "significant regulatory action." As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Paperwork Reduction Act

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this rule under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060.02, or DCN 6–0001. Compliance with the applicable information collection requirements imposed under this final rule (*see* §§ 122.21(r), 125.95, 125.96, 125.97, 125.98, 125.99) is mandatory. Existing facilities are required to perform several data-gathering activities as part of the permit renewal application process. Today's final rule requires several distinct types of information collection as part of the NPDES renewal application. In general, the information will be used to identify which of the requirements in today's final rule apply to the existing facility, how the existing facility will meet those requirements, and whether the existing facility's cooling water intake structure reflects the best technology available for minimizing adverse environmental impact. Categories of data required by today's final rule follow.

- Source waterbody data for determining appropriate requirements to apply to the facility, evaluating ambient conditions, and characterizing potential for impingement and entrainment of all life stages of fish and shellfish by the cooling water intake structure;
- Intake structure and cooling water system data, consisting of intake structure design, cooling water system operational data and relationship of each intake to the cooling water system, and a facility water balance diagram, to determine appropriate requirements and characterize potential for impingement and entrainment of all life stages of fish and shellfish;
- Information on design and construction technologies implemented to ensure compliance with applicable requirements set forth in today's final rule; and
- Information on supplemental restoration measures proposed for use with design and construction technologies or alone to minimize adverse environmental impact.

In addition to the information requirements of the permit renewal application, NPDES permits normally

specify monitoring and reporting requirements to be met by the permitted entity. Existing facilities that fall within the scope of this final rule would be required to perform biological monitoring for at least two years, and as required by the Director, to demonstrate compliance. Additional ambient water quality monitoring may also be required of facilities depending on the specifications of their permits. The facility is expected to analyze the results from its monitoring efforts and provide these results in a bi-annual status report to the permitting authority. Finally, facilities are required to maintain records of all submitted documents, supporting materials, and monitoring results for at least three years. (Note that the Director may require more frequent reporting and that records be kept for a longer period to coincide with the life of the NPDES permit.)

All facilities carry out the activities necessary to fulfill the general information collection requirements. The estimated burden includes developing a water balance diagram that can be used to identify the proportion of intake water used for cooling, make-up, and process water. Facilities will also gather data (as required by the compliance alternative selected) to calculate the reduction in impingement mortality and entrainment of all life stages of fish and shellfish that would be achieved by the technologies and operational measures they select. The burden estimates include sampling, assessing the source waterbody, estimating the magnitude of impingement mortality and entrainment, and reporting results in a comprehensive demonstration study. For some facilities, the burden also includes conducting a pilot study to evaluate the suitability of the technologies and operational measures based on the species that are found at the site.

Some of the facilities (those choosing to use restoration measures to maintain fish and shellfish) will need to prepare a plan documenting the restoration measures they implement and how they demonstrate that the restoration measures are effective. Restoration is a voluntary alternative. Since facilities would most likely choose restoration only if other alternatives are more costly or infeasible, EPA has not assessed facility burden for this activity. However, burden estimates have been included for the Director's review of restoration activities.

Some facilities may choose to request a site-specific determination of best technology available because of costs significantly greater than those EPA considered in establishing the performance standards or because costs are significantly greater than the benefits of complying with the performance standards. These facilities must perform a comprehensive cost evaluation study and submit a site-specific technology plan characterizing the design and construction technologies, operational measures and/or restoration measures they have selected. In addition, facilities that request a site-specific determination because of costs significantly greater than the benefits must also perform a valuation of the monetized benefits of reducing impingement mortality and entrainment and an assessment of non-monetized benefits. Site-specific determinations are voluntary. Since facilities would choose site-specific determinations only if other alternatives are more costly, EPA has not assessed a facility burden for these activities; however, EPA has incorporated burden into the activities that the Director will perform in reviewing site-specific information.

The total average annual burden of the information collection requirements associated with today's final rule is estimated at 1,700,392 hours. The annual average reporting and record keeping burden for the collection of information by facilities responding to the section 316(b) Phase II existing facility final rule is estimated to be 5,428 hours per respondent (*i.e.*,, an annual average of 1,595,786 hours of burden divided among an anticipated annual average of 294 facilities). The Director reporting and record keeping burden for the review, oversight, and administration of the rule is estimated to average 2,615 hours per respondent (*i.e.*, an annual average of 104,606 hours of burden divided among an anticipated 40 States on average per year).

Respondent activities are separated into those activities associated with the NPDES permit application and those activities associated with monitoring and reporting after the permit is issued. The reason for this is that the permit cycle is every five years, while Information Collection Requests (ICRs) must be renewed every three years. Therefore, the application activities occur only once per facility during an ICR approval period, and so they are considered one-time burden for the purpose of this ICR. By contrast, the monitoring and reporting activities that occur after issuance of the permit occur on an annual basis. The burden and costs are for the information collection, reporting, and recordkeeping requirements for the three-year period beginning with the effective date of today's rule. Additional information collection requirements will occur after this initial three-year period as existing facilities continue to be issued permit renewals and such requirements will be counted in a subsequent information collection request. EPA does not consider the specific data that would be collected under this final rule to be confidential business information. However, if a respondent does consider this information to be confidential, the respondent may request that such information be treated as confidential. All confidential data will be handled in accordance with 40 CFR 122.7, 40 CFR Part 2, and EPA's Security Manual Part III, Chapter 9, dated August 9, 1976.

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, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR Part 9. EPA is amending the table in 40 CFR Part 9 of currently approved OMB control numbers for various regulations to list the information requirements contained in this final rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.*, 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 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 the purposes of assessing the impacts of today's rule on

small entities, small entity is defined as: (1) A small business according to RFA default definitions for small business (based on Small Business Administration (SBA) size standards); (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 final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule applies to existing power producing facilities that employ a cooling water intake structure and are design to withdraw 50 million gallons per day (MGD) or more from waters of the United States for cooling purposes. EPA expects this final rule to regulate 25 small entities that own electric generators. We estimate that 17 of the small entities are governmental jurisdictions (*i.e.*, 16 municipalities and one political subdivision), two are private businesses (*i.e.*, one nonutility and one investor-owned entity), and six are not-for-profit enterprises (*i.e.*, rural electric cooperative).

Of the 25 small entities, one entity is estimated to incur annualized post-tax compliance costs of greater than three percent of revenues; eight are estimated to incur compliance costs of between one and three percent of revenues; and 16 small entities are estimated to incur compliance costs of less than one percent of revenues. Eleven small entities are estimated to incur no costs other than permitting and monitoring costs.

Although this final rule will not have a significant economic impact on a substantial number of small entities, EPA nonetheless has tried to reduce the impact of this rule on small entities. EPA has divided implementation of section 316(b) of the Clean Water Act (CWA) into three phases where the majority of small entities will be addressed in Phase III. Under the Phase III rule, EPA will convene a SBREFA panel that will evaluate impacts to small entities.

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 one 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 intergovernmental mandates, and informing, educating, and advising small governments on compliance with regulatory requirements.

EPA estimates the total annualized (post-tax) costs of compliance for facilities subject to the final rule to be $249.5 million (2002$), of which $216.3 million is incurred by the private sector (including investor-owned utilities, nonutilities, and rural electric cooperatives) and $23.1 million is incurred by State and local governments that operate in-scope facilities.[59] Additionally, permitting authorities incur $4.1 million to administer the rule, including labor costs to write permits and to conduct compliance monitoring and enforcement activities. EPA estimates that the highest undiscounted post-tax cost incurred by the private sector in any one year is approximately $419.1 million in 2009. The highest undiscounted cost incurred by the government sector in any one year is approximately $43.5 million in 2008. Thus, EPA has determined that this rule contains 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 one year. Accordingly, EPA has prepared a written statement under § 202 of the UMRA, which is summarized as follows. See Economic and Benefits Analysis, Chapter B5, UMRA Analysis, for detailed information.

1. Summary of Written Statement

a. Authorizing Legislation

This final rule is issued under the authority of sections 101, 301, 304, 306, 308, 316, 401, 402, 501, and 510 of the Clean Water Act (CWA), 33 U.S.C. 1251, 1311, 1314, 1316, 1318, 1326, 1341, 1342, 1361, and 1370. This rule partially fulfills the obligations of the U.S. Environmental Protection Agency (EPA) under a consent decree in *Riverkeeper, Inc. et al.* v. *Whitman,* United States District Court, Southern District of New York, No. 93 Civ. 0314. See section III of this preamble for detailed information on the legal authority of this regulation.

b. Cost-Benefit Analysis

The final rule is expected to have total annualized pre-tax (social) costs of $389.2 million (2002$), including direct costs incurred by facilities and implementation costs incurred by State and Federal governments. The total use benefits of the rule are estimated to be $82.9 million. EPA was not able to estimate the monetary value of non-use benefits resulting from the rule, although the Agency believes non-use benefits may be significant. Thus, the total social costs exceed the total use benefits of the rule by $306.3 million, and the benefit-cost ratio, calculated by dividing total use benefits by total social costs, is 0.2. EPA notes that these analyses are based on a comparison of a partial measure of benefits with a complete measure of costs; therefore, the results must be interpreted with caution. For a more detailed comparison of the costs and benefits of the final rule, refer to section XII.E of this preamble.

EPA notes that States may be able to use existing sources of financial assistance to revise and implement the final rule. Section 106 of the Clean Water Act authorizes EPA to award grants to States, Tribes, intertribal consortia, and interstate agencies for administering programs for the prevention, reduction, and elimination of water pollution. These grants may be used for various activities to develop

[59] In addition, 14 facilities owned by Tennessee Valley Authority (TVA), a Federal entity, incur $10.1 million in compliance costs. The costs incurred by the Federal government are not included in this section.

and carry out a water pollution control program, including permitting, monitoring, and enforcement. Thus, State and Tribal NPDES permit programs represent one type of State program that can be funded by section 106 grants.

c. Macro-Economic Effects

EPA estimates that this regulation will not have an effect on the national economy, including productivity, economic growth, employment and job creation, and international competitiveness of U.S. goods and services. Macroeconomic effects on the economy are generally not considered to be measurable unless the total economic impact of a rule reaches at least 0.25 percent to 0.5 percent of Gross Domestic Product (GDP). In 2002, U.S. GDP was $10.4 trillion (2002$), according to the U.S. Bureau of Labor Statistics. Thus, in order to be considered measurable, the final rule would have to generate costs of at least $26 billion to $52 billion. Since EPA estimates the final rule will generate total annual pre-tax costs of only $389.2 million, the Agency does not believe that the final rule will have an effect on the national economy.

d. Summary of State, Local, and Tribal Government Input

EPA consulted with State governments and representatives of local governments in developing the regulation. The outreach activities are discussed in section III of this preamble.

e. Least Burdensome Option

EPA considered and analyzed several alternative regulatory options to determine the best technology available for minimizing adverse environmental impact. These regulatory options are discussed in the proposed rule at 67 FR 17154–17168, as well as in section VII of this preamble. These options included a range of technology-based approaches (*e.g.*, reducing intake flow to a level commensurate with the use of a closed-cycle cooling system for all facilities; facilities located on certain waterbody types; facilities located on certain waterbody types that withdraw a specified percentage of flow; and the use of impingement and entrainment controls at all facilities). EPA also included consideration of at least four distinct site-specific options, including several proposed by industry. As discussed in detail in section VII., EPA did not select these options because ultimately they are not the most cost-effective among the options that fulfill the requirements of section 316(b). EPA selected the final rule because it meets the requirement of section 316(b) of the CWA that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact, and it is economically practicable. EPA believes the final rule reflects the most cost-effective and flexible approach among the options considered. By providing five compliance alternatives the final rule offers Phase II existing facilities a high degree of flexibility in selecting the most cost-effective approach to meeting section 316(b) requirements. Under the rule, these facilities can demonstrate that existing flow or CWIS technologies fulfill section 316(b), identify design and control technologies, and/or use operational measures or restoration measures to fulfill the rule requirements. The final rule also ensures that any applicable requirements are economically practicable through the inclusion of the site-specific compliance alternative at § 125.94(a)(5). EPA further notes that the compliance alternative specified in § 125.94(a)(4) and 125.99(a) and (b) was included in part to provide additional flexibility to Phase II existing facilities as well as to reduce the burden of determining, implementing, and administering section 316(b) requirements among all relevant parties. Finally, the Agency believes that the rule extends additional flexibility to States by providing that where a State has adopted alternative regulatory requirements that achieve environmental performance comparable to that required under the rule, the Administrator will approve such alternative requirements.

2. Impact on Small Governments

EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. EPA estimates that 17 of the 62 government-owned facilities subject to the final rule are owned by small governments (*i.e.*, governments with a population of less than 50,000). The total annualized post-tax compliance cost for all small government-owned facilities incurring costs under the final rule is $5.4 million, or approximately $316,000 per facility. The highest annualized compliance costs for a small government-owned facility is $1.3 million. These costs are lower than the corresponding costs for large governments and private entities. EPA therefore concludes that these costs do not significantly or uniquely affect small governments, and that today's rule is not subject to the requirement of section 203 of 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 final rule 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. Rather, this rule would result in minimal administrative costs on States that have an authorized NPDES program; would result in minimal costs to States and local government entities that own facilities subject to the regulation; it maintains the existing relationship between the national government and the States in the administration of the NPDES program; and it preserves the existing distribution of power and responsibilities among various levels of government. Thus, Executive Order 13132 does not apply to this rule.

The national cooling water intake structure requirements will be implemented through permits issued under the NPDES program. Forty-five States and the Virgin Islands are currently authorized pursuant to section 402(b) of the CWA to implement the NPDES program. In States not authorized to implement the NPDES program, EPA issues NPDES permits. Under the CWA, States are not required to become authorized to administer the NPDES program. Rather, such authorization (and potential funding to support administration) is available to States if they operate their programs in a manner consistent with section 402(b) and applicable regulations. Generally, these provisions require that State NPDES programs include requirements that are as stringent as Federal program requirements. States retain the ability to implement requirements that are broader in scope or more stringent than Federal requirements. (*See* section 510 of the CWA). EPA expects an average annual burden of 104,606 hours with total average annual cost of $4.8 million

for States to collectively administer this rule during the first three years after promulgation.

EPA has identified 62 Phase II existing facilities that are owned by State or local government entities. The estimated average annual compliance cost incurred by these facilities is $372,000 per facility.

Today's rule would not have substantial direct effects on either authorized or nonauthorized States or on local governments because it would not change how EPA and the States and local governments interact or their respective authority or responsibilities for implementing the NPDES program. Today's rule establishes national requirements for Phase II existing facilities with cooling water intake structures. NPDES-authorized States that currently do not comply with the final regulations based on today's rule will need to amend their regulations or statutes to ensure that their NPDES programs are consistent with Federal section 316(b) requirements. *See* 40 CFR 123.62(e).

For purposes of this rule, the relationship and distribution of power and responsibilities between the Federal government and the States and local governments are established under the CWA (*e.g.*, sections 402(b) and 510), and nothing in this rule alters this established relationship and distribution of power and responsibilities. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

Although Executive Order 13132 does not apply to this rule, EPA did consult with representatives of State and local governments in developing this rule. EPA also met with the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) and, with the assistance of ASIWPCA, conducted a conference call in which representatives from 17 States or interstate organizations participated. A summary of consultation activities is provided in section III of this preamble. In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA also specifically solicited comments on the proposed rule from State and local officials. A summary of the concerns raised during that consultation and subsequent public comment periods and EPA's response to those concerns is provided in section VIII of this preamble and in the response to comment document in the record.

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 9, 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" are 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 the distribution of power and responsibilities between Federal government and Indian tribes."

This rule does not have Tribal implications. It will not have substantial direct effects on Tribal governments, on the relationship between the Federal government and the Indian Tribes, or the distribution of power and responsibilities between the Federal government and Indian Tribes as specified in Executive Order 13175. The national cooling water intake structure requirements will be implemented through permits issued under the NPDES program. No Tribal governments are currently authorized pursuant to section 402(b) of the CWA to implement the NPDES program. In addition, EPA's analyses show that no facility subject to this rule is owned by Tribal governments and thus this rule does not affect Tribes in any way in the foreseeable future. Thus, Executive Order 13175 does not apply to this rule.

Nevertheless, in the spirit of Executive Order 13175 and consistent with EPA policy to promote communications between EPA and Tribal governments, EPA solicited comment on the proposed rule from all stakeholders. EPA did not receive any comments from Tribal governments.

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.

Executive Order 13405 does not apply to this rule because the rule does not concern an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. This rule establishes requirements for cooling water intake structures to protect aquatic organisms.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not a "significant energy action" as defined in Executive Order 13211, ("Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001)) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The final rule does not contain any compliance requirements that will:

- Reduce crude oil supply in excess of 10,000 barrels per day;
- Reduce fuel production in excess of 4,000 barrels per day;
- .Reduce coal production in excess of 5 million tons per day;
- Reduce electricity production in excess of 1 billion kilowatt hours per day or in excess of 500 megawatts of installed capacity;
- Increase energy prices in excess of 10 percent;
- Increase the cost of energy distribution in excess of 10 percent;
- Significantly increase dependence on foreign supplies of energy; or
- Have other similar adverse outcomes, particularly unintended ones.

EPA analyzed the final rule for each of these potential effects and found that this rule will not lead to any adverse outcomes. Based on the analyses, EPA concludes that this final rule will have minimal energy effects at a national and regional level. As a result, EPA did not prepare a Statement of Energy Effects. For more detail on the potential energy effects of this rule, see section XI.B.1 of this preamble or the *Economic and Benefits Analysis for the Final Section 316(b) Phase II Existing Facilities Rule.*

I. National Technology Transfer and Advancement Act

As noted in the proposed rule, section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Pub. L. No. 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 standard bodies. The NTTAA directs EPA to provide Congress, through the Office of Management and Budget (OMB), explanations when the Agency decides not to use available and applicable voluntary consensus standards. This rule does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each Federal agency must make achieving environmental justice part of its mission. E.O. 12898 states that each Federal agency must conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin.

Today's final rule would require that the location, design, construction, and capacity of cooling water intake structures (CWIS) at Phase II existing facilities reflect the best technology available for minimizing adverse environmental impact. For several reasons, EPA does not expect that this final rule would have an exclusionary effect, deny persons the benefits of participating in a program, or subject persons to discrimination because of their race, color, or national origin.

To assess the impact of the rule on low-income and minority populations, EPA calculated the poverty rate and the percentage of the population classified as non-white for populations living within a 50-mile radius of each of the 543 in-scope facilities for which survey data are available. The results of the analysis, presented in the Economic Benefits Analysis, show that the populations affected by the in-scope facilities have poverty levels and racial compositions that are quite similar to the U.S. population as a whole. A relatively small subset of the facilities are located near populations with poverty rates (23 of 543, or 4.2%), or non-white populations (105 of 543, or 19.3%), or both (13 of 543, or 2.4%) that are significantly higher than national levels. Based on these results, EPA does not believe that this rule will have an exclusionary effect, deny persons the benefits of the NPDES program, or subject persons to discrimination because of their race, color, or national origin.

In fact, because EPA expects that this final rule would help to preserve the health of aquatic ecosystems located in reasonable proximity to Phase II existing facilities, it believes that all populations, including minority and low-income populations, would benefit from improved environmental conditions as a result of this rule. Under current conditions, EPA estimates over 1.5 billion fish (expressed as age 1 equivalents) of recreational and commercial species are lost annually due to impingement and entrainment at the inscope Phase II existing facilities. Under the final rule, more than 0.5 billion individuals of these commercially and recreationally sought fish species (age 1 equivalents) will now survive to join the fishery each year. These additional fish will provide increased opportunities for subsistence anglers to increase their catch, thereby providing some benefit to low income households located near regulation-impacted waters.

K. Executive Order 13158: Marine Protected Areas

Executive Order 13158 (65 FR 34909, May 31, 2000) requires EPA to "expeditiously propose new science-based regulations, as necessary, to ensure appropriate levels of protection for the marine environment." EPA may take action to enhance or expand protection of existing marine protected areas and to establish or recommend, as appropriate, new marine protected areas. The purpose of the Executive Order is to protect the significant natural and cultural resources within the marine environment, which means "those areas of coastal and ocean waters, the Great Lakes and their connecting waters, and submerged lands thereunder, over which the United States exercises jurisdiction, consistent with international law."

Today's final rule recognizes the biological sensitivity of tidal rivers, estuaries, oceans, and the Great Lakes and their susceptibility to adverse environmental impact from cooling water intake structures. This rule provides the most stringent requirements to minimize adverse environmental impact for cooling water intake structures located on these types of waterbodies, including potential reduction of intake flows to a level commensurate with that which can be attained by a closed-cycle recirculating cooling system for facilities that withdraw certain proportions of water from estuaries, tidal rivers, and oceans.

EPA expects that this rule will reduce impingement mortality and entrainment at facilities with design intake flows of 50 MGD or more. The rule would afford protection of aquatic organisms at individual, population, community, or ecosystem levels of ecological structure. Therefore, EPA expects today's rule would advance the objective of the Executive Order to protect marine areas.

L. Congressional Review Act

The Congressional Review Act, 5. U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule can not take effect until 60 days after it is published in the **Federal Register**. This action is a "major rule" as defined by 5 U.S.C. 804(2). This will be effective September 7, 2004.

Dated: February 16, 2004.

Michael O. Leavitt,

Administrator.

Note: The following appendices A and B will not appear in the Code of Federal Regulations.

Appendix A

Facility ID	Intake ID	EPA assumed design intake flow, gpm (X_{epa}) ($)	Capital cost ($)	Baseline O&M annual cost ($)	Post construction O&M annual cost ($)	Annualized capital [3] + net O&M using EPA design intake flow [2] (γ_{epa}) ($)	Net revenue losses from net construction downtime ($)	Pilot study costs ($)	Annualized downtime and pilot study costs [2,4] ($)	Performance standards on which EPA cost estimates are based	EPA modeled technology code	Design flow adjustment slope (m) [1]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13
AUT0001		401,881	322,884	699,866	795,393	141,498				I&E	2	0.8639
AUT0002		549,533	5,750,259	68,489	104,063	854,282	6,650,155	290,459	559,082	I&E	12	3.6581
AUT0004		239,107	528,427	30,725	104,458	148,969				I	1	1.1604
AUT0011		453,758	967,675	55,545	193,660	275,890				I	1	1.1604
AUT0012		2,018,917	48,835,329	360,813	989,876	7,582,115	110,716,357	4,933,578	9,315,779	I&E	12	3.6581
AUT0014		572,383	2,732,729	91,057	110,893	408,915		276,073	22,022	I&E	11	0.7352
AUT0015		1,296,872	510,784		134,070	206,794				I	5	0.1286
AUT0016		301,127	41,613		28,195	34,120				I	5	0.1286
AUT0019		848,784	11,094,343	271,045	994,876	2,303,416				I	1	1.1604
AUT0020		207,514	1,517,779	34,859	42,089	223,327		153,333	12,231	I&E	11	0.7352
AUT0021		267,138	1,187,727	65,395	263,140	366,851		150,000	11,965	I&E	2	0.8639
AUT0024		639,702	72,402		47,164	57,472				I	5	0.1286
AUT0027		404,214	2,362,864	147,563	532,881	721,737				I	1	1.1604
AUT0044		457,869	183,653		57,997	84,145				I	5	0.1286
AUT0049		820,866	6,080,054	196,361	797,241	1,466,543		204,745	16,332	I&E	2	0.8639
AUT0051		348,052	11,832,011	17,181	50,842	1,718,273				I	4	2.5787
AUT0053		147,762	454,296	27,346	108,078	145,413				I&E	2	0.8639
AUT0057		56,391	271,166	19,811	65,525	84,322				I	1	1.1604
AUT0058		624,376	8,582,766	68,231	225,908	1,379,670	7,092,806	867,072	640,749	I&E	12	3.6581
AUT0064		553,145	3,039,302	195,656	695,636	932,709				I	1	1.1604
AUT0066		65,571	2,006,184	80,531	63,685	268,790	23,985,660	150,000	1,944,883	I&E	4	2.5787
AUT0078		288,792	5,683,876	267,577	1,083,987	1,625,667		574,212	45,804	I&E	2	0.8639
AUT0084		2,100,000	2,976,122	3,003,550	3,318,577	738,760		150,331	11,992	I&E	2	0.8639
AUT0085		975,261	23,279,870	341,127	452,608	3,426,011	52,842,026	2,351,844	4,445,953	I&E	4	2.5787
AUT0092		2,786,349	929,777		269,122	401,501				I	5	0.1286
AUT0095		67,369	55,826	120,772	140,422	27,598				I&E	2	0.8639
AUT0106		325,449	1,104,684	55,757	223,858	325,383		150,000	11,965	I&E	2	0.8639
AUT0110		551,114	6,445,617	70,141	104,066	951,636	5,297,741	651,167	478,869	I&E	12	3.6581
AUT0120		207,333	2,085,862	55,736	225,656	466,900		210,724	16,809	I&E	2	0.8639
AUT0123		62,226	106,975	7,021	20,122	28,333				I	1	1.1604
AUT0127		104,672	573,136	34,651	118,506	165,457				I	1	1.1604
AUT0130		929,723	8,127,384	402,025	1,628,672	2,383,804		821,067	65,496	I&E	2	0.8639
AUT0131		492,987	3,299,931	195,321	694,407	968,921				I	1	1.1604
AUT0134		99,252	3,334,593	8,170	35,218	501,819	238,035		19,182	I	3	3.4562
AUT0137		401,222	1,916,441	117,385	475,099	630,572		193,608	15,444	I&E	2	0.8639
AUT0139		369,074	117,095		49,945	66,617				I	5	0.1286
AUT0142		407,669	9,461,494	66,798	78,036	1,358,342	3,421,735	955,845	351,992	I&E	14	6.9559
AUT0143		289,294	971,645	50,004	200,412	288,748		150,000	11,965	I&E	2	0.8639
AUT0146		213,207	1,618,126	88,506	313,588	455,467				I	1	1.1604
AUT0148		1,036,476	12,443,192		288,984	2,060,615				I&E	9	5.973
AUT0149		848,079	109,389		58,838	74,413				I	5	0.1286
AUT0151		482,911	1,465,485	95,774	340,264	453,142				I	1	1.1604
AUT0161		555,680	1,600,167	101,254	360,434	487,008				I	1	1.1604
AUT0168		329,758	5,156,763	39,196	51,388	746,399	492,266	260,480	60,448	I&E	12	3.6581
AUT0171		1,189,016	14,989,478	120,512	398,517	2,412,170	15,890,363		1,280,547	I&E	7	2.504
AUT0174		1,341,997	934,469	1,387,449	1,537,156	282,755		150,000	11,965	I&E	2	0.8639
AUT0175		258,008	2,505,868	134,658	484,461	706,582				I	1	1.1604
AUT0176		1,652,395	6,892,691	425,370	1,533,553	2,089,548				I	1	1.1604
AUT0183		118,504	196,689	7,303	21,121	41,823				I	1	1.1604
AUT0185		810,911	97,503		56,756	70,638				I	5	0.1286
AUT0187		1,242,691	257,332		107,659	144,297				I	5	0.1286
AUT0190		511,950	27,779,896	616,589	191,870	3,530,513				I&E	9	5.973
AUT0191		692,335	19,255,865	184,161	66,491	2,623,932				I&E	9	5.973

AUT0192	.....	359,686	959,625	71,963	253,183	317,849	.....	.....	.....	I	1	1.1604
AUT0193	.....	1,006,084	19,112,665	90,728	323,635	2,954,121	3,278,888	.....	264,234	I	3	3.4562
AUT0196	.....	230,120	374,975	.....	10,672	64,060	.....	.....	.....	I	8	0.3315
AUT0197	.....	407,061	4,773,876	248,548	891,410	1,322,554	.....	.....	.....	I	1	1.1604
AUT0202	.....	2,080,399	106,025,028	477,625	769,048	15,387,001	.....	.....	.....	I&E	9	5.973
AUT0203	.....	1,083,174	4,847,332	232,706	851,244	1,308,689	.....	.....	.....	I	1	1.1604
AUT0205	.....	313,218	720,557	37,147	127,449	192,893	.....	.....	.....	I&E	1	1.1604
AUT0208	.....	220,683	3,140,556	27,181	51,205	471,169	3,544,915	.....	285,672	I&E	4	2.5787
AUT0222	.....	156,464	299,274	.....	9,554	52,164	.....	.....	.....	I	8	0.3315
AUT0227	.....	82,468	523,999	30,107	102,249	146,748	.....	.....	.....	I	1	1.1604
AUT0228	.....	147,594	837,743	41,023	163,811	242,064	.....	.....	.....	I&E	2	0.8639
AUT0229	.....	483,349	1,784,794	87,496	391,634	558,253	.....	.....	.....	I&E	2	0.8639
AUT0238	.....	376,148	757,400	51,856	180,342	236,323	.....	.....	.....	I	1	1.1604
AUT0242	.....	1,113,045	8,239,161	291,327	1,039,947	1,921,691	.....	.....	.....	I	1	1.1604
AUT0244	.....	49,980	426,844	22,868	76,413	114,318	.....	.....	.....	I	1	1.1604
AUT0245	.....	491,302	1,459,999	50,879	61,192	218,185	.....	150,000	11,965	I&E	11	0.7352
AUT0254	.....	145,838	353,928	22,339	74,527	102,580	.....	.....	.....	I	1	1.1604
AUT0255	.....	194,919	258,805	.....	10,232	47,080	.....	.....	.....	I	8	0.3315
AUT0261	.....	201,229	943,433	57,335	230,290	307,278	.....	150,000	11,965	I&E	2	0.8639
AUT0264	.....	840,000	21,384,690	1,502,211	185,672	1,728,160	43,525,468	2,160,384	3,679,892	I&E	12	3.6581
AUT0266	.....	653,994	139,380	307,951	351,075	62,969	.....	.....	.....	I&E	2	0.8639
AUT0268	.....	712,677	2,998,753	114,173	417,470	730,253	.....	.....	.....	I	1	1.1604
AUT0273	.....	173,689	994,534	52,039	208,703	298,263	.....	150,000	11,965	I&E	2	0.8639
AUT0277	.....	88,831	1,192,106	45,779	51,021	174,971	186,802	.....	15,054	I&E	4	2.5787
AUT0278	.....	1,642,492	6,410,550	771,895	257,586	398,409	.....	647,624	51,660	I&E	11	0.7352
AUT0284	.....	728,495	3,743,165	208,370	742,487	1,067,059	.....	.....	.....	I	1	1.1604
AUT0292	.....	556,596	2,227,636	99,379	350,087	567,874	.....	.....	.....	I	1	1.1604
AUT0295	.....	359,098	3,584,905	53,365	114,232	571,276	5,005,800	.....	403,399	I&E	4	2.5787
AUT0297	.....	184,293	1,172,223	63,592	255,790	359,096	.....	150,000	11,965	I&E	2	0.8639
AUT0298	.....	897,819	100,769	.....	61,625	75,972	.....	.....	.....	I	5	0.1286
AUT0299	.....	864,873	9,012,107	150,709	127,282	1,259,694	15,622,548	227,612	1,277,121	I&E	12	3.6581
AUT0302	.....	71,413	91,562	6,933	19,813	25,916	.....	.....	.....	I	1	1.1604
AUT0305	.....	762,197	42,822,242	146,012	281,593	6,232,505	49,751,104	4,326,108	4,354,352	I&E	14	6.9559
AUT0308	.....	394,361	3,381,768	151,364	77,961	408,085	3,407,223	.....	274,576	I&E	7	2.504
AUT0309	.....	789,860	81,433	.....	55,577	67,171	.....	.....	.....	I	5	0.1286
AUT0314	.....	1,039,315	2,438,597	134,759	484,839	697,281	.....	.....	.....	I	1	1.1604
AUT0319	.....	468,117	1,326,662	88,025	355,386	456,248	.....	150,000	11,965	I&E	2	0.8639
AUT0321	.....	669,493	2,092,630	88,910	107,698	316,732	.....	150,000	11,965	I&E	11	0.7352
AUT0331	.....	178,562	24,860	.....	21,328	24,867	.....	.....	.....	I	5	0.1286
AUT0333	.....	336,448	786,807	46,794	162,104	227,333	.....	.....	.....	I	1	1.1604
AUT0337	.....	1,110,944	131,046	.....	73,566	92,224	.....	.....	.....	I	5	0.1286
AUT0341	.....	405,256	2,429,275	115,249	412,169	642,794	.....	.....	.....	I	1	1.1604
AUT0345	.....	610,223	5,103,322	267,506	952,013	1,411,106	.....	.....	.....	I	1	1.1604
AUT0349	.....	2,429,925	8,146,829	424,696	1,514,477	2,249,706	.....	.....	.....	I	1	1.1604
AUT0351	.....	301,024	6,389,631	42,269	99,196	966,667	700,911	.....	56,484	I&E	3	3.4562
AUT0358	.....	210,439	2,170,195	117,833	421,759	612,913	.....	.....	.....	I	1	1.1604
AUT0361	.....	433,165	7,652,621	59,105	140,320	1,170,775	893,934	.....	72,039	I&E	3	3.4562
AUT0362	.....	312,830	1,566,464	51,821	185,883	357,091	.....	.....	.....	I	1	1.1604
AUT0364	.....	505,137	5,447,440	170,196	611,090	1,216,487	.....	.....	.....	I	1	1.1604
AUT0365	.....	140,093	445,526	29,331	116,166	150,268	.....	.....	.....	I&E	2	0.8639
AUT0368	.....	83,406	2,715,938	146,752	529,832	769,768	.....	.....	.....	I	1	1.1604
AUT0370	.....	322,374	1,816,861	79,915	289,868	468,633	.....	.....	.....	I	1	1.1604
AUT0379	.....	351,933	41,890	.....	31,041	37,006	.....	.....	.....	I	5	0.1286
AUT0381	.....	50,143	960,912	9,964	22,083	148,931	506,182	.....	40,791	I&E	4	2.5787
AUT0384	.....	146,511	66,229	91,020	104,211	22,620	.....	.....	.....	I&E	2	0.8639
AUT0385	.....	130,966	1,823,217	20,420	25,983	265,149	1,445,463	.....	116,485	I&E	4	2.5787
AUT0387	.....	576,057	5,283,933	122,322	496,655	1,126,646	.....	533,808	42,581	I&E	2	0.8639
AUT0398	.....	537,402	6,842,592	63,631	75,697	986,297	6,440,309	.....	519,001	I&E	4	2.5787
AUT0399	.....	140,486	232,496	.....	9,212	42,314	.....	.....	.....	I	8	0.3315
AUT0401	.....	613,529	578,957	.....	72,110	154,541	.....	.....	.....	I	5	0.1286
AUT0404	.....	291,400	4,124,975	44,642	51,995	594,657	3,259,312	.....	262,656	I&E	4	2.5787
AUT0408	.....	73,728	900,969	13,020	49,057	164,315	803,968	.....	64,789	I&E	4	2.5787
AUT0416	.....	143,562	41,835	96,659	112,954	22,251	.....	.....	.....	I&E	2	0.8639
AUT0423	.....	564,501	29,714,518	122,524	248,148	4,356,303	.....	.....	.....	I&E	9	5.973
AUT0427	.....	148,668	291,697	.....	9,392	50,923	.....	.....	.....	I	8	0.3315
AUT0431	.....	143,775	356,208	20,913	69,450	99,253	.....	.....	.....	I	1	1.1604

Facility ID	Intake ID	EPA assumed design intake flow, gpm (X_{epa}) ($)	Capital cost ($)	Baseline O&M annual cost ($)	Post construction O&M annual cost ($)	Annualized capital[3] + net O&M using EPA design intake flow[2] (y_{epa}) ($)	Net revenue losses from net construction downtime ($)	Pilot study costs ($)	Annualized downtime and pilot study costs[2,4] ($)	Performance standards on which EPA cost estimates are based	EPA modeled technology code	Design flow adjustment slope (m)[1]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13
AUT0434	.....	400,472	763,363	40,353	138,952	207,284	.....	.....	.....	I	1	1.1604
AUT0435	.....	183,306	483,907	27,166	107,346	149,077	.....	.....	.....	I&E	2	0.8639
AUT0441	.....	108,296	276,983	17,492	57,275	79,220	.....	.....	.....	I	1	1.1604
AUT0446	.....	278,043	3,528,075	28,547	111,202	584,973	1,404,150	.....	113,155	I&E	4	2.5787
AUT0449	.....	487,640	1,738,410	110,263	393,700	530,948	.....	.....	.....	I	1	1.1604
AUT0472	.....	239,620	218,958	453,683	511,926	89,417	.....	.....	.....	I&E	2	0.8639
AUT0476	.....	233,631	489,074	27,565	93,169	135,237	.....	.....	.....	I	1	1.1604
AUT0483	.....	1,146,722	2,715,801	112,654	136,742	410,757	.....	274,363	21,886	I&E	11	0.7352
AUT0489	.....	211,629	1,477,232	84,570	299,177	424,931	.....	.....	.....	I	1	1.1604
AUT0490	.....	405,350	3,527,610	73,321	78,027	506,958	3,548,991	.....	286,000	I&E	4	2.5787
AUT0493	.....	257,137	1,429,134	51,159	206,956	359,274	.....	150,000	11,965	I&E	2	0.8639
AUT0496	.....	603,432	1,649,804	57,304	206,130	383,721	.....	.....	.....	I	1	1.1604
AUT0499	.....	45,374	171,551	9,346	48,606	63,685	.....	.....	.....	I&E	2	0.8639
AUT0501	.....	346,213	115,781	205,027	230,840	42,297	.....	.....	.....	I&E	2	0.8639
AUT0513	.....	1,296,772	27,395,451	170,929	603,316	4,332,883	36,923,245	.....	2,975,512	I&E	4	2.5787
AUT0517	.....	98,553	1,040,022	20,976	72,416	199,516	.....	.....	.....	I	1	1.1604
AUT0518	.....	193,413	435,346	28,467	96,388	129,905	.....	.....	.....	I	1	1.1604
AUT0522	.....	237,692	856,098	40,165	162,010	243,734	.....	.....	.....	I&E	2	0.8639
AUT0523	.....	608,373	7,741,521	.....	189,045	1,291,263	.....	.....	.....	I&E	9	5.973
AUT0529	.....	422,181	3,402,665	144,308	530,442	870,598	.....	.....	.....	I	1	1.1604
AUT0534	.....	70,565	230,241	17,175	56,150	71,756	.....	.....	.....	I	1	1.1604
AUT0535	.....	196,084	3,706,283	25,082	66,100	568,710	604,316	.....	48,700	I&E	3	3.4562
AUT0539	.....	1,056,137	13,978,398	183,682	342,369	2,148,896	2,343,730	1,412,165	301,520	I&E	12	3.6581
AUT0541	.....	117,759	3,346,437	108,327	37,393	405,523	27,152,758	169,037	2,201,627	I&E	12	3.6581
AUT0547	.....	780,279	9,747,498	118,281	129,393	1,398,937	17,882,815	.....	1,441,112	I&E	4	2.5787
AUT0551	.....	295,707	823,114	30,125	35,820	122,888	.....	150,000	11,965	I&E	11	0.7352
AUT0552	.....	1,226,625	133,029	.....	80,047	98,987	.....	.....	.....	I	5	0.1286
AUT0553	.....	71,128	230,549	10,379	32,023	54,468	.....	.....	.....	I	1	1.1604
AUT0554	.....	429,991	8,840,925	249,963	170,468	1,179,253	1,498,242	.....	120,738	I&E	3	3.4562
AUT0557	.....	37,500	20,033	.....	19,881	22,734	.....	.....	.....	I	5	0.1286
AUT0564	.....	1,129,749	14,903,816	170,408	396,749	2,348,309	15,236,406	.....	1,227,847	I&E	7	2.504
AUT0567	.....	441,177	5,817,871	67,488	77,963	838,809	4,139,441	.....	333,583	I&E	4	2.5787
AUT0568	.....	584,525	2,308,321	342,703	382,141	368,091	.....	150,000	11,965	I&E	2	0.8639
AUT0570	.....	951,201	4,021,857	164,817	591,048	998,853	.....	.....	.....	I	1	1.1604
AUT0577	.....	741,931	10,647,710	113,337	129,884	1,532,542	.....	.....	.....	I&E	7	2.504
AUT0583	.....	222,087	2,210,305	36,279	51,245	329,663	9,610,528	.....	774,478	I&E	4	2.5787
AUT0585	.....	128,015	1,561,382	49,933	54.853	227,225	1,102,473	.....	88,844	I&E	4	2.5787
AUT0588	.....	396,576	1,788,685	191,759	66,639	129,548	.....	180,701	14,414	I&E	11	0.7352
AUT0590	.....	147,803	315,803	22,592	75,430	97,801	.....	.....	.....	I	1	1.1604
AUT0599	.....	198,681	3,040,887	21,121	104,455	516,288	.....	307,205	24,505	I	4	2.5787
AUT0600	.....	711,801	1,717,012	80,592	284,636	448,508	.....	.....	.....	I	1	1.1604
AUT0601	.....	1,151,214	541,482	677,194	742,753	142,654	.....	.....	.....	I&E	2	0.8639
AUT0603	.....	1,228,633	684,562	720,077	802,140	179,529	.....	150,000	11,965	I&E	2	0.8639
AUT0607	.....	635,364	9,044,216	111,819	226,342	1,402,216	3,693,163	456,845	334,061	I&E	12	3.6581
AUT0611	.....	547,114	3,195,898	88,288	320,973	687,709	.....	.....	.....	I	1	1.1604
AUT0612	.....	186,464	6,614,075	.....	85,670	1,027,365	.....	.....	.....	I&E	13	7.0567
AUT0613	.....	493,923	4,341,494	155,354	572,021	1,034,798	.....	.....	.....	I	1	1.1604
AUT0617	.....	2,292,812	37,040,390	1,403,836	741,877	4,611,760	2,161,531	1,247,332	273,688	I&E	12	3.6581
AUT0619	.....	159,600	62,547	98,454	112,506	22,957	.....	.....	.....	I&E	2	0.8639
AUT0620	.....	551,528	2,198,869	264,319	90,714	139,464	.....	222,140	17,720	I&E	11	0.7352
AUT0621	.....	391,137	2,018,600	70,658	245,595	462,340	.....	.....	.....	I	1	1.1604
AUT0623	.....	73,622	267,379	13,006	49,653	74,715	.....	.....	.....	I	2	0.8639
AUT0625	.....	562,255	2,841,330	104,168	380,113	680,487	.....	.....	.....	I	1	1.1604

AUT0630		569,211	16,086,712	94,881	227,787	2,423,292	974,792	.....	78,555	I&E	3	3.4562
AUT0631		480,721	11,721,529	77,934	190,232	1,781,179	193,002	.....	15,553	I&E	3	3.4562
AUT0635		72,550	1,057,088	50,149	201,000	301,357	.....	150,000	11,965	I&E	2	0.8639
AUT0638		201,395	2,336,881	50,154	202,851	485,416	.....	236,083	18,832	I&E	2	0.8639
AUT0639		479,860	2,960,066	143,531	527,524	805,439	.....	.....	.....	I	1	1.1604
DMU3244 ...	1	22,222	138,465	.....	27,927	47,641	.....	.....	.....	I	1	1.1604
DMU3244 ...	2	56,250	163,334	.....	33,357	56,612	.....	.....	.....	I	1	1.1604
DMU3310 ...		41,319	25,594	8,793	27,169	22,020	.....	.....	.....	I	1	1.1604
DNU2003		156,944	68,455	.....	30,711	40,458	.....	.....	.....	I	5	0.1286
DNU2010		67,000	1,010,938	11,787	23,430	155,578	543,834	.....	43,826	I	4	2.5787
DNU2011		181,250	2,707,585	21,222	102,473	466,750	5,223,420	273,533	442,756	I&E	12	3.6581
DNU2013		65,000	588,369	.....	24,812	108,583	.....	150,000	11,965	I&E	11	0.7352
DNU2014		42,798	531,997	64,365	22,327	33,707	.....	150,000	11,965	I&E	11	0.7352
DNU2017		38,194	984,494	.....	13,803	153,973	.....	.....	.....	I&E	13	7.0567
DNU2018		44,260	446,336	11,513	13,633	65,668	.....	.....	.....	I&E	11	0.7352
DNU2021		55,750	292,158	18,165	59,671	83,103	.....	.....	.....	I	1	1.1604
DNU2025		120,689	7,720,257	.....	825,174	1,924,365	.....	779,937	62,215	I&E	2	0.8639
DNU2032	Units 1 & 2	156,250	.....	.....	.....	.....	.....	.....	.....	I	5	0.1286
DNU2032	Unit 3	124,306	.....	.....	.....	.....	.....	.....	.....	I	5	0.1286
DNU2032	Unit 4	136,806	143,049	.....	54,324	74,691	.....	.....	.....	I	5	0.1286
DNU2038		41,667	465,858	50,489	58,892	74,730	.....	.....	.....	I&E	2	0.8639
DUT0062	1	72,917	1,069,902	8,527	48,944	192,747	5,279,493	.....	425,455	I&E	4	2.5787
DUT0062	2	156,250	1,922,088	14,312	56,483	315,834	5,279,493	.....	425,455	I&E	4	2.5787
DUT0576	5&6	50,000	1,434,192	51,770	185,694	338,121	.....	.....	.....	I	1	1.1604
DUT0576	7	43,056	866,245	29,000	101,863	196,197	.....	.....	.....	I	1	1.1604
DUT0576	CT	2,083	202,358	.....	25,785	54,596	.....	.....	.....	I	1	1.1604
DUT1002	Screenhouse 1	685,833	166,652	322,571	367,337	68,493	.....	.....	.....	I&E	2	0.8639
DUT1002	Screenhouse 2	685,833	166,652	322,571	367,337	68,493	.....	.....	.....	I&E	2	0.8639
DUT1003		38,500	703,237	15,912	20,989	105,202	236,360	.....	19,047	I	4	2.5787
DUT1006	Unit 1/2	173,611	1,286,341	54,154	153,027	282,018	.....	.....	.....	I	1	1.1604
DUT1006	Unit 3/4	20,833	281,263	12,914	39,309	66,440	.....	.....	.....	I	1	1.1604
DUT1007		242,778	680,059	32,861	39,165	103,129	.....	150,000	11,965	I&E	11	0.7352
DUT1008		60,000	1,016,367	26,935	107,846	225,619	.....	150,000	11,965	I&E	2	0.8639
DUT1011		283,611	1,350,484	76,112	267,481	383,648	.....	.....	.....	I	1	1.1604
DUT1012		173,611	522,205	29,576	100,351	145,125	.....	.....	.....	I	1	1.1604
DUT1014		87,000	920,321	40,859	163,140	253,315	.....	150,000	11,965	I&E	2	0.8639
DUT1022		2,200,000	8,268,801	291,801	1,051,593	1,937,083	.....	.....	.....	I	1	1.1604
DUT1023	CWS #535	478,444	28,961,166	360,609	274,535	4,037,344	.....	.....	.....	I&E	3	3.4562
DUT1023	DWS #536	520,000	39,708,776	97,288	361,137	5,917,486	4,830,432	.....	389,267	I&E	3	3.4562
DUT1029	CRS	638,000	14,391,478	63,709	254,538	2,239,852	.....	.....	.....	I&E	3	3.4562
DUT1029	CR Nuc	680,000	6,740,847	162,470	659,152	1,456,426	.....	.....	.....	I&E	2	0.8639
DUT1029	CRN	68,000	649,893	13,914	16,340	94,956	.....	.....	.....	I&E	11	0.7352
DUT1029	HCT	735,000	4,654,560	159,675	194,358	697,388	21,796,254	667,692	1,809,743	I&E	11	0.7352
DUT1031	1	59,000	808,777	17,797	22,826	120,181	.....	.....	.....	I&E	4	2.5787
DUT1031	2	140,000	1,524,044	24,132	26,017	218,874	5,399,114	.....	435,095	I&E	4	2.5787
DUT1033		240,000	1,076,251	43,293	55,502	165,443	.....	150,000	11,965	I&E	11	0.7352
DUT1034		1,231,944	4,990,608	202,923	820,337	1,327,964	.....	504,175	40,218	I&E	2	0.8639
DUT1036		444,000	753,297	41,568	141,630	207,314	.....	.....	.....	I	1	1.1604
DUT1038		65,972	213,848	12,804	38,918	56,561	.....	.....	.....	I	1	1.1604
DUT1041		188,958	433,167	27,973	94,625	128,325	.....	.....	.....	I	1	1.1604
DUT1043		280,556	36,345	.....	27,042	32,217	.....	.....	.....	I	5	0.1286
DUT1044		756,944	76,726	.....	53,732	64,656	.....	.....	.....	I	5	0.1286
DUT1047		614,306	16,998,704	151,032	103,667	2,372,868	4,783,541	.....	385,488	I&E	7	2.504
DUT1048	HI-1	256,944	1,766,372	113,534	405,813	543,770	.....	.....	.....	I	1	1.1604
DUT1048	HI-2	170,139	473,836	33,127	113,050	147,387	.....	.....	.....	I	1	1.1604
DUT1050		2,104,167	407,068	.....	171,852	229,809	.....	.....	.....	I	5	0.1286
DUT1051		374,000	1,027,013	55,468	193,382	284,137	.....	.....	.....	I	1	1.1604
DUT1057		340,000	2,844,898	35,159	51,102	420,993	7,997,712	.....	644,507	I&E	4	2.5787
DUT1062		670,139	67,658	.....	48,869	58,502	.....	.....	.....	I	5	0.1286
DUT1066		1,712,000	32,777,974	260,695	678,771	5,084,922	845,987	.....	68,175	I&E	3	3.4562
DUT1067	1	63,611	.....	.....	.....	.....	.....	.....	.....	I	5	0.1286
DUT1067	2	31,667	.....	.....	.....	.....	.....	.....	.....	I	5	0.1286
DUT1067	3	69,653	23,159	.....	20,564	23,862	.....	.....	.....	I	5	0.1286
DUT1068		91,528	360,536	56,351	20,060	15,042	.....	.....	.....	I&E	11	0.7352
DUT1072		366,597	691,381	40,319	137,184	195,303	.....	.....	.....	I	1	1.1604
DUT1084		264,583	835,764	54,494	189,863	254,363	.....	.....	.....	I	1	1.1604

Facility ID	Intake ID	EPA assumed design intake flow, gpm (X_{epa}) ($)	Capital cost ($)	Baseline O&M annual cost ($)	Post construction O&M annual cost ($)	Annualized capital[3] + net O&M using EPA design intake flow[2] (y_{epa}) ($)	Net revenue losses from net construction downtime ($)	Pilot study costs ($)	Annualized downtime and pilot study costs[2,4] ($)	Performance standards on which EPA cost estimates are based	EPA modeled technology code	Design flow adjustment slope (m)[1]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13
DUT1085	.....	297,000	2,410,696	159,608	619,834	803,455	.....	243,540	19,427	I&E	2	0.8639
DUT1086	Unit 1	57,292	667,197	29,048	122,691	188,637	.....	.....	.....	I&E	2	0.8639
DUT1086	Unit 2	57,292	667,197	29,048	122,691	188,637	.....	150,000	11,965	I&E	2	0.8639
DUT1088	#4	49,280	865,324	11,129	22,007	134,081	.....	.....	.....	I&E	7	2.504
DUT1088	#5	99,458	1,438,399	12,058	25,232	217,970	1,601,167	.....	129,032	I&E	7	2.504
DUT1093	.....	307,760	9,456,466	.....	33,762	1,380,150	.....	.....	.....	I&E	9	5.973
DUT1097	.....	106,007	2,349,646	.....	242,606	577,143	.....	237,372	18,935	I&E	6	5.0065
DUT1098	.....	71,528	507,025	29,461	99,942	142,669	.....	.....	.....	I	1	1.1604
DUT1100	Units 1 & 2	188,000	.....	.....	.....	.....	.....	.....	.....	I	5	0.1286
DUT1100	Units 3 & 4	188,000	136,878	.....	50,573	70,062	.....	.....	.....	I	5	0.1286
DUT1103	Unit 1 Screenhouse	118,000	.....	.....	.....	.....	.....	.....	.....	I		
DUT1103	Unit 2 Screenhouse	250,000	47,060	.....	31,941	38,642	.....	.....	.....	I	5	0.1286
DUT1103	Hvdc Lake Intake	1,200	34,615	.....	4,734	9,662	.....	.....	.....	I	8	0.3315
DUT1103	Hvdc Separator Dike	1,200	34,615	.....	4,734	9,662	.....	.....	.....	I	8	0.3315
DUT1103	River Intake	7,800	75,587	5,734	15,570	20,597	.....	.....	.....	I	1	1.1604
DUT1109	.....	58,333	873,553	32,385	130,170	222,159	.....	150,000	11,965	I	2	0.8639
DUT1111	Unit 1&2	199,716	764,700	99,547	37,851	47,181	.....	.....	.....	I&E	11	0.7352
DUT1111	Unit 3	189,842	717,221	93,277	35,552	44,391	.....	150,000	11,965	I&E	11	0.7352
DUT1112	.....	193,750	501,403	28,510	96,543	139,421	.....	.....	.....	I	1	1.1604
DUT1113	System 27	1,125,000	6,518,329	281,013	1,001,831	1,648,882	.....	.....	.....	I	1	1.1604
DUT1113	System 67	44,028	181,599	.....	8,508	34,364	.....	.....	.....	I	8	0.3315
DUT1116	.....	355,556	2,886,459	69,804	84,921	426,084	.....	291,604	23,261	I&E	11	0.7352
DUT1118	.....	667,361	140,959	.....	64,789	84,858	.....	.....	.....	I	5	0.1286
DUT1122	.....	120,000	23,134	.....	18,047	21,341	.....	.....	.....	I	5	0.1286
DUT1123	6	111,806	4,071,741	15,536	39,240	603,428	.....	.....	.....	I&E	3	3.4562
DUT1123	7	256,250	5,809,773	.....	431,082	1,258,263	.....	.....	.....	I&E	6	5.0065
DUT1123	8	220,139	5,590,610	27,185	73,721	842,513	1,136,010	.....	91,547	I&E	3	3.4562
DUT1132	.....	1,896,000	3,995,072	197,552	927,311	1,298,568	.....	403,601	32,195	I&E	2	0.8639
DUT1133	.....	213,889	1,180,537	44,631	57,260	180,711	.....	150,000	11,965	I&E	11	0.7352
DUT1138	.....	77,083	264,532	12,475	37,753	62,942	.....	.....	.....	I	1	1.1604
DUT1140	Mc2-4	131,250	334,100	20,512	66,264	93,320	.....	.....	.....	I	1	1.1604
DUT1140	Mc5&6	383,958	1,450,787	82,444	290,867	414,982	.....	.....	.....	I	1	1.1604
DUT1145	.....	178,472	2,702,979	38,035	57,101	403,909	1,565,614	273,068	147,950	I&E	12	3.6581
DUT1146	.....	181,944	325,271	276,184	309,256	79,383	.....	.....	.....	I&E	2	0.8639
DUT1152	.....	399,306	10,606,982	355,225	1,321,682	2,476,653	.....	.....	.....	I	1	1.1604
DUT1156	.....	496,000	16,234,946	67,033	77,047	2,321,504	9,287,608	.....	748,455	I&E	7	2.504
DUT1157	6	110,000	1,262,753	47,827	25,593	157,553	.....	.....	.....	I&E	4	2.5787
DUT1157	7	5,833	305,286	13,438	17,201	47,229	.....	.....	.....	I&E	4	2.5787
DUT1165	1	480,000	9,356,403	220,447	189,951	1,301,645	.....	.....	.....	I&E	3	3.4562
DUT1165	2	489,233	.....	.....	.....	.....	9,426,676	.....	759,662	I&E		
DUT1169	.....	620,000	14,855,719	47,990	185,073	2,252,203	1,896,934	.....	152,867	I&E	3	3.4562
DUT1173	.....	37,986	312,285	18,521	72,119	98,061	.....	.....	.....	I&E	2	0.8639
DUT1179	.....	390,278	1,204,485	74,177	261,241	358,556	.....	.....	.....	I	1	1.1604
DUT1185	.....	225,000	3,496,693	21,560	51,324	527,614	1,266,125	.....	102,032	I&E	7	2.504
DUT1186	Unit 4	62,000	577,654	26,371	88,907	144,780	.....	.....	.....	I	1	1.1604
DUT1186	Unit 5	62,000	577,654	26,371	88,907	144,780	.....	.....	.....	I	1	1.1604
DUT1187	Mt 2&3	147,014	.....	.....	.....	.....	.....	.....	.....	I	5	0.1286
DUT1187	Mt 6-8	500,000	78,370	.....	47,573	58,732	.....	.....	.....	I	5	0.1286
DUT1189	Unit 6 & 8	72,222	.....	.....	.....	.....	.....	.....	.....	I	5	0.1286
DUT1189	Unit 7	80,000	22,427	.....	19,852	23,045	.....	.....	.....	I	5	0.1286
DUT1198	.....	279,511	5,198,159	27,451	92,443	805,093	268,118	.....	21,607	I&E	3	3.4562
DUT1202	Power Plant	36,000	1,154,817	.....	13,668	178,088	.....	.....	.....	I&E	11	0.7352
DUT1202	Filtration Plant	30,000	987,137	.....	13,284	153,830	.....	.....	.....	I&E	9	5.973

DUT1206	1	85,972	53,440	56,705	65,852	16,756				I&E	2	0.8639
DUT1206	2	85,000	59,054	56,155	65,236	17,489				I&E	2	0.8639
DUT1206	3	120,972	87,045	76,530	88,027	23,890				I&E	2	0.8639
DUT1209	Plant A	640,000	2,227,053	89,172	116,036	343,947				I&E	11	0.7352
DUT1209	Plant B	515,972	10,503,729	51,204	184,394	1,628,685	5,849,051		471,354	I&E	3	3.4562
DUT1211		1,666,667	32,926,766	3,240,832	1,072,136	2,519,335		3,326,419	265,345	I&E	11	0.7352
DUT1212		687,500	2,000,922	85,020	302,122	501,987				I	1	1.1604
DUT1214		51,944	754,488	34,900	22,241	94,763	7,829,721		630,969	I	4	2.5787
DUT1217	Unit 1									I&E		
DUT1217	Unit 6-8	104,861	848,612		16,547	137,371				I&E	13	7.0567
DUT1217	Unit 4									I&E		
DUT1219		550,000	2,862,608	108,307	438,079	737,343		289,194	23,069	I&E	2	0.8639
DUT1223	1	142,000	1,422,632	8,898	55,779	249,432				I&E	12	3.6581
DUT1223	2	224,800	2,121,274	22,284	56,502	336,239	376,088	179,011	44,587	I&E	12	3.6581
DUT1227	1 & 2	130,000	373,205	21,493	71,516	103,159				I	1	1.1604
DUT1227	3	185,000	512,326	29,084	98,594	142,454				I	1	1.1604
DUT1229		73,000	30,638	82,612	96,918	18,668				I&E	2	0.8639
DUT1238	A	676,000	386,447	531,800	688,788	212,010				I	2	0.8639
DUT1238	B	334,000	344,428	525,715	662,610	185,934				I	2	0.8639
DUT1248		452,083	49,114		36,652	43,645				I	5	0.1286
DUT1249		43,900	10,765		13,783	15,316				I	5	0.1286
DUT1250		360,000	12,788,752	160,063	151,944	1,812,711	17,224,807		1,388,085	I&E	7	2.504
DUT1252		112,000	157,353	10,988	32,494	43,910				I	1	1.1604
DUT1258	Screen House No.1	287,083	6,665,603	171,249	116,490	894,273				I&E	3	3.4562
DUT1258	Screen House No.2	422,708	9,009,434	248,577	168,448	1,202,611				I&E	3	3.4562
DUT1258	Screen House No.3	243,056	4,842,849	108,025	73,278	654,766	4,429,893		356,989	I&E	3	3.4562
DUT1259		71,181	2,706,303	20,742	26,203	390,778	81,723		6,586	I&E	3	3.4562
DUT1261	U12	79,000	49,889	119,643	139,137	26,598				I&E	2	0.8639
DUT1261	U34	139,750	1,735,631	101,580	26,018	171,552	1,650,821		133,034	I&E	4	2.5787
DUT1265		70,000	495,281	35,987	143,288	177,818		150,000	11,965	I&E	2	0.8639
DUT1268		2,400,000	20,911,797	1,793,928	623,613	1,807,054		2,112,610	168,521	I&E	11	0.7352
DUT1269		456,000	3,012,280	107,765	130,761	451,877		304,315	24,275	I&E	11	0.7352
DUT1270		89,583	18,084		16,343	18,918				I	5	0.1286
DUT1271		186,000	14,970,016	30,165	49,913	2,151,142	4,337,253	1,512,343	470,162	I&E	7	2.504
DUT1272	Mo1 & 2	713,889	1,238,695	76,910	270,425	369,877				I	1	1.1604
DUT1272	Mo3	528,472	849,029	53,826	185,965	253,021				I	1	1.1604
DUT1273		444,444	2,752,775	164,719	582,187	809,401				I	1	1.1604
DUT1274		330,556	1,564,234	62,476	225,250	385,486				I	1	1.1604
DUT1275		1,992,500	6,739,793		355,766	1,315,361		680,886	54,314	I	2	0.8639
DUT1276		62,500	412,277	23,754	26,574	61,518				I&E	11	0.7352
DUT1278		559,722	4,962,033	193,479	688,069	1,201,071				I	1	1.1604

Facilities Receiving No EPA Technology Upgrade Costs

AUT0010		n/a									n/a	n/a
AUT0013		n/a									n/a	n/a
AUT0018		n/a									n/a	n/a
AUT0022		n/a									n/a	n/a
AUT0033		n/a									n/a	n/a
AUT0036		n/a									n/a	n/a
AUT0041		n/a									n/a	n/a
AUT0047		n/a									n/a	n/a
AUT0050		n/a									n/a	n/a
AUT0054		n/a									n/a	n/a
AUT0067		n/a									n/a	n/a
AUT0068		n/a									n/a	n/a
AUT0071		n/a									n/a	n/a
AUT0072		n/a									n/a	n/a
AUT0073		n/a									n/a	n/a
AUT0077		n/a									n/a	n/a
AUT0079		n/a									n/a	n/a
AUT0080		n/a									n/a	n/a
AUT0083		n/a									n/a	n/a
AUT0087		n/a									n/a	n/a
AUT0091		n/a									n/a	n/a
AUT0093		n/a									n/a	n/a

Facility ID	Intake ID	EPA assumed design intake flow, gpm (X_{epa}) ($)	Capital cost ($)	Baseline O&M annual cost ($)	Post construction O&M annual cost ($)	Annualized capital [3] + net O&M using EPA design intake flow [2] (y_{epa}) ($)	Net revenue losses from net construction downtime ($)	Pilot study costs ($)	Annualized downtime and pilot study costs [2,4] ($)	Performance standards on which EPA cost estimates are based	EPA modeled technology code	Design flow adjustment slope (m) [1]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13
AUT0097		n/a									n/a	n/a
AUT0101		n/a									n/a	n/a
AUT0104		n/a									n/a	n/a
AUT0111		n/a									n/a	n/a
AUT0114		n/a									n/a	n/a
AUT0125		n/a									n/a	n/a
AUT0126		n/a									n/a	n/a
AUT0129		n/a									n/a	n/a
AUT0152		n/a									n/a	n/a
AUT0156		n/a									n/a	n/a
AUT0157		n/a									n/a	n/a
AUT0160		n/a									n/a	n/a
AUT0163		n/a									n/a	n/a
AUT0170		n/a									n/a	n/a
AUT0173		n/a									n/a	n/a
AUT0178		n/a									n/a	n/a
AUT0181		n/a									n/a	n/a
AUT0182		n/a									n/a	n/a
AUT0199		n/a									n/a	n/a
AUT0201		n/a									n/a	n/a
AUT0215		n/a									n/a	n/a
AUT0216		n/a									n/a	n/a
AUT0221		n/a									n/a	n/a
AUT0226		n/a									n/a	n/a
AUT0230		n/a									n/a	n/a
AUT0232		n/a									n/a	n/a
AUT0235		n/a									n/a	n/a
AUT0240		n/a									n/a	n/a
AUT0241		n/a									n/a	n/a
AUT0246		n/a									n/a	n/a
AUT0248		n/a									n/a	n/a
AUT0257		n/a									n/a	n/a
AUT0260		n/a									n/a	n/a
AUT0270		n/a									n/a	n/a
AUT0275		n/a									n/a	n/a
AUT0276		n/a									n/a	n/a
AUT0285		n/a									n/a	n/a
AUT0286		n/a									n/a	n/a
AUT0287		n/a									n/a	n/a
AUT0296		n/a									n/a	n/a
AUT0300		n/a									n/a	n/a
AUT0304		n/a									n/a	n/a
AUT0307		n/a									n/a	n/a
AUT0310		n/a									n/a	n/a
AUT0315		n/a									n/a	n/a
AUT0343		n/a									n/a	n/a
AUT0344		n/a									n/a	n/a
AUT0350		n/a									n/a	n/a
AUT0355		n/a									n/a	n/a
AUT0356		n/a									n/a	n/a
AUT0359		n/a									n/a	n/a
AUT0363		n/a									n/a	n/a
AUT0373		n/a									n/a	n/a

AUT0380		n/a									n/a	n/a
AUT0388		n/a									n/a	n/a
AUT0390		n/a									n/a	n/a
AUT0394		n/a									n/a	n/a
AUT0396		n/a									n/a	n/a
AUT0397		n/a									n/a	n/a
AUT0403		n/a									n/a	n/a
AUT0405		n/a									n/a	n/a
AUT0406		n/a									n/a	n/a
AUT0411		n/a									n/a	n/a
AUT0415		n/a									n/a	n/a
AUT0419		n/a									n/a	n/a
AUT0424		n/a									n/a	n/a
AUT0433		n/a									n/a	n/a
AUT0440		n/a									n/a	n/a
AUT0443		n/a									n/a	n/a
AUT0444		n/a									n/a	n/a
AUT0453		n/a									n/a	n/a
AUT0455		n/a									n/a	n/a
AUT0459		n/a									n/a	n/a
AUT0462		n/a									n/a	n/a
AUT0463		n/a									n/a	n/a
AUT0467		n/a									n/a	n/a
AUT0473		n/a									n/a	n/a
AUT0477		n/a									n/a	n/a
AUT0478		n/a									n/a	n/a
AUT0481		n/a									n/a	n/a
AUT0482		n/a									n/a	n/a
AUT0492		n/a									n/a	n/a
AUT0500		n/a									n/a	n/a
AUT0507		n/a									n/a	n/a
AUT0512		n/a									n/a	n/a
AUT0515		n/a									n/a	n/a
AUT0521		n/a									n/a	n/a
AUT0531		n/a									n/a	n/a
AUT0536		n/a									n/a	n/a
AUT0537		n/a									n/a	n/a
AUT0538		n/a									n/a	n/a
AUT0540		n/a									n/a	n/a
AUT0544		n/a									n/a	n/a
AUT0546		n/a									n/a	n/a
AUT0555		n/a									n/a	n/a
AUT0559		n/a									n/a	n/a
AUT0561		n/a									n/a	n/a
AUT0571		n/a									n/a	n/a
AUT0573		n/a									n/a	n/a
AUT0575		n/a									n/a	n/a
AUT0580		n/a									n/a	n/a
AUT0582		n/a									n/a	n/a
AUT0595		n/a									n/a	n/a
AUT0602		n/a									n/a	n/a
AUT0604		n/a									n/a	n/a
AUT0606		n/a									n/a	n/a
AUT0608		n/a									n/a	n/a
AUT0618		n/a									n/a	n/a
AUT0636		n/a									n/a	n/a
AUT0637		n/a									n/a	n/a
AUT0755		n/a									n/a	n/a
DNU2002		n/a									n/a	n/a
DNU2005		n/a									n/a	n/a
DNU2006		n/a									n/a	n/a
DNU2015		n/a									n/a	n/a
DNU2031		n/a									n/a	n/a
DNU2047		n/a									n/a	n/a
DUT1010		n/a									n/a	n/a
DUT1013		n/a									n/a	n/a

Facility ID	Intake ID	EPA assumed design intake flow, gpm (X_{cpa}) ($)	Capital cost ($)	Baseline O&M annual cost ($)	Post construction O&M annual cost ($)	Annualized capital[3] + net O&M using EPA design intake flow[2] (y_{cpa}) ($)	Net revenue losses from net construction downtime ($)	Pilot study costs ($)	Annualized downtime and pilot study costs[2,4] ($)	Performance standards on which EPA cost estimates are based	EPA modeled technology code	Design flow adjustment slope (m)[1]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13
DUT1021		n/a									n/a	n/a
DUT1026		n/a									n/a	n/a
DUT1027		n/a									n/a	n/a
DUT1032		n/a									n/a	n/a
DUT1039		n/a									n/a	n/a
DUT1046		n/a									n/a	n/a
DUT1049		n/a									n/a	n/a
DUT1053		n/a									n/a	n/a
DUT1056		n/a									n/a	n/a
DUT1070		n/a									n/a	n/a
DUT1071		n/a									n/a	n/a
DUT1078		n/a									n/a	n/a
DUT1081		n/a									n/a	n/a
DUT1087		n/a									n/a	n/a
DUT1092		n/a									n/a	n/a
DUT1104		n/a									n/a	n/a
DUT1105		n/a									n/a	n/a
DUT1106		n/a									n/a	n/a
DUT1117		n/a									n/a	n/a
DUT1120		n/a									n/a	n/a
DUT1129		n/a									n/a	n/a
DUT1130		n/a									n/a	n/a
DUT1142		n/a									n/a	n/a
DUT1143		n/a									n/a	n/a
DUT1148		n/a									n/a	n/a
DUT1149		n/a									n/a	n/a
DUT1153		n/a									n/a	n/a
DUT1154		n/a									n/a	n/a
DUT1155		n/a									n/a	n/a
DUT1161		n/a									n/a	n/a
DUT1167		n/a									n/a	n/a
DUT1170		n/a									n/a	n/a
DUT1172		n/a									n/a	n/a
DUT1174		n/a									n/a	n/a
DUT1175		n/a									n/a	n/a
DUT1176		n/a									n/a	n/a
DUT1177		n/a									n/a	n/a
DUT1183		n/a									n/a	n/a
DUT1188		n/a									n/a	n/a
DUT1191		n/a									n/a	n/a
DUT1192		n/a									n/a	n/a
DUT1194		n/a									n/a	n/a
DUT1199		n/a									n/a	n/a
DUT1201		n/a									n/a	n/a
DUT1213		n/a									n/a	n/a
DUT1220		n/a									n/a	n/a
DUT1222		n/a									n/a	n/a
DUT1224		n/a									n/a	n/a
DUT1225		n/a									n/a	n/a
DUT1228		n/a									n/a	n/a
DUT1233		n/a									n/a	n/a
DUT1234		n/a									n/a	n/a
DUT1235		n/a									n/a	n/a

DUT1239	.....	n/a	.....	.....	.....	.....	.....	.....	.....	.....	n/a	n/a
DUT1243	.....	n/a	.....	.....	.....	.....	.....	.....	.....	.....	n/a	n/a
DUT1254	.....	n/a	.....	.....	.....	.....	.....	.....	.....	.....	n/a	n/a
DUT1257	.....	n/a	.....	.....	.....	.....	.....	.....	.....	.....	n/a	n/a
DUT1262	.....	n/a	.....	.....	.....	.....	.....	.....	.....	.....	n/a	n/a

[1] The design flow adjustment slope (m) represents the slope that corresponds to the particular facility using the technology in column 3
[2] Discount rate = 7%
[3] Amortization period for capital costs = 10 years
[4] Amortization period for downtime and pilot study costs = 30 years

Note: Depending on the data provided, some facilities with multiple intakes were costed separately for each intake. In such cases, the facility should calculate the costs considered by EPA for each intake using the steps below and sum. Note that some costs (e.g., construction downtime) are assigned evenly to each intake for convenience.

Appendix B: Facility ID and Facility Name for All Facilities Not Claiming Survey Information CBI

Facility ID	Facility name
AUT0001 ...	Cane Run
AUT0002 ...	Chesapeake
AUT0004 ...	Hennepin
AUT0010 ...	Bowen
AUT0011 ...	Shawville
AUT0012 ...	Diablo Canyon Nuclear
AUT0013 ...	Montville
AUT0014 ...	Williams
AUT0015 ...	Northport
AUT0016 ...	Cholla
AUT0018 ...	R M Heskett Station
AUT0019 ...	Charles Poletti
AUT0020 ...	B L England
AUT0021 ...	B C Cobb
AUT0022 ...	St Johns River Power
AUT0024 ...	Bull Run
AUT0027 ...	Lake Hubbard
AUT0033 ...	Muscatine
AUT0036 ...	Edgewater
AUT0041 ...	Edwin I Hatch
AUT0044 ...	Hunters Point
AUT0047 ...	Michoud
AUT0049 ...	Chalk Point
AUT0050 ...	Wyandotte
AUT0051 ...	Suwannee River
AUT0053 ...	Nelson Dewey
AUT0054 ...	Flint Creek
AUT0057 ...	Thomas Fitzhugh
AUT0058 ...	Mercer
AUT0064 ...	Decordova
AUT0066 ...	Fermi Nuclear
AUT0067 ...	Henry D King
AUT0068 ...	Scattergood
AUT0071 ...	Oswego
AUT0072 ...	Sioux
AUT0073 ...	Lake Catherine
AUT0078 ...	Missouri City
AUT0079 ...	Eagle Mountain
AUT0080 ...	Lone Star
AUT0083 ...	Schiller
AUT0084 ...	Salem Nuclear
AUT0085 ...	Point Beach Nuclear
AUT0092 ...	Linden
AUT0093 ...	Perry Nuclear
AUT0095 ...	Tyrone
AUT0097 ...	Little Gypsy
AUT0101 ...	Lakeside
AUT0106 ...	Cheswick
AUT0110 ...	C P Crane
AUT0111 ...	Cape Fear
AUT0114 ...	Kewaunee Nuclear
AUT0120 ...	Norwalk Harbor
AUT0123 ...	Warren
AUT0125 ...	Beaver Valley Nuclear
AUT0127 ...	Lake Road
AUT0129 ...	Susquehanna Nuclear
AUT0130 ...	Elmer W Stout
AUT0131 ...	Hammond
AUT0134 ...	Mount Tom
AUT0137 ...	Mitchell
AUT0139 ...	Albany
AUT0142 ...	Lauderdale
AUT0143 ...	Wood River
AUT0146 ...	Meredosia
AUT0148 ...	Tanners Creek
AUT0149 ...	Thomas Hill
AUT0151 ...	Decker Creek
AUT0152 ...	Duck Creek
AUT0156 ...	Waterford 1 & 2
AUT0157 ...	Pulliam
AUT0160 ...	L V Sutton
AUT0161 ...	Valley
AUT0163 ...	Belle River
AUT0168 ...	E F Barrett
AUT0170 ...	O W Sommers
AUT0171 ...	New Madrid
AUT0173 ...	Fort Calhoun Nuclear
AUT0174 ...	Herbert a Wagner
AUT0175 ...	R E Burger
AUT0176 ...	Martin Lake
AUT0178 ...	Mt Storm
AUT0181 ...	Prairie Creek
AUT0182 ...	Arsenal Hill
AUT0183 ...	Schuylkill
AUT0185 ...	Gallatin
AUT0187 ...	North Anna Nuclear
AUT0190 ...	Ginna
AUT0191 ...	J H Campbell
AUT0192 ...	R W Miller
AUT0193 ...	Joliet 29
AUT0196 ...	Southside
AUT0197 ...	Austin-dt
AUT0201 ...	Cope
AUT0202 ...	Donald C Cook Nuclear
AUT0203 ...	Riverside
AUT0205 ...	Joliet 9
AUT0208 ...	New Castle
AUT0215 ...	Coleto Creek
AUT0216 ...	Fort St Vrain
AUT0221 ...	Polk
AUT0222 ...	Marion
AUT0226 ...	Sooner
AUT0227 ...	Silver Lake
AUT0228 ...	High Bridge
AUT0229 ...	Dan E Karn
AUT0230 ...	McWilliams
AUT0232 ...	V H Braunig
AUT0235 ...	Sam Rayburn
AUT0238 ...	North Lake
AUT0240 ...	Lee
AUT0241 ...	J B Sims
AUT0242 ...	Quad Cities Nuclear
AUT0244 ...	Elk River
AUT0245 ...	Avon Lake
AUT0246 ...	Canaday
AUT0248 ...	Sam Bertron
AUT0254 ...	Chamois
AUT0255 ...	Cooper
AUT0257 ...	Gerald Gentleman
AUT0260 ...	Marshall
AUT0261 ...	Dale
AUT0264 ...	Indian Point 3 Nucler
AUT0266 ...	North Omaha
AUT0268 ...	Cutler
AUT0270 ...	Possum Point
AUT0273 ...	Stanton
AUT0275 ...	Seabrook Nuclear
AUT0276 ...	River Rouge
AUT0277 ...	Dubuque
AUT0278 ...	Morgantown
AUT0284 ...	Handley
AUT0285 ...	Conners Creek
AUT0286 ...	Welsh
AUT0287 ...	Horseshoe Lake
AUT0292 ...	Harris Nuclear
AUT0295 ...	Jack Mcdonough
AUT0296 ...	W H Zimmer
AUT0297 ...	Quindaro
AUT0298 ...	Harllee Branch
AUT0299 ...	Chesterfield
AUT0300 ...	Eckert Station
AUT0302 ...	U.S. DOE SRS (D-area)
AUT0304 ...	Lansing
AUT0305 ...	Kahe
AUT0307 ...	Rodemacher
AUT0308 ...	W S Lee
AUT0309 ...	Wilkes
AUT0310 ...	A B Paterson
AUT0314 ...	Philip Sporn
AUT0315 ...	Sabine
AUT0319 ...	Cliffside
AUT0321 ...	J E Corette
AUT0331 ...	Lake Creek
AUT0333 ...	Hamilton
AUT0337 ...	Johnsonville
AUT0341 ...	Montrose
AUT0343 ...	John E Amos
AUT0344 ...	Weston
AUT0345 ...	Summer Nuclear
AUT0349 ...	McGuire Nuclear
AUT0350 ...	Clinton Nuclear
AUT0351 ...	Portland
AUT0355 ...	Limerick Nuclear
AUT0356 ...	Byron Nuclear
AUT0358 ...	H T Pritchard
AUT0359 ...	Hookers Point
AUT0361 ...	Hawthorn
AUT0362 ...	Teche
AUT0363 ...	Wansley
AUT0364 ...	Dresden Nuclear
AUT0365 ...	Arkwright
AUT0368 ...	Kaw
AUT0370 ...	Deepwater
AUT0373 ...	Valmont
AUT0379 ...	Lake Pauline
AUT0380 ...	Will County
AUT0381 ...	Healy
AUT0384 ...	Somerset
AUT0385 ...	Hutsonville
AUT0387 ...	Haynes
AUT0388 ...	Lewis Creek
AUT0390 ...	Fort Churchill
AUT0394 ...	Nebraska City
AUT0396 ...	Bremo Power Station
AUT0397 ...	George Neal North
AUT0398 ...	Iatan
AUT0399 ...	Boomer Lake
AUT0401 ...	Fort Myers
AUT0403 ...	Nine Mile Point Nuclear
AUT0404 ...	Mitchell
AUT0405 ...	Fisk
AUT0406 ...	Merom
AUT0408 ...	Cameo
AUT0411 ...	Roseton
AUT0415 ...	Rochester 7
AUT0416 ...	Noblesville
AUT0419 ...	Brunswick Nuclear
AUT0423 ...	James A Fitzpatrick
AUT0424 ...	Davis-besse
AUT0427 ...	Blount Street
AUT0431 ...	San Angelo
AUT0433 ...	Mistersky
AUT0434 ...	Paradise
AUT0435 ...	Shiras
AUT0440 ...	Eaton
AUT0441 ...	Piqua
AUT0443 ...	Milton L Kapp
AUT0444 ...	Gibbons Creek
AUT0446 ...	Richard H. Gorsuch
AUT0449 ...	Big Brown
AUT0453 ...	Four Corners
AUT0455 ...	Seminole
AUT0459 ...	Vogtle Nuclear
AUT0462 ...	Warrick
AUT0463 ...	Rex Brown
AUT0467 ...	Vero Beach
AUT0472 ...	Miami Fort
AUT0473 ...	Palisades Nuclear

Facility ID	Facility name
AUT0476 ...	Trinidad
AUT0477 ...	Fair Station
AUT0478 ...	Dansby
AUT0481 ...	Powerlane
AUT0482 ...	Gen J M Gavin
AUT0483 ...	Shawnee
AUT0489 ...	Nearman Creek
AUT0490 ...	Buck
AUT0492 ...	Collins
AUT0493 ...	E S Joslin
AUT0496 ...	Indian River
AUT0499 ...	Bay Front
AUT0500 ...	Big Cajun 2
AUT0501 ...	Jack Watson
AUT0507 ...	Crawford
AUT0512 ...	J K Spruce
AUT0513 ...	Waterford #3 Nuclear
AUT0515 ...	Rockport
AUT0517 ...	Humboldt Bay
AUT0518 ...	James River
AUT0521 ...	Menasha
AUT0522 ...	Jefferies
AUT0523 ...	Walter C Beckjord
AUT0529 ...	Gould Street
AUT0531 ...	Braidwood Nuclear
AUT0534 ...	Crisp
AUT0535 ...	Urquhart
AUT0536 ...	Rush Island
AUT0537 ...	Dallman
AUT0538 ...	Genoa
AUT0539 ...	Edge Moor
AUT0540 ...	J P Madgett
AUT0541 ...	Indian Point Nuclear
AUT0544 ...	Eddystone
AUT0546 ...	Watts Bar Nuclear
AUT0547 ...	Muskingum River
AUT0551 ...	Allen S King
AUT0552 ...	Kingston
AUT0553 ...	Hunlock Pwr Station
AUT0554 ...	Potomac River
AUT0555 ...	Zuni
AUT0557 ...	Sayreville
AUT0561 ...	J T Deely
AUT0564 ...	Kyger Creek
AUT0567 ...	F B Culley
AUT0568 ...	Northside
AUT0570 ...	Peach Bottom Nuclear
AUT0571 ...	Baxter Wilson
AUT0573 ...	San Onofre Nuclear
AUT0575 ...	Trenton Channel
AUT0577 ...	Middletown
AUT0580 ...	Sixth Street
AUT0582 ...	E W Brown
AUT0583 ...	Dave Johnston
AUT0585 ...	Burlington
AUT0588 ...	Monticello
AUT0590 ...	C D McIntosh Jr
AUT0599 ...	Kearny
AUT0600 ...	Kincaid
AUT0601 ...	Bridgeport Harbor
AUT0602 ...	Mason Steam
AUT0603 ...	Astoria
AUT0604 ...	C R Huntley
AUT0606 ...	Hmp&l Station 2
AUT0607 ...	Moss Landing
AUT0608 ...	Pilgrim Nuclear
AUT0611 ...	New Boston
AUT0612 ...	Huntington Beach
AUT0613 ...	Morro Bay
AUT0617 ...	Ravenswood
AUT0618 ...	New Haven Harbor
AUT0619 ...	William F Wyman
AUT0620 ...	Dunkirk
AUT0621 ...	Contra Costa
AUT0623 ...	Kendall Square
AUT0625 ...	Encina
AUT0630 ...	Lovett
AUT0631 ...	Salem Harbor
AUT0635 ...	Aes Hickling
AUT0637 ...	Ormond Beach
AUT0638 ...	Mandalay
AUT0639 ...	Pittsburg
DMU3244 ..	University of Notre Dame Power Plant
DMU3310 ..	University of Iowa—Main Power Plant
DNU2002 ...	Brooklyn Navy Yard Cogeneration Partners, L.P.
DNU2011 ...	Long Beach Generation
DNU2013 ...	Maine Energy Recovery Company
DNU2014 ...	Baltimore Resco
DNU2015 ...	Southern Energy-Canal
DNU2017 ...	Westchester Resco Co.
DNU2018 ...	Grays Ferry Cogeneration Partnership
DNU2021 ...	Morgantown
DNU2025 ...	Sparrows Point Div Bethlehem Steel Corp
DNU2031 ...	Ch Resources—Beaver Falls
DNU2032 ...	Duke Energy South Bay
DNU2038 ...	Saugus Resco
DNU2047 ...	El Segundo Power
DUT0062 ...	Leland Olds Station
DUT0576 ...	Sam O. Purdom Generating Station
DUT1002 ...	Monroe
DUT1003 ...	Peru
DUT1006 ...	Martins Creek
DUT1007 ...	Presque Isle
DUT1008 ...	Far Rockaway
DUT1011 ...	Stryker Creek
DUT1012 ...	Grand Tower
DUT1014 ...	Dolphus M Grainger
DUT1021 ...	Alma
DUT1022 ...	Comanche Peak Nuclear
DUT1023 ...	Oyster Creek Nuclear
DUT1026 ...	Delaware
DUT1029 ...	Crystal River
DUT1031 ...	Merrimack
DUT1033 ...	J C Weadock
DUT1034 ...	South Oak Creek
DUT1036 ...	Allen
DUT1038 ...	North Texas
DUT1041 ...	Elmer Smith
DUT1043 ...	Ray Olinger
DUT1044 ...	Tradinghouse
DUT1046 ...	Labadie
DUT1047 ...	Elrama
DUT1048 ...	Holly Street
DUT1049 ...	Joppa Steam
DUT1050 ...	Browns Ferry Nuclear
DUT1051 ...	Havana
DUT1056 ...	Webster
DUT1057 ...	Wateree
DUT1062 ...	Fayette Power Prj
DUT1066 ...	F J Gannon
DUT1067 ...	Paint Creek
DUT1068 ...	Harbor
DUT1070 ...	Millstone
DUT1072 ...	Graham
DUT1084 ...	Fort Phantom
DUT1085 ...	Petersburg
DUT1086 ...	Valley
DUT1088 ...	Seward
DUT1093 ...	Bailly
DUT1097 ...	Rock River
DUT1098 ...	Blackhawk
DUT1100 ...	Sewaren
DUT1103 ...	Milton R Young
DUT1109 ...	Riverside
DUT1111 ...	E D Edwards
DUT1112 ...	Lieberman
DUT1113 ...	Sequoyah Nuclear
DUT1116 ...	Waiau
DUT1117 ...	Columbia
DUT1118 ...	Cooper
DUT1122 ...	Edgewater
DUT1123 ...	Waukegan
DUT1132 ...	Cumberland
DUT1133 ...	J R Whiting
DUT1138 ...	Harbor
DUT1140 ...	Morgan Creek
DUT1142 ...	Victoria
DUT1143 ...	East River
DUT1145 ...	Honolulu
DUT1146 ...	Devon
DUT1148 ...	Council Bluffs
DUT1152 ...	Coffeen
DUT1153 ...	Mill Creek
DUT1154 ...	McClellan
DUT1155 ...	P H Robinson
DUT1156 ...	John Sevier
DUT1157 ...	Sterlington
DUT1161 ...	Robert E Ritchie
DUT1165 ...	Big Bend
DUT1167 ...	Ninemile Point
DUT1169 ...	Hudson
DUT1170 ...	Carl Bailey
DUT1172 ...	Barney M Davis
DUT1173 ...	Logansport
DUT1174 ...	Arkansas Nuclear One
DUT1175 ...	Fox Lake
DUT1179 ...	Pirkey
DUT1185 ...	Cromby
DUT1186 ...	Glenwood
DUT1187 ...	Mountain Creek
DUT1189 ...	Larsen Memorial
DUT1191 ...	Monroe
DUT1192 ...	Meramec
DUT1194 ...	Gerald Andrus
DUT1198 ...	O H Hutchings
DUT1202 ...	Manitowoc
DUT1206 ...	Indian River
DUT1209 ...	Widows Creek
DUT1211 ...	Surry Nuclear
DUT1212 ...	J M Stuart
DUT1213 ...	Riverside
DUT1214 ...	Charles R Lowman
DUT1217 ...	Deepwater
DUT1219 ...	Port Washington
DUT1223 ...	Nueces Bay
DUT1225 ...	Burlington
DUT1227 ...	Sibley
DUT1228 ...	Willow Glen
DUT1229 ...	Riverton
DUT1235 ...	Riverside
DUT1238 ...	Cedar Bayou
DUT1248 ...	Knox Lee
DUT1249 ...	Oak Creek
DUT1250 ...	Vermont Yankee Nuclear
DUT1252 ...	Muskogee
DUT1258 ...	St Clair
DUT1259 ...	James De Young
DUT1261 ...	Green River
DUT1265 ...	River Crest
DUT1268 ...	Calvert Cliffs Nuclear
DUT1269 ...	Dean H Mitchell
DUT1270 ...	Pueblo
DUT1271 ...	Michigan City
DUT1272 ...	Monticello
DUT1273 ...	Sim Gideon

Facility ID	Facility name
DUT1274 ...	P L Bartow
DUT1275 ...	Anclote
DUT1276 ...	Animas
DUT1278 ...	Newton

List of Subjects

40 CFR Part 9

Environmental protection, Reporting and recordkeeping requirements.

40 CFR Part 122

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 123

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Indians-lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 124

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous waste, Indians-lands, Reporting and recordkeeping requirements, Water pollution control, Water supply.

40 CFR Part 125

Environmental protection, Cooling water intake structure, Reporting and recordkeeping requirements, Waste treatment and disposal, Water pollution control.

■ For the reasons set forth in the preamble, chapter I of title 40 of the Code of Federal Regulations is amended as follows:

PART 9—OMB APPROVALS UNDER THE PAPERWORK REDUCTION ACT

■ 1. The authority citation for part 9 continues to read as follows:

Authority: 7 U.S.C. 135 *et seq.*, 136–136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601–2671, 21 U.S.C. 331j, 346a, 348; 31 U.S.C. 9701; 33 U.S.C. 1251 *et seq.*, 1311, 1313d, 1314, 1318, 1321, 1326, 1330, 1342, 1344, 1345 (d) and (e), 1361; E.O. 11735, 38 FR 21243, 3 CFR, 1971–1975 Comp. p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–1, 300j–2, 300j–3, 300j–4, 300j–9, 1857 *et seq.*, 6901–6992k, 7401–7671q, 7542, 9601–9657, 11023, 11048.

■ 2. In § 9.1 the table is amended by revising the entry for "122.21(r)" and by adding entries in numerical order under the indicated heading to read as follows:

§ 9.1 OMB approvals under the Paperwork Reduction Act.

* * * * *

40 CFR citation	OMB Control No.
* * * * *	
EPA Administered Permit Programs: The National Pollutant Discharge Elimination System	
* * * * *	
122.21(r)	2040–0241, 2040–0257
* * * * *	
Criteria and Standards for the National Pollutant Discharge Elimination System	
* * * * *	
125.95	2040–0257
125.96	2040–0257
125.97	2040–0257
125.98	2040–0257
125.99	2040–0257
* * * * *	

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

■ 1. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

■ 2. Section 122.21 is amended by revising paragraph (r)(1) and by adding a new paragraph (r)(5) to read as follows:

§ 122.21 Application for a permit (applicable to State programs, see § 123.25)

* * * * *

(r) *Application requirements for facilities with cooling water intake structures*—(1)(i) *New facilities with new or modified cooling water intake structures.* New facilities with cooling water intake structures as defined in part 125, subpart I, of this chapter must submit to the Director for review the information required under paragraphs (r)(2), (3), and (4) of this section and § 125.86 of this chapter as part of their application. Requests for alternative requirements under § 125.85 of this chapter must be submitted with your permit application.

(ii) *Phase II existing facilities.* Phase II existing facilities as defined in part 125, subpart J, of this chapter must submit to the Director for review the information required under paragraphs (r)(2), (3), and (5) of this section and all applicable provisions of § 125.95 of this chapter as part of their application except for the Proposal for Information Collection which must be provided in accordance with § 125.95(b)(1).

* * * * *

(5) *Cooling water system data.* Phase II existing facilities as defined in part 125, subpart J of this chapter must provide the following information for each cooling water intake structure they use:

(i) A narrative description of the operation of the cooling water system, its relationship to cooling water intake structures, the proportion of the design intake flow that is used in the system, the number of days of the year the cooling water system is in operation and seasonal changes in the operation of the system, if applicable; and

(ii) Design and engineering calculations prepared by a qualified professional and supporting data to support the description required by paragraph (r)(5)(i) of this section.

■ 3. Section 122.44 is amended by revising paragraph (b)(3) to read as follows:

§ 122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25).

* * * * *

(b) * * *

(3) Requirements applicable to cooling water intake structures under section 316(b) of the CWA, in accordance with part 125, subparts I and J, of this chapter.

* * * * *

PART 123—STATE PROGRAM REQUIREMENTS

■ 1. The authority citation for part 123 continues to read as follows:

Authority: Clean Water Act, 33 U.S.C. 1251 *et seq.*

■ 2. Section 123.25 is amended by revising paragraphs (a)(4) and (36) to read as follows:

§ 123.25 Requirements for permitting.

(a) * * *

(4) § 122.21 (a)-(b), (c)(2), (e)-(k), (m)-(p), (q), and (r)—(Application for a permit);

* * * * *

(36) Subparts A, B, D, H, I, and J of part 125 of this chapter;

* * * * *

PART 124—PROCEDURES FOR DECISIONMAKING

■ 1. The authority citation for part 124 continues to read as follows:

Authority: Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*; Safe Drinking Water Act, 42 U.S.C. 300f *et seq.*; Clean Water Act, 33 U.S.C. 1251 *et seq.*; Clean Air Act, 42 U.S.C. 7401 *et seq.*

■ 2. Section 124.10 is amended by revising paragraph (d)(1)(ix) to read as follows:

§ 124.10 Public notice of permit actions and public comment period.

* * * * *

(d) * * *

(1) * * *

(ix) Requirements applicable to cooling water intake structures under section 316(b) of the CWA, in accordance with part 125, subparts I and J, of this chapter.

* * * * *

PART 125—CRITERIA AND STANDARDS FOR THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

■ 1. The authority citation for part 125 continues to read as follows:

Authority: Clean Water Act, 33 U.S.C. 1251 *et seq.*; unless otherwise noted.

■ 2. Add subpart J to part 125 to read as follows:

Subpart J—Requirements Applicable to Cooling Water Intake Structures for Phase II Existing Facilities Under Section 316(b) of the Act

Sec.

Subpart J—Requirements Applicable to Cooling Water Intake Structures for Phase II Existing Facilities Under Section 316(b) of the Act

§ 125.90 What are the purpose and scope of this subpart?

(a) This subpart establishes requirements that apply to the location, design, construction, and capacity of cooling water intake structures at existing facilities that are subject to this subpart (*i.e.*, Phase II existing facilities). The purpose of these requirements is to establish the best technology available for minimizing adverse environmental impact associated with the use of cooling water intake structures. These requirements are implemented through National Pollutant Discharge Elimination System (NPDES) permits issued under section 402 of the Clean Water Act (CWA).

(b) Existing facilities that are not subject to requirements under this or another subpart of this part must meet requirements under section 316(b) of the CWA determined by the Director on a case-by-case, best professional judgment (BPJ) basis.

(c) *Alternative regulatory requirements.* Notwithstanding any other provision of this subpart, if a State demonstrates to the Administrator that it has adopted alternative regulatory requirements in its NPDES program that will result in environmental performance within a watershed that is comparable to the reductions of impingement mortality and entrainment that would otherwise be achieved under § 125.94, the Administrator must approve such alternative regulatory requirements.

(d) Nothing in this subpart shall be construed to preclude or deny the right of any State or political subdivision of a State or any interstate agency under section 510 of the CWA to adopt or enforce any requirement with respect to control or abatement of pollution that is not less stringent than those required by Federal law.

§ 125.91 What is a "Phase II Existing Facility"?

(a) An existing facility, as defined in § 125.93, is a Phase II existing facility subject to this subpart if it meets each of the following criteria:

(1) It is a point source.

(2) It uses or proposes to use cooling water intake structures with a total design intake flow of 50 million gallons per day (MGD) or more to withdraw cooling water from waters of the United States;

(3) As its primary activity, the facility both generates and transmits electric power, or generates electric power but sells it to another entity for transmission; and

(4) It uses at least 25 percent of water withdrawn exclusively for cooling purposes, measured on an average annual basis.

(b) In the case of a Phase II existing facility that is co-located with a manufacturing facility, only that portion of the combined cooling water intake flow that is used by the Phase II facility to generate electricity for sale to another entity will be considered for purposes of determining whether the 50 MGD and 25 percent criteria in paragraphs (a)(2) and (4) of this section have been exceeded.

(c) Use of a cooling water intake structure includes obtaining cooling water by any sort of contract or arrangement with one or more independent suppliers of cooling water if the supplier withdraws water from waters of the United States but is not itself a Phase II existing facility, except as provided in paragraph (d) of this section. This provision is intended to prevent circumvention of these requirements by creating arrangements to receive cooling water from an entity that is not itself a Phase II existing facility.

(d) Notwithstanding paragraph (c) of this section, obtaining cooling water from a public water system or using treated effluent as cooling water does not constitute use of a cooling water intake structure for purposes of this subpart.

§ 125.92 [Reserved]

§ 125.93 What special definitions apply to this subpart?

In addition to the definitions provided in § 122.3 of this chapter, the following special definitions apply to this subpart:

Adaptive management method is a type of project management method where a facility chooses an approach to meeting the project goal, monitors the effectiveness of that approach, and then based on monitoring and any other relevant information, makes any adjustments necessary to ensure continued progress toward the project's goal. This cycle of activity is repeated as necessary to reach the project's goal.

Annual mean flow means the average of daily flows over a calendar year.

All life stages means eggs, larvae, juveniles, and adults.

Calculation baseline means an estimate of impingement mortality and entrainment that would occur at your site assuming that: the cooling water system has been designed as a once-

through system; the opening of the cooling water intake structure is located at, and the face of the standard 3/8-inch mesh traveling screen is oriented parallel to, the shoreline near the surface of the source waterbody; and the baseline practices, procedures, and structural configuration are those that your facility would maintain in the absence of any structural or operational controls, including flow or velocity reductions, implemented in whole or in part for the purposes of reducing impingement mortality and entrainment. You may also choose to use the current level of impingement mortality and entrainment as the calculation baseline. The calculation baseline may be estimated using: historical impingement mortality and entrainment data from your facility or from another facility with comparable design, operational, and environmental conditions; current biological data collected in the waterbody in the vicinity of your cooling water intake structure; or current impingement mortality and entrainment data collected at your facility. You may request that the calculation baseline be modified to be based on a location of the opening of the cooling water intake structure at a depth other than at or near the surface if you can demonstrate to the Director that the other depth would correspond to a higher baseline level of impingement mortality and/or entrainment.

Capacity utilization rate means the ratio between the average annual net generation of power by the facility (in MWh) and the total net capability of the facility to generate power (in MW) multiplied by the number of hours during a year. In cases where a facility has more than one intake structure, and each intake structure provides cooling water exclusively to one or more generating units, the capacity utilization rate may be calculated separately for each intake structure, based on the capacity utilization of the units it services. Applicable requirements under this subpart would then be determined separately for each intake structure. The average annual net generation should be measured over a five year period (if available) of representative operating conditions, unless the facility makes a binding commitment to maintain capacity utilization below 15 percent for the life of the permit, in which case the rate may be based on this commitment. For purposes of this subpart, the capacity utilization rate applies to only that portion of the facility that generates electricity for transmission or sale using a thermal cycle employing the steam water system as the thermodynamic medium.

Closed-cycle recirculating system means a system designed, using minimized make-up and blowdown flows, to withdraw water from a natural or other water source to support contact and/or noncontact cooling uses within a facility. The water is usually sent to a cooling canal or channel, lake, pond, or tower to allow waste heat to be dissipated to the atmosphere and then is returned to the system. (Some facilities divert the waste heat to other process operations.) New source water (make-up water) is added to the system to replenish losses that have occurred due to blowdown, drift, and evaporation.

Cooling water means water used for contact or noncontact cooling, including water used for equipment cooling, evaporative cooling tower makeup, and dilution of effluent heat content. The intended use of the cooling water is to absorb waste heat rejected from the process or processes used, or from auxiliary operations on the facility's premises. Cooling water that is used in a manufacturing process either before or after it is used for cooling is considered process water for the purposes of calculating the percentage of a facility's intake flow that is used for cooling purposes in § 125.91(a)(4).

Cooling water intake structure means the total physical structure and any associated constructed waterways used to withdraw cooling water from waters of the U.S. The cooling water intake structure extends from the point at which water is withdrawn from the surface water source up to, and including, the intake pumps.

Design and construction technology means any physical configuration of the cooling water intake structure, or a technology that is placed in the water body in front of the cooling water intake structure, to reduce impingement mortality and/or entrainment. Design and construction technologies include, but are not limited to, location of the intake structure, intake screen systems, passive intake systems, fish diversion and/or avoidance systems, and fish handling and return systems. Restoration measures are not design and construction technologies for purposes of this definition.

Design intake flow means the value assigned (during the cooling water intake structure design) to the total volume of water withdrawn from a source waterbody over a specific time period.

Design intake velocity means the value assigned (during the design of a cooling water intake structure) to the average speed at which intake water passes through the open area of the intake screen (or other device) against which organisms might be impinged or through which they might be entrained.

Diel means daily and refers to variation in organism abundance and density over a 24-hour period due to the influence of water movement, physical or chemical changes, and changes in light intensity.

Entrainment means the incorporation of any life stages of fish and shellfish with intake water flow entering and passing through a cooling water intake structure and into a cooling water system.

Estuary means a semi-enclosed body of water that has a free connection with open seas and within which the seawater is measurably diluted with fresh water derived from land drainage. The salinity of an estuary exceeds 0.5 parts per thousand (by mass) but is typically less than 30 parts per thousand (by mass).

Existing facility means any facility that commenced construction as described in 40 CFR 122.29(b)(4) on or before January 17, 2002; and any modification of, or any addition of a unit at such a facility that does not meet the definition of a new facility at § 125.83.

Freshwater river or stream means a lotic (free-flowing) system that does not receive significant inflows of water from oceans or bays due to tidal action. For the purposes of this rule, a flow-through reservoir with a retention time of 7 days or less will be considered a freshwater river or stream.

Impingement means the entrapment of any life stages of fish and shellfish on the outer part of an intake structure or against a screening device during periods of intake water withdrawal.

Lake or reservoir means any inland body of open water with some minimum surface area free of rooted vegetation and with an average hydraulic retention time of more than 7 days. Lakes or reservoirs might be natural water bodies or impounded streams, usually fresh, surrounded by land or by land and a man-made retainer (*e.g.*, a dam). Lakes or reservoirs might be fed by rivers, streams, springs, and/or local precipitation.

Moribund means dying; close to death.

Natural thermal stratification means the naturally occurring and/or existing division of a waterbody into horizontal layers of differing densities as a result of variations in temperature at different depths.

Ocean means marine open coastal waters with a salinity greater than or

equal to 30 parts per thousand (by mass).

Once-through cooling water system means a system designed to withdraw water from a natural or other water source, use it at the facility to support contact and/or noncontact cooling uses, and then discharge it to a waterbody without recirculation. Once-through cooling systems sometimes employ canals/channels, ponds, or non-recirculating cooling towers to dissipate waste heat from the water before it is discharged.

Operational measure means a modification to any operation at a facility that serves to minimize impact to fish and shellfish from the cooling water intake structure. Examples of operational measures include, but are not limited to: reductions in cooling water intake flow through the use of variable speed pumps and seasonal flow reductions or shutdowns; and more frequent rotation of traveling screens.

Phase II existing facility means any existing facility that meets the criteria specified in § 125.91.

Source water means the waters of the U.S. from which the cooling water is withdrawn.

Supplier means an entity, other than the regulated facility, that owns and operates its own cooling water intake structure and directly withdraws water from waters of the United States. The supplier sells the cooling water to other facilities for their use, but may also use a portion of the water itself. An entity that provides potable water to residential populations (*e.g.*, public water system) is not a supplier for purposes of this subpart.

Thermocline means the middle layer of a thermally stratified lake or a reservoir. In this layer, there is a rapid change in temperatures between the top and bottom of the layer.

Tidal river means the most seaward reach of a river or stream where the salinity is typically less than or equal to 0.5 parts per thousand (by mass) at a time of annual low flow and whose surface elevation responds to the effects of coastal lunar tides.

§ 125.94 How will requirements reflecting best technology available for minimizing adverse environmental impact be established for my Phase II existing facility?

(a) *Compliance alternatives.* You must select and implement one of the following five alternatives for establishing best technology available for minimizing adverse environmental impact at your facility:

(1)(i)You may demonstrate to the Director that you have reduced, or will reduce, your flow commensurate with a closed-cycle recirculating system. In this case, you are deemed to have met the applicable performance standards and will *not* be required to demonstrate further that your facility meets the impingement mortality and entrainment performance standards specified in paragraph (b) of this section. In addition, you are not subject to the requirements in §§ 125.95, 125.96, 125.97, or 125.98. However, you may still be subject to any more stringent requirements established under paragraph (e) of this section; or

(ii) You may demonstrate to the Director that you have reduced, or will reduce, your maximum through-screen design intake velocity to 0.5 ft/s or less. In this case, you are deemed to have met the impingement mortality performance standards and will not be required to demonstrate further that your facility meets the performance standards for impingement mortality specified in paragraph (b) of this section and you are not subject to the requirements in §§ 125.95, 125.96, 125.97, or 125.98 as they apply to impingement mortality. However, you are still subject to any applicable requirements for entrainment reduction and may still be subject to any more stringent requirements established under paragraph (e) of this section.

(2) You may demonstrate to the Director that your existing design and construction technologies, operational measures, and/or restoration measures meet the performance standards specified in paragraph (b) of this section and/or the restoration requirements in paragraph (c) of this section.

(3) You may demonstrate to the Director that you have selected, and will install and properly operate and maintain, design and construction technologies, operational measures, and/or restoration measures that will, in combination with any existing design and construction technologies, operational measures, and/or restoration measures, meet the performance standards specified in paragraph (b) of this section and/or the restoration requirements in paragraph (c) of this section;

(4) You may demonstrate to the Director that you have installed, or will install, and properly operate and maintain an approved design and construction technology in accordance with § 125.99(a) or (b); or

(5) You may demonstrate to the Director that you have selected, installed, and are properly operating and maintaining, or will install and properly operate and maintain design and construction technologies, operational measures, and/or restoration measures that the Director has determined to be the best technology available to minimize adverse environmental impact for your facility in accordance with paragraphs (a)(5)(i) or (ii) of this section.

(i) If the Director determines that data specific to your facility demonstrate that the costs of compliance under alternatives in paragraphs (a)(2) through (4) of this section would be significantly greater than the costs considered by the Administrator for a facility like yours in establishing the applicable performance standards in paragraph (b) of this section, the Director must make a site-specific determination of the best technology available for minimizing adverse environmental impact. This determination must be based on reliable, scientifically valid cost and performance data submitted by you and any other information that the Director deems appropriate. The Director must establish site-specific alternative requirements based on new and/or existing design and construction technologies, operational measures, and/or restoration measures that achieve an efficacy that is, in the judgment of the Director, as close as practicable to the applicable performance standards in paragraph (b) of this section, without resulting in costs that are significantly greater than the costs considered by the Administrator for a facility like yours in establishing the applicable performance standards. The Director's site-specific determination may conclude that design and construction technologies, operational measures, and/or restoration measures in addition to those already in place are not justified because of the significantly greater costs. To calculate the costs considered by the Administrator for a facility like yours in establishing the applicable performance standards you must:

(A) Determine which technology the Administrator modeled as the most appropriate compliance technology for your facility;

(B) Using the Administrator's costing equations, calculate the annualized capital and net operation and maintenance (O&M) costs for a facility with your design intake flow using this technology;

(C) Determine the annualized net revenue loss associated with net construction downtime that the Administrator modeled for your facility to install this technology;

(D) Determine the annualized pilot study costs that the Administrator modeled for your facility to test and optimize this technology;

(E) Sum the cost items in paragraphs (a)(5)(i)(B), (C), and (D) of this section; and

(F) Determine if the performance standards that form the basis of these estimates (*i.e.*, impingement mortality reduction only or impingement mortality and entrainment reduction) are applicable to your facility, and if necessary, adjust the estimates to correspond to the applicable performance standards.

(ii) If the Director determines that data specific to your facility demonstrate that the costs of compliance under alternatives in paragraphs (a)(2) through (4) of this section would be significantly greater than the benefits of complying with the applicable performance standards at your facility, the Director must make a site-specific determination of best technology available for minimizing adverse environmental impact. This determination must be based on reliable, scientifically valid cost and performance data submitted by you and any other information the Director deems appropriate. The Director must establish site-specific alternative requirements based on new and/or existing design and construction technologies, operational measures, and/or restoration measures that achieve an efficacy that, in the judgment of the Director, is as close as practicable to the applicable performance standards in paragraph (b) of this section without resulting in costs that are significantly greater than the benefits at your facility. The Director's site-specific determination may conclude that design and construction technologies, operational measures, and/or restoration measures in addition to those already in place are not justified because the costs would be significantly greater than the benefits at your facility.

(b) *National performance standards.*—(1) *Impingement mortality performance standards.* If you choose compliance alternatives in paragraphs (a)(2), (a)(3), or (a)(4) of this section, you must reduce impingement mortality for all life stages of fish and shellfish by 80 to 95 percent from the calculation baseline.

(2) *Entrainment performance standards.* If you choose compliance alternatives in paragraphs (a)(1)(ii), (a)(2), (a)(3), or (a)(4) of this section, you must also reduce entrainment of all life stages of fish and shellfish by 60 to 90 percent from the calculation baseline if:

(i) Your facility has a capacity utilization rate of 15 percent or greater, and

(ii)(A) Your facility uses cooling water withdrawn from a tidal river, estuary, ocean, or one of the Great Lakes; or

(B) Your facility uses cooling water withdrawn from a freshwater river or stream and the design intake flow of your cooling water intake structures is greater than five percent of the mean annual flow.

(3) *Additional performance standards for facilities withdrawing from a lake (other than one of the Great Lakes) or a reservoir.* If your facility withdraws cooling water from a lake (other than one of the Great Lakes) or a reservoir and you propose to increase the design intake flow of cooling water intake structures it uses, your increased design intake flow must not disrupt the natural thermal stratification or turnover pattern (where present) of the source water, except in cases where the disruption does not adversely affect the management of fisheries. In determining whether any such disruption does not adversely affect the management of fisheries, you must consult with Federal, State, or Tribal fish and wildlife management agencies).

(4) *Use of performance standards for site-specific determinations of best technology available.* The performance standards in paragraphs (b)(1) through (3) of this section must also be used for determining eligibility for site-specific determinations of best technology available for minimizing adverse environmental impact and establishing site specific requirements that achieve an efficacy as close as practicable to the applicable performance standards without resulting in costs that are significantly greater than those considered by the Administrator for a facility like yours in establishing the performance standards or costs that are significantly greater than the benefits at your facility, pursuant to § 125.94(a)(5).

(c) *Requirements for restoration measures.* With the approval of the Director, you may implement and adaptively manage restoration measures that produce and result in increases of fish and shellfish in your facility's watershed in place of or as a supplement to installing design and control technologies and/or adopting operational measures that reduce impingement mortality and entrainment. You must demonstrate to the Director that:

(1) You have evaluated the use of design and construction technologies and operational measures for your facility and determined that the use of restoration measures is appropriate because meeting the applicable performance standards or site-specific requirements through the use of design and construction technologies and/or operational measures alone is less feasible, less cost-effective, or less environmentally desirable than meeting the standards or requirements in whole or in part through the use of restoration measures; and

(2) The restoration measures you will implement, alone or in combination with design and construction technologies and/or operational measures, will produce ecological benefits (fish and shellfish), including maintenance or protection of community structure and function in your facility's waterbody or watershed, at a level that is substantially similar to the level you would achieve by meeting the applicable performance standards under paragraph (b) of this section, or that satisfies alternative site-specific requirements established pursuant to paragraph (a)(5) of this section.

(d)(1) *Compliance using a technology installation and operation plan or restoration plan.* If you choose one of the compliance alternatives in paragraphs (a)(2), (3), (4), or (5) of this section, you may request that compliance with the requirements of § 125.94(b) during the first permit containing requirements consistent with this subpart be determined based on whether you have complied with the construction, operational, maintenance, monitoring, and adaptive management requirements of a Technology Installation and Operation Plan developed in accordance with § 125.95(b)(4)(ii) (for any design and construction technologies and/or operational measures) and/or a Restoration Plan developed in accordance with § 125.95(b)(5) (for any restoration measures). The Technology Installation and Operation Plan must be designed to meet applicable performance standards in paragraph (b) of this section or alternative site-specific requirements developed pursuant to paragraph (a)(5) of this section. The Restoration Plan must be designed to achieve compliance with the applicable requirements in paragraph (c) of this section.

(2) During subsequent permit terms, if you selected and installed design and construction technologies and/or operational measures and have been in compliance with the construction, operational, maintenance, monitoring, and adaptive management requirements of your Technology Installation and Operation Plan during the preceding permit term, you may request that compliance with the requirements of § 125.94 during the following permit term be determined based on whether you remain in compliance with your Technology Installation and Operation Plan, revised in accordance with your adaptive management plan in § 125.95(b)(4)(ii)(C) if applicable performance standards are not being

met. Each request and approval of a Technology Installation and Operation Plan shall be limited to one permit term.

(3) During subsequent permit terms, if you selected and installed restoration measures and have been in compliance with the construction, operational, maintenance, monitoring, and adaptive management requirements in your Restoration Plan during the preceding permit term, you may request that compliance with the requirements of this section during the following permit term be determined based on whether you remain in compliance with your Restoration Plan, revised in accordance with your adaptive management plan in § 125.95(b)(5)(v) if applicable performance standards are not being met. Each request and approval of a Restoration Plan shall be limited to one permit term.

(e) *More stringent standards.* The Director may establish more stringent requirements as best technology available for minimizing adverse environmental impact if the Director determines that your compliance with the applicable requirements of this section would not meet the requirements of applicable State and Tribal law, or other Federal law.

(f) *Nuclear facilities.* If you demonstrate to the Director based on consultation with the Nuclear Regulatory Commission that compliance with this subpart would result in a conflict with a safety requirement established by the Commission, the Director must make a site-specific determination of best technology available for minimizing adverse environmental impact that would not result in a conflict with the Nuclear Regulatory Commission's safety requirement.

§ 125.95 As an owner or operator of a Phase II existing facility, what must I collect and submit when I apply for my reissued NPDES permit?

(a)(1) You must submit to the Director the Proposal for Information Collection required in paragraph (b)(1) of this section prior to the start of information collection activities;

(2) You must submit to the Director the information required in 40 CFR 122.21(r)(2), (r)(3) and (r)(5) and any applicable portions of the Comprehensive Demonstration Study (Study), except for the Proposal for Information Collection required by paragraph (b)(1) of this section; and

(i) You must submit your NPDES permit application in accordance with the time frames specified in 40 CFR 122.21(d)(2).

(ii) If your existing permit expires before [Insert date 4 years after date of publication in the FR], you may request that the Director establish a schedule for you to submit the information required by this section as expeditiously as practicable, but not later than [Insert date 3 years and 180 days after date of publication in the FR]. Between the time your existing permit expires and the time an NPDES permit containing requirements consistent with this subpart is issued to your facility, the best technology available to minimize adverse environmental impact will continue to be determined based on the Director's best professional judgment.

(3) In subsequent permit terms, the Director may approve a request to reduce the information required to be submitted in your permit application on the cooling water intake structure(s) and the source waterbody, if conditions at your facility and in the waterbody remain substantially unchanged since your previous application. You must submit your request for reduced cooling water intake structure and waterbody application information to the Director at least one year prior to the expiration of the permit. Your request must identify each required information item in § 122.21(r) and this section that you determine has not substantially changed since the previous permit application and the basis for your determination.

(b) *Comprehensive Demonstration Study.* The purpose of the Comprehensive Demonstration Study (The Study) is to characterize impingement mortality and entrainment, to describe the operation of your cooling water intake structures, and to confirm that the technologies, operational measures, and/or restoration measures you have selected and installed, or will install, at your facility meet the applicable requirements of § 125.94. All facilities except those that have met the applicable requirements in accordance with §§ 125.94(a)(1)(i), 125.94(a)(1)(ii), and 125.94(a)(4) must submit all applicable portions of the Comprehensive Demonstration Study to the Director in accordance with paragraph (a) of this section. Facilities that meet the requirements in § 125.94(a)(1)(i) by reducing their flow commensurate with a closed-cycle, recirculating system are not required to submit a Comprehensive Demonstration Study. Facilities that meet the requirements in § 125.94(a)(1)(ii) by reducing their design intake velocity to 0.5 ft/sec or less are required to submit a Study only for the entrainment requirements, if applicable. Facilities that meet the requirements in § 125.94(a)(4) and have installed and properly operate and maintain an approved design and construction technology (in accordance with § 125.99) are required to submit only the Technology Installation and Operation Plan in paragraph (b)(4) of this section and the Verification Monitoring Plan in paragraph (b)(7) of this section. Facilities that are required to meet only impingement mortality performance standards in § 125.94(b)(1) are required to submit only a Study for the impingement mortality reduction requirements. The Comprehensive Demonstration Study must include:

(1) *Proposal For Information Collection.* You must submit to the Director for review and comment a description of the information you will use to support your Study. The Proposal for Information must be submitted prior to the start of information collection activities, but you may initiate such activities prior to receiving comment from the Director. The proposal must include:

(i) A description of the proposed and/or implemented technologies, operational measures, and/or restoration measures to be evaluated in the Study;

(ii) A list and description of any historical studies characterizing impingement mortality and entrainment and/or the physical and biological conditions in the vicinity of the cooling water intake structures and their relevance to this proposed Study. If you propose to use existing data, you must demonstrate the extent to which the data are representative of current conditions and that the data were collected using appropriate quality assurance/quality control procedures;

(iii) A summary of any past or ongoing consultations with appropriate Federal, State, and Tribal fish and wildlife agencies that are relevant to this Study and a copy of written comments received as a result of such consultations; and

(iv) A sampling plan for any new field studies you propose to conduct in order to ensure that you have sufficient data to develop a scientifically valid estimate of impingement mortality and entrainment at your site. The sampling plan must document all methods and quality assurance/quality control procedures for sampling and data analysis. The sampling and data analysis methods you propose must be appropriate for a quantitative survey and include consideration of the methods used in other studies performed in the source waterbody. The sampling plan must include a description of the study area (including the area of influence of the cooling water intake structure(s)), and provide a

taxonomic identification of the sampled or evaluated biological assemblages (including all life stages of fish and shellfish).

(2) *Source waterbody flow information.* You must submit to the Director the following source waterbody flow information:

(i) If your cooling water intake structure is located in a freshwater river or stream, you must provide the annual mean flow of the waterbody and any supporting documentation and engineering calculations to support your analysis of whether your design intake flow is greater than five percent of the mean annual flow of the river or stream for purposes of determining applicable performance standards under paragraph (b) of this section. Representative historical data (from a period of time up to 10 years, if available) must be used; and

(ii) If your cooling water intake structure is located in a lake (other than one of the Great Lakes) or a reservoir and you propose to increase its design intake flow, you must provide a description of the thermal stratification in the waterbody, and any supporting documentation and engineering calculations to show that the total design intake flow after the increase will not disrupt the natural thermal stratification and turnover pattern in a way that adversely impacts fisheries, including the results of any consultations with Federal, State, or Tribal fish and wildlife management agencies.

(3) *Impingement Mortality and/or Entrainment Characterization Study.* You must submit to the Director an Impingement Mortality and/or Entrainment Characterization Study whose purpose is to provide information to support the development of a calculation baseline for evaluating impingement mortality and entrainment and to characterize current impingement mortality and entrainment. The Impingement Mortality and/or Entrainment Characterization Study must include the following, in sufficient detail to support development of the other elements of the Comprehensive Demonstration Study:

(i) Taxonomic identifications of all life stages of fish, shellfish, and any species protected under Federal, State, or Tribal Law (including threatened or endangered species) that are in the vicinity of the cooling water intake structure(s) and are susceptible to impingement and entrainment;

(ii) A characterization of all life stages of fish, shellfish, and any species protected under Federal, State, or Tribal Law (including threatened or endangered species) identified pursuant to paragraph (b)(3)(i) of this section, including a description of the abundance and temporal and spatial characteristics in the vicinity of the cooling water intake structure(s), based on sufficient data to characterize annual, seasonal, and diel variations in impingement mortality and entrainment (*e.g.*, related to climate and weather differences, spawning, feeding and water column migration). These may include historical data that are representative of the current operation of your facility and of biological conditions at the site;

(iii) Documentation of the current impingement mortality and entrainment of all life stages of fish, shellfish, and any species protected under Federal, State, or Tribal Law (including threatened or endangered species) identified pursuant to paragraph (b)(3)(i) of this section and an estimate of impingement mortality and entrainment to be used as the calculation baseline. The documentation may include historical data that are representative of the current operation of your facility and of biological conditions at the site. Impingement mortality and entrainment samples to support the calculations required in paragraphs (b)(4)(i)(C) and (b)(5)(iii) of this section must be collected during periods of representative operational flows for the cooling water intake structure and the flows associated with the samples must be documented;

(4) *Technology and compliance assessment information*—(i) *Design and Construction Technology Plan.* If you choose to use design and construction technologies and/or operational measures, in whole or in part to meet the requirements of § 125.94(a)(2) or (3), you must submit a Design and Construction Technology Plan to the Director for review and approval. In the plan, you must provide the capacity utilization rate for your facility (or for individual intake structures where applicable, in accordance with § 125.93) and provide supporting data (including the average annual net generation of the facility (in MWh) measured over a five year period (if available) of representative operating conditions and the total net capacity of the facility (in MW)) and underlying calculations. The plan must explain the technologies and/or operational measures you have in place and/or have selected to meet the requirements in § 125.94. (Examples of potentially appropriate technologies may include, but are not limited to, wedgewire screens, fine mesh screens, fish handling and return systems, barrier nets, aquatic filter barrier systems, vertical and/or lateral relocation of the cooling water intake structure, and enlargement of the cooling water intake structure opening to reduce velocity. Examples of potentially appropriate operational measures may include, but are not limited to, seasonal shutdowns, reductions in flow, and continuous or more frequent rotation of traveling screens.) The plan must contain the following information:

(A) A narrative description of the design and operation of all design and construction technologies and/or operational measures (existing and proposed), including fish handling and return systems, that you have in place or will use to meet the requirements to reduce impingement mortality of those species expected to be most susceptible to impingement, and information that demonstrates the efficacy of the technologies and/or operational measures for those species;

(B) A narrative description of the design and operation of all design and construction technologies and/or operational measures (existing and proposed) that you have in place or will use to meet the requirements to reduce entrainment of those species expected to be the most susceptible to entrainment, if applicable, and information that demonstrates the efficacy of the technologies and/or operational measures for those species;

(C) Calculations of the reduction in impingement mortality and entrainment of all life stages of fish and shellfish that would be achieved by the technologies and/or operational measures you have selected based on the Impingement Mortality and/or Entrainment Characterization Study in paragraph (b)(3) of this section. In determining compliance with any requirements to reduce impingement mortality or entrainment, you must assess the total reduction in impingement mortality and entrainment against the calculation baseline determined in accordance with paragraph (b)(3) of this section. Reductions in impingement mortality and entrainment from this calculation baseline as a result of any design and construction technologies and/or operational measures already implemented at your facility should be added to the reductions expected to be achieved by any additional design and/or construction technologies and operational measures that will be implemented, and any increases in fish and shellfish within the waterbody attributable to your restoration measures. Facilities that recirculate a portion of their flow, but do not reduce

flow sufficiently to satisfy the compliance option in § 125.94(a)(1)(i) may take into account the reduction in impingement mortality and entrainment associated with the reduction in flow when determining the net reduction associated with existing design and construction technologies and/or operational measures. This estimate must include a site-specific evaluation of the suitability of the technologies and/or operational measures based on the species that are found at the site, and may be determined based on representative studies (*i.e.*, studies that have been conducted at a similar facility's cooling water intake structures located in the same waterbody type with similar biological characteristics) and/or site-specific technology prototype or pilot studies; and

(D) Design and engineering calculations, drawings, and estimates prepared by a qualified professional to support the descriptions required by paragraphs (b)(4)(i)(A) and (B) of this section.

(ii) *Technology Installation and Operation Plan.* If you choose the compliance alternative in § 125.94(a)(2), (3), (4), or (5) and use design and construction technologies and/or operational measures in whole or in part to comply with the applicable requirements of § 125.94, you must submit the following information with your application for review and approval by the Director:

(A) A schedule for the installation and maintenance of any new design and construction technologies. Any downtime of generating units to accommodate installation and/or maintenance of these technologies should be scheduled to coincide with otherwise necessary downtime (*e.g.*, for repair, overhaul, or routine maintenance of the generating units) to the extent practicable. Where additional downtime is required, you may coordinate scheduling of this downtime with the North American Electric Reliability Council and/or other generators in your area to ensure that impacts to reliability and supply are minimized;

(B) List of operational and other parameters to be monitored, and the location and frequency that you will monitor them;

(C) List of activities you will undertake to ensure to the degree practicable the efficacy of installed design and construction technologies and operational measures, and your schedule for implementing them;

(D) A schedule and methodology for assessing the efficacy of any installed design and construction technologies and operational measures in meeting applicable performance standards or site-specific requirements, including an adaptive management plan for revising design and construction technologies, operational measures, operation and maintenance requirements, and/or monitoring requirements if your assessment indicates that applicable performance standards or site-specific requirements are not being met; and

(E) If you choose the compliance alternative in § 125.94(a)(4), documentation that the appropriate site conditions in § 125.99(a) or (b) exist at your facility.

(5) *Restoration Plan.* If you propose to use restoration measures, in whole or in part, to meet the applicable requirements in § 125.94, you must submit the following information with your application for review and approval by the Director. You must address species of concern identified in consultation with Federal, State, and Tribal fish and wildlife management agencies with responsibility for fisheries and wildlife potentially affected by your cooling water intake structure(s).

(i) A demonstration to the Director that you have evaluated the use of design and construction technologies and/or operational measures for your facility and an explanation of how you determined that restoration would be more feasible, cost-effective, or environmentally desirable;

(ii) A narrative description of the design and operation of all restoration measures (existing and proposed) that you have in place or will use to produce fish and shellfish;

(iii) Quantification of the ecological benefits of the proposed restoration measures. You must use information from the Impingement Mortality and/or Entrainment Characterization Study required in paragraph (b)(3) of this section, and any other available and appropriate information, to estimate the reduction in fish and shellfish impingement mortality and/or entrainment that would be necessary for your facility to comply with § 125.94(c)(2). You must then calculate the production of fish and shellfish that you will achieve with the restoration measures you will or have already installed. You must include a discussion of the nature and magnitude of uncertainty associated with the performance of these restoration measures. You must also include a discussion of the time frame within which these ecological benefits are expected to accrue;

(iv) Design calculations, drawings, and estimates to document that your proposed restoration measures in combination with design and construction technologies and/or operational measures, or alone, will meet the requirements of § 125.94(c)(2). If the restoration measures address the same fish and shellfish species identified in the Impingement Mortality and/or Entrainment Characterization Study (in-kind restoration), you must demonstrate that the restoration measures will produce a level of these fish and shellfish substantially similar to that which would result from meeting applicable performance standards in § 125.94(b), or that they will satisfy site-specific requirements established pursuant to § 125.94(a)(5). If the restoration measures address fish and shellfish species different from those identified in the Impingement Mortality and/or Entrainment Characterization Study (out-of-kind restoration), you must demonstrate that the restoration measures produce ecological benefits substantially similar to or greater than those that would be realized through in-kind restoration. Such a demonstration should be based on a watershed approach to restoration planning and consider applicable multi-agency watershed restoration plans, site-specific peer-reviewed ecological studies, and/or consultation with appropriate Federal, State, and Tribal fish and wildlife management agencies.

(v) A plan utilizing an adaptive management method for implementing, maintaining, and demonstrating the efficacy of the restoration measures you have selected and for determining the extent to which the restoration measures, or the restoration measures in combination with design and construction technologies and operational measures, have met the applicable requirements of § 125.94(c)(2). The plan must include:

(A) A monitoring plan that includes a list of the restoration parameters that will be monitored, the frequency at which you will monitor them, and success criteria for each parameter;

(B) A list of activities you will undertake to ensure the efficacy of the restoration measures, a description of the linkages between these activities and the items in paragraph (b)(5)(v)(A) of this section, and an implementation schedule; and

(C) A process for revising the Restoration Plan as new information, including monitoring data, becomes available, if the applicable requirements under § 125.94(c)(2) are not being met.

(vi) A summary of any past or ongoing consultation with appropriate Federal, State, and Tribal fish and wildlife management agencies on your use of restoration measures including a copy of

any written comments received as a result of such consultations;

(vii) If requested by the Director, a peer review of the items you submit for the Restoration Plan. You must choose the peer reviewers in consultation with the Director who may consult with EPA and Federal, State, and Tribal fish and wildlife management agencies with responsibility for fish and wildlife potentially affected by your cooling water intake structure(s). Peer reviewers must have appropriate qualifications (*e.g.*, in the fields of geology, engineering, and/or biology, etc.) depending upon the materials to be reviewed; and

(viii) A description of the information to be included in a bi-annual status report to the Director.

(6) *Information to support site-specific determination of best technology available for minimizing adverse environmental impact.* If you have requested a site-specific determination of best technology available for minimizing adverse environmental impact pursuant to § 125.94(a)(5)(i) because of costs significantly greater than those considered by the Administrator for a facility like yours in establishing the applicable performance standards of § 125.94(b), you are required to provide to the Director the information specified in paragraphs (b)(6)(i) and (b)(6)(iii) of this section. If you have requested a site-specific determination of best technology available for minimizing adverse environmental impact pursuant to § 125.94(a)(5)(ii) because of costs significantly greater than the benefits of meeting the applicable performance standards of § 125.94(b) at your facility, you must provide the information specified in paragraphs (b)(6)(i), (b)(6)(ii), and (b)(6)(iii) of this section:

(i) *Comprehensive Cost Evaluation Study.* You must perform and submit the results of a Comprehensive Cost Evaluation Study, that includes:

(A) Engineering cost estimates in sufficient detail to document the costs of implementing design and construction technologies, operational measures, and/or restoration measures at your facility that would be needed to meet the applicable performance standards of § 125.94(b);

(B) A demonstration that the costs documented in paragraph (b)(6)(i)(A) of this section significantly exceed either those considered by the Administrator for a facility like yours in establishing the applicable performance standards or the benefits of meeting the applicable performance standards at your facility; and

(C) Engineering cost estimates in sufficient detail to document the costs of implementing the design and construction technologies, operational measures, and/or restoration measures in your Site-Specific Technology Plan developed in accordance with paragraph (b)(6)(iii) of this section.

(ii) *Benefits Valuation Study.* If you are seeking a site-specific determination of best technology available for minimizing adverse environmental impact because of costs significantly greater than the benefits of meeting the applicable performance standards of § 125.94(b) at your facility, you must use a comprehensive methodology to fully value the impacts of impingement mortality and entrainment at your site and the benefits achievable by meeting the applicable performance standards. In addition to the valuation estimates, the benefit study must include the following:

(A) A description of the methodology(ies) used to value commercial, recreational, and ecological benefits (including any non-use benefits, if applicable);

(B) Documentation of the basis for any assumptions and quantitative estimates. If you plan to use an entrainment survival rate other than zero, you must submit a determination of entrainment survival at your facility based on a study approved by the Director;

(C) An analysis of the effects of significant sources of uncertainty on the results of the study; and

(D) If requested by the Director, a peer review of the items you submit in the Benefits Valuation Study. You must choose the peer reviewers in consultation with the Director who may consult with EPA and Federal, State, and Tribal fish and wildlife management agencies with responsibility for fish and wildlife potentially affected by your cooling water intake structure. Peer reviewers must have appropriate qualifications depending upon the materials to be reviewed.

(E) A narrative description of any non-monetized benefits that would be realized at your site if you were to meet the applicable performance standards and a qualitative assessment of their magnitude and significance.

(iii) *Site-Specific Technology Plan.* Based on the results of the Comprehensive Cost Evaluation Study required by paragraph (b)(6)(i) of this section, and the Benefits Valuation Study required by paragraph (b)(6)(ii) of this section, if applicable, you must submit a Site-Specific Technology Plan to the Director for review and approval. The plan must contain the following information:

(A) A narrative description of the design and operation of all existing and proposed design and construction technologies, operational measures, and/or restoration measures that you have selected in accordance with § 125.94(a)(5);

(B) An engineering estimate of the efficacy of the proposed and/or implemented design and construction technologies or operational measures, and/or restoration measures. This estimate must include a site-specific evaluation of the suitability of the technologies or operational measures for reducing impingement mortality and/or entrainment (as applicable) of all life stages of fish and shellfish based on representative studies (*e.g.*, studies that have been conducted at cooling water intake structures located in the same waterbody type with similar biological characteristics) and, if applicable, site-specific technology prototype or pilot studies. If restoration measures will be used, you must provide a Restoration Plan that includes the elements described in paragraph (b)(5) of this section.

(C) A demonstration that the proposed and/or implemented design and construction technologies, operational measures, and/or restoration measures achieve an efficacy that is as close as practicable to the applicable performance standards of § 125.94(b) without resulting in costs significantly greater than either the costs considered by the Administrator for a facility like yours in establishing the applicable performance standards, or as appropriate, the benefits of complying with the applicable performance standards at your facility;

(D) Design and engineering calculations, drawings, and estimates prepared by a qualified professional to support the elements of the Plan.

(7) *Verification Monitoring Plan.* If you comply using compliance alternatives in § 125.94(a)(2), (3), (4), or (5) using design and construction technologies and/or operational measures, you must submit a plan to conduct, at a minimum, two years of monitoring to verify the full-scale performance of the proposed or already implemented technologies and/or operational measures. The verification study must begin once the design and construction technologies and/or operational measures are installed and continue for a period of time that is sufficient to demonstrate to the Director whether the facility is meeting the applicable performance standards in § 125.94(b) or site-specific requirements

developed pursuant to § 125.94(a)(5). The plan must provide the following:

(i) Description of the frequency and duration of monitoring, the parameters to be monitored, and the basis for determining the parameters and the frequency and duration for monitoring. The parameters selected and duration and frequency of monitoring must be consistent with any methodology for assessing success in meeting applicable performance standards in your Technology Installation and Operation Plan as required by paragraph (b)(4)(ii) of this section.

(ii) A proposal on how naturally moribund fish and shellfish that enter the cooling water intake structure would be identified and taken into account in assessing success in meeting the performance standards in § 125.94(b).

(iii)A description of the information to be included in a bi-annual status report to the Director.

§ 125.96 As an owner or operator of a Phase II existing facility, what monitoring must I perform?

As an owner or operator of a Phase II existing facility, you must perform monitoring, as applicable, in accordance with the Technology Installation and Operation Plan required by § 125.95(b)(4)(ii), the Restoration Plan required by § 125.95(b)(5), the Verification Monitoring Plan required by § 125.95(b)(7), and any additional monitoring specified by the Director to demonstrate compliance with the applicable requirements of § 125.94.

§ 125.97 As an owner or operator of a Phase II existing facility, what records must I keep and what information must I report?

As an owner or operator of a Phase II existing facility you are required to keep records and report information and data to the Director as follows:

(a) You must keep records of all the data used to complete the permit application and show compliance with the requirements of § 125.94, any supplemental information developed under § 125.95, and any compliance monitoring data submitted under § 125.96, for a period of at least three (3) years from date of permit issuance. The Director may require that these records be kept for a longer period.

(b) You must submit a status report to the Director for review every two years that includes appropriate monitoring data and other information as specified by the Director in accordance with § 125.98(b)(5).

§ 125.98 As the Director, what must I do to comply with the requirements of this subpart?

(a) *Permit application.* As the Director, you must review materials submitted by the applicant under 40 CFR 122.21(r) and § 125.95 before each permit renewal or reissuance.

(1) You must review and comment on the Proposal for Information Collection submitted by the facility in accordance with § 125.95(a)(1). You are encouraged to provide comments expeditiously so that the permit applicant can make responsive modifications to its information gathering activities. If a facility submits a request in accordance with § 125.95(a)(2)(ii) for an alternate schedule for submitting the information required in § 125.95, you must approve a schedule that is as expeditious as practicable, but does not extend beyond January 7, 2008. If a facility submits a request in accordance with § 125.95(a)(3) to reduce the information about their cooling water intake structures and the source waterbody required to be submitted in their permit application (other than with the first permit application after September 7, 2004), you must approve the request within 60 days if conditions at the facility and in the waterbody remain substantially unchanged since the previous application.

(2) After receiving the permit application from the owner or operator of a Phase II existing facility, you must determine which of the requirements specified in § 125.94 apply to the facility. In addition, you must review materials to determine compliance with the applicable requirements.

(3) At each permit renewal, you must review the application materials and monitoring data to determine whether new or revised requirements for design and construction technologies, operational measures, or restoration measures should be included in the permit to meet the applicable performance standards in § 125.94(b) or alternative site-specific requirements established pursuant to § 125.94(a)(5).

(b) *Permitting requirements.* Section 316(b) requirements are implemented for a facility through an NPDES permit. As the Director, you must consider the information submitted by the Phase II existing facility in its permit application, and determine the appropriate requirements and conditions to include in the permit based on the compliance alternatives in § 125.94(a). The following requirements must be included in each permit:

(1) *Cooling water intake structure requirements.* The permit conditions must include the requirements that implement the applicable provisions of § 125.94. You must evaluate the performance of the design and construction technologies, operational measures, and/or restoration measures proposed and implemented by the facility and require additional or different design and construction technologies, operational measure, and/or restoration measures, and/or improved operation and maintenance of existing technologies and measures, if needed to meet the applicable performance standards, restoration requirements, or alternative site-specific requirements. In determining compliance with the performance standards for facilities proposing to increase withdrawals of cooling water from a lake (other than a Great Lake) or a reservoir in § 125.94(b)(3), you must consider anthropogenic factors (those not considered "natural") unrelated to the Phase II existing facility's cooling water intake structures that can influence the occurrence and location of a thermocline. These include source water inflows, other water withdrawals, managed water uses, wastewater discharges, and flow/level management practices (*e.g.*, some reservoirs release water from deeper bottom layers). As the Director, you must coordinate with appropriate Federal, State, or Tribal fish and wildlife management agencies to determine if any disruption of the natural thermal stratification resulting from the proposed increased withdrawal of cooling water does not adversely affect the management of fisheries. Specifically:

(i) You must review and approve the Design and Construction Technology Plan required in § 125.95(b)(4) to evaluate the suitability and feasibility of the design and construction technology and/or operational measures proposed to meet the performance standards in § 125.94(b) or site-specific requirements developed pursuant to § 125.94(a)(5).

(ii) If the facility proposes restoration measures in accordance with § 125.94(c), you must review and approve the Restoration Plan required under § 125.95(b)(5) to determine whether the proposed measures, alone or in combination with design and construction technologies and/or operational measures, will meet the requirements under § 125.94(c).

(iii) In each reissued permit, you must include a condition in the permit requiring the facility to reduce impingement mortality and entrainment (or to increase fish production, if applicable) commensurate with the efficacy at the facility of the installed design and construction technologies,

operational measures, and/or restoration measures.

(iv) If the facility implements design and construction technologies and/or operational measures and requests that compliance with the requirements in § 125.94 be measured for the first permit term (or subsequent permit terms, if applicable) employing the Technology Installation and Operation Plan in accordance with § 125.95(b)(4)(ii), you must review the Technology Installation and Operation Plan to ensure it meets the requirements of § 125.95(b)(4)(ii). If the Technology Installation and Operation Plan meets the requirements of § 125.95(b)(4)(ii), you must approve the Technology Installation and Operation Plan and require the facility to meet the terms of the plan including any revision to the plan that may be necessary if applicable performance standards or alternative site-specific requirements are not being met. If the facility implements restoration measures and requests that compliance with the requirements in § 125.94 be measured for the first permit term (or subsequent permit terms, if applicable) employing a Restoration Plan in accordance with § 125.95(b)(5), you must review the Restoration Plan to ensure it meets the requirements of § 125.95(b)(5). If the Restoration Plan meets the requirements of § 125.95(b)(5), you must approve the plan and require the facility to meet the terms of the plan including any revision to the plan that may be necessary if applicable performance standards or site-specific requirements are not being met. In determining whether to approve a Technology Installation and Operation Plan or Restoration Plan, you must evaluate whether the design and construction technologies, operational measures, and/or restoration measures the facility has installed, or proposes to install, can reasonably be expected to meet the applicable performance standards in § 125.94(b), restoration requirements in § 125.94(c)(2), and/or alternative site-specific requirements established pursuant to § 125.94(a)(5), and whether the Technology Installation and Operation Plan and/or Restoration Plan complies with the applicable requirements of § 125.95(b). In reviewing the Technology Installation and Operation Plan, you must approve any reasonable scheduling provisions that are designed to ensure that impacts to energy reliability and supply are minimized, in accordance with § 125.95(b)(4)(ii)(A). If the facility does not request that compliance with the requirements in § 125.94 be measured employing a Technology Installation and Operation Plan and/or Restoration Plan, or the facility has not been in compliance with the terms of its current Technology Installation and Operation Plan and/or Restoration Plan during the preceding permit term, you must require the facility to comply with the applicable performance standards in § 125.94(b), restoration requirement in § 125.94(c)(2), and/or alternative site-specific requirements developed pursuant to § 125.94(a)(5). In considering a permit application, you must review the performance of the design and construction technologies, operational measures, and/or restoration measures implemented and require additional or different design and construction technologies, operational measures, and/or restoration measures, and/or improved operation and maintenance of existing technologies and measures, if needed to meet the applicable performance standards, restoration requirements, and/or alternative site-specific requirements.

(v) You must review and approve the proposed Verification Monitoring Plan submitted under § 125.95(b)(7) (for design and construction technologies) and/or monitoring provisions of the Restoration Plan submitted under § 125.95(b)(5)(v) and require that the monitoring continue for a sufficient period of time to demonstrate whether the design and construction technology, operational measures, and/or restoration measures meet the applicable performance standards in § 125.94(b), restoration requirements in 125.94(c)(2) and/or site-specific requirements established pursuant to § 125.94(a)(5).

(vi) If a facility requests requirements based on a site-specific determination of best technology available for minimizing adverse environmental impact, you must review the application materials submitted under § 125.95(b)(6) and any other information you may have, including quantitative and qualitative benefits, that would be relevant to a determination of whether alternative requirements are appropriate for the facility. If a facility submits a study to support entrainment survival at the facility, you must review and approve the results of that study. If you determine that alternative requirements are appropriate, you must make a site-specific determination of best technology available for minimizing adverse environmental impact in accordance with § 125.94(a)(5). You, as the Director, may request revisions to the information submitted by the facility in accordance with § 125.95(b)(6) if it does not provide an adequate basis for you to make this determination. Any alternative site-specific requirements established based on new and/or existing design and construction technologies, operational measures, and/or restoration measures, must achieve an efficacy that is, in your judgement, as close as practicable to the applicable performance standards of § 125.94(b) without resulting in costs that are significantly greater than the costs considered by the Administrator for a like facility in establishing the applicable performance standards in § 125.94(b), determined in accordance with § 125.94(a)(5)(i)(A) through (F), or the benefits of complying with the applicable performance standards at the facility; and

(vii) You must review the proposed methods for assessing success in meeting applicable performance standards and/or restoration requirements submitted by the facility under § 125.95(b)(4)(ii)(D) and/or (b)(5)(v)(A), evaluate those and other available methods, and specify how assessment of success in meeting the performance standards and/or restoration requirements must be determined including the averaging period for determining the percent reduction in impingement mortality and entrainment and/or the production of fish and shellfish. Compliance for facilities who request that compliance be measured employing a Technology Installation and Operation Plan and/or Restoration Plan must be determined in accordance with § 125.98(b)(1)(iv).

(2) *Monitoring conditions.* You must require the facility to perform monitoring in accordance with the Technology Installation and Operation Plan in § 125.95(b)(4)(ii), the Restoration Plan required by § 125.95(b)(5), if applicable, and the Verification Monitoring Plan required by § 125.95(b)(7). In determining any additional applicable monitoring requirements in accordance with § 125.96, you must consider the monitoring facility's Verification Monitoring, Technology Installation and Operation, and/or Restoration Plans, as appropriate. You may modify the monitoring program based on changes in physical or biological conditions in the vicinity of the cooling water intake structure.

(3) *Recordkeeping and reporting.* At a minimum, the permit must require the facility to report and keep records specified in § 125.97.

(4) *Design and construction technology approval*—(i) For a facility that chooses to demonstrate that it has installed and properly operate and maintain a design and construction technology approved in accordance with § 125.99, the Director must review

and approve the information submitted in the Technology Installation and Operation Plan in § 125.95(b)(4)(ii) and determine if it meets the criteria in § 125.99.

(ii) If a person requests approval of a technology under § 125.99(b), the Director must review and approve the information submitted and determine its suitability for widespread use at facilities with similar site conditions in its jurisdiction with minimal study. As the Director, you must evaluate the adequacy of the technology when installed in accordance with the required design criteria and site conditions to consistently meet the performance standards in § 125.94. You, as the Director, may only approve a technology following public notice and consideration of comment regarding such approval.

(5) *Bi-annual status report.* You must specify monitoring data and other information to be included in a status report every two years. The other information may include operation and maintenance records, summaries of adaptive management activities, or any other information that is relevant to determining compliance with the terms of the facility's Technology Operation and Installation Plan and/or Restoration Plan.

§ 125.99 What are approved design and construction technologies?

(a) The following technologies constitute approved design and construction technologies for purposes of § 125.94(a)(4):

(1) Submerged cylindrical wedge-wire screen technology, if you meet the following conditions:

(i) Your cooling water intake structure is located in a freshwater river or stream;

(ii) Your cooling water intake structure is situated such that sufficient ambient counter currents exist to promote cleaning of the screen face;

(iii)Your maximum through-screen design intake velocity is 0.5 ft/s or less;

(iv) The slot size is appropriate for the size of eggs, larvae, and juveniles of all fish and shellfish to be protected at the site; and

(v) Your entire main condenser cooling water flow is directed through the technology. Small flows totaling less than 2 MGD for auxiliary plant cooling uses are excluded from this provision.

(2) A technology that has been approved in accordance with the process described in paragraph (b) of this section.

(b) You or any other interested person may submit a request to the Director that a technology be approved in accordance with the compliance alternative in § 125.94(a)(4) after providing the public with notice and an opportunity to comment on the request for approval of the technology. If the Director approves the technology, it may be used by all facilities with similar site conditions under the Director's jurisdiction. Requests for approval of a technology must be submitted to the Director and include the following information:

(1) A detailed description of the technology;

(2) A list of design criteria for the technology and site characteristics and conditions that each facility must have in order to ensure that the technology can consistently meet the appropriate impingement mortality and entrainment performance standards in § 125.94(b); and

(3) Information and data sufficient to demonstrate that facilities under the jurisdiction of the Director can meet the applicable impingement mortality and entrainment performance standards in § 125.94(b) if the applicable design criteria and site characteristics and conditions are present at the facility.

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July 9, 2004

Part III

Securities and Exchange Commission

17 CFR Parts 270, 275, and 279
Investment Adviser Codes of Ethics; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 270, 275, and 279

[Release Nos. IA–2256, IC–26492; File No. S7–04–04]

RIN 3235–AJ08

Investment Adviser Codes of Ethics

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission is adopting a new rule and related rule amendments under the Investment Advisers Act of 1940 that require registered advisers to adopt codes of ethics. The codes of ethics must set forth standards of conduct expected of advisory personnel and address conflicts that arise from personal trading by advisory personnel. Among other things, the rule requires advisers' supervised persons to report their personal securities transactions, including transactions in any mutual fund managed by the adviser. The Commission is also adopting amendments to rule 17j–1 to conform certain provisions to the new rule. The rule and rule amendments are designed to promote compliance with fiduciary standards by advisers and their personnel.

DATES: *Effective Date:* August 31, 2004. *Compliance Date:* January 7, 2005.

FOR FURTHER INFORMATION CONTACT: Robert L. Tuleya, Attorney-Adviser, or Jennifer Sawin, Assistant Director, at (202) 942–0719, Office of Investment Adviser Regulation, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0506.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission ("Commission" or "SEC") is adopting (i) rule 204A–1 [17 CFR 275.204A–1] under the Investment Advisers Act of 1940 [15 U.S.C. 80b] ("Advisers Act" or "Act"); (ii) amendments to rule 204–2 [17 CFR 275.204–2] and Form ADV [17 CFR 279.1] under the Advisers Act; and (iii) amendments to rule 17j–1 [17 CFR 270.17j–1] under the Investment Company Act of 1940 [15 U.S.C. 80a] ("Company Act").[1]

[1] Unless otherwise noted, when we refer to rule 17j–1 or any paragraph of the rule, we are referring to 17 CFR 270.17j–1 of the Code of Federal Regulations in which the rule is published, and when we refer to rule 204–2 or any paragraph of the rule, we are referring to 17 CFR 275.204–2 of the Code of Federal Regulations in which the rule is published.

Executive Summary

Executive Summary

The Commission is adopting new rule 204A–1 under the Advisers Act to require registered investment advisers to adopt codes of ethics. The rule requires an adviser's code of ethics to set forth standards of conduct and require compliance with Federal securities laws. Codes of ethics must also address personal trading: they must require advisers' personnel to report their personal securities holdings and transactions, including those in affiliated mutual funds, and must require personnel to obtain pre-approval of certain investments. The Commission is amending the Advisers Act recordkeeping rule to require advisers to keep copies of their codes of ethics and records relating to the code. The Commission is also amending the client disclosure requirements under part II of Form ADV to require advisers to describe their codes of ethics to clients.

I. Background

In January of this year, we proposed to require every adviser registered with us to adopt and enforce a written code of ethics applicable to its supervised persons.[2] Our proposal was designed to prevent fraud by reinforcing fiduciary principles that must govern the conduct of advisory firms and their personnel. The proposal was part of a package of regulatory initiatives with which we have responded to a number of recent enforcement actions against advisers or their personnel alleging violations of their fiduciary obligations to clients, including mutual fund clients.[3]

Advisers' codes would be required to contain provisions reminding employees of their obligations to clients as well as provisions requiring reporting of personal securities transactions and holdings. In order to ensure that advisers' employees are made aware of their firms' standards, advisers would have to obtain (and keep) a written acknowledgement from each supervised person confirming that he or she received a copy of the code of ethics and any amendments. While the code of

[2] *Investment Adviser Codes of Ethics*, Investment Advisers Act Release No. 2209 (Jan. 20, 2004) [69 FR 4040 (Jan. 27, 2004)].

[3] *See, e.g., In the Matter of Strong Capital Management, Inc.*, Investment Advisers Act Release No. 2239 (May 20, 2004) ("Strong") (adviser disclosed material nonpublic information about fund portfolio holdings to hedge fund, and permitted own chairman and hedge fund to engage in undisclosed market timing of funds managed by adviser); *In the Matter of Massachusetts Financial Services Co.*, Investment Advisers Act Release No. 2213 (Feb. 5, 2004) (2 senior executives of adviser permitted undisclosed market timing in certain funds in the complex managed by the adviser); *In the Matter of Alliance Capital Management, L.P.*, Investment Advisers Act Release No. 2205 (Dec. 18, 2003) (*"Alliance"*) (disclosure of material nonpublic information about certain mutual fund portfolio holdings permitted favored client to profit from market timing); *In the Matter of Robert T. Littell and Wilfred Meckel*, Investment Advisers Act Release No. 2203 (Dec. 15, 2003) (portfolio manager of hedge fund made misrepresentations to investors and potential investors concerning performance, management oversight, and risk management practices); *In the Matter of Zion Capital Management LLC and Ricky A. Lang*, Investment Advisers Act Release No. 2200 (Dec. 11, 2003) (*"Zion"*) (adviser favored an advisory account in which he had an interest, allocating profitable trades to this account while allocating numerous unprofitable trades to another client); *In the Matter of George F. Fahey*, Investment Advisers Act Release No. 2196 (Nov. 24, 2003) (president of investment adviser made misrepresentations to clients as to risk of investment strategy and value of investments); *In the Matter of Putnam Investment Management LLC*, Investment Advisers Act Release No. 2192 (Nov. 13, 2003) (*"Putnam"*) (adviser failed to reasonably supervise employees who market timed funds managed by the adviser and failed to disclose their timing activities); *In the Matter of Wendell D. Belden*, Investment Advisers Act Release No. 2191 (Nov. 6, 2003) (associate of adviser defrauded clients by misleading them about their investment options and the security of their invested principal and by investing their money in a manner calculated to enrich himself at their expense); *In the Matter of James Patrick Connelly, Jr.*, Investment Advisers Act Release No. 2183 (Oct. 16, 2003) (adviser's vice chairman permitted more than a dozen clients to market time certain funds in the complex managed by the adviser in exchange for stable investments in other funds in the complex); *In the Matter of Marshall E. Melton and Asset Management & Research, Inc.*, Investment Advisers Act Release No. 2151 (Jul. 25, 2003) (investment adviser made material misrepresentations to its clients to induce them to invest their funds in limited liability companies controlled by adviser's principal).

ethics would have to contain certain minimum provisions, our proposal left advisers with substantial flexibility to design individualized codes that would best fit the structure, size and nature of their advisory businesses.

We received 44 comment letters in response to our proposal. Most commenters supported requiring advisers to have written codes of ethics, and supported the flexibility that our proposal offered. Today, we are adopting new rule 204A–1 with certain changes that respond to commenters' recommendations.

II. Discussion

A. Standards of Conduct and Compliance With Laws

Rule 204A–1 requires each adviser's code of ethics to set forth a standard of business conduct that the adviser requires of all its supervised persons.[4] The rule does not require the adviser to adopt a particular standard, but the standard chosen must reflect the adviser's fiduciary obligations and those of its supervised persons, and must require compliance with the federal securities laws.[5]

This provision, which we are adopting as proposed, establishes only a minimum requirement. Advisers are free to set higher standards for their employees, such as those established by professional or trade groups.[6] Of course, any other code adopted for use must meet the minimum requirements of the rule, or be supplemented to meet the minimum requirements.[7]

We urge advisers to take great care and thought in preparing their codes of ethics, which should be more than a compliance manual. Rather, a code of ethics should set out ideals for ethical conduct premised on fundamental principals of openness, integrity, honesty and trust. A good code of ethics should effectively convey to employees the value the advisory firm places on ethical conduct, and should challenge employees to live up not only to the letter of the law, but also to the ideals of the organization.[8]

B. Protection of Material Nonpublic Information

We proposed to require codes of ethics to prevent access to material nonpublic information about the adviser's securities recommendations, and client securities holdings and transactions by individuals who do not need the information to perform their duties.[9] Commenters supported our objective of controlling access to information as a first line of defense against misuse, but noted that it may be impractical to segregate employees, particularly in smaller firms that have limited office space. We are not requiring this provision in the code of ethics, but remind advisers that they must maintain and enforce policies and procedures to prevent the misuse of material nonpublic information,[10] which we believe includes misuse of material nonpublic information about the adviser's securities recommendations, and client securities holdings and transactions.[11] Advisers' duty of care also requires that they safeguard this sensitive information.[12] Advisers should carefully consider how to control dissemination of sensitive information both within their organizations and outside them.

C. Personal Securities Trading

Each adviser's code of ethics must require an adviser's "access persons" to periodically report their personal securities transactions and holdings to the adviser's chief compliance officer or other designated persons.[13] The code of ethics must also require the adviser to review those reports.[14] Reviewing these reports will allow advisers as well as the Commission's examination staff to identify improper trades or patterns of trading by access persons. The reports are modeled largely on those required by rule 17j–1 under the Company Act.[15]

1. Personal Trading Procedures

As discussed in more detail below, while rule 204A–1 requires advisers' codes of ethics to contain provisions requiring access persons to report securities transactions and holdings, it does not require advisers to adopt many of the detailed prophylactic measures common to many codes.[16] Commenters agreed with this approach, which we took to accommodate the vast differences among advisory firms registered with us and the variety of risks associated with employee securities transactions. Advisory firms that have already adopted codes of ethics, however, commonly include many of the following elements, or address the following issues, which we believe that all advisers should consider in crafting their own procedures for

[4] Rule 204A–1(a)(1).

[5] Rule 204A–1(a)(1) and (2).

[6] Many professional and trade organizations, such as the Financial Planning Association, the Association for Investment Management and Research, the Certified Financial Planner Board of Standards, the Investment Counsel Association of America, and the American Institute of Certified Public Accountants, have developed professional codes of ethics or model codes for their members' use.

[7] While advisers are also free to structure their codes as best fits their organizations, an adviser using multi-document codes should ensure that all parts are integrated and understandable, so it is clear to supervised persons that these documents constitute the firm's code of ethics.

[8] *See* joint comment letter from the Ethics Resource Center and Thelen Reid & Priest LLP (Apr. 6, 2004) (available from the Commission's public reference room in File No. S7–04–04).

[9] Proposed rule 204A–1(a)(3).

[10] Section 204A [15 U.S.C. 80b–4a]. Advisers' required procedures under section 204A usually also contain a summary of insider trading law and procedures for determining whether information has become public. These may be distinct from the adviser's section 204A procedures to guard against misuse of material nonpublic information about client recommendations, trading, and holdings. Many advisers may choose to integrate their section 204A procedures into their codes, but they are not required to do so.

[11] *See, e.g., Strong, supra* note (adviser that released nonpublic information about fund portfolio holdings to select market timers violated section 204A); *Alliance, supra* note (adviser that released, to select market timers, material nonpublic information concerning portfolio holdings of fund managed by the adviser violated section 204A); *Putnam, supra* note (adviser whose portfolio manager traded on nonpublic information regarding portfolio holdings and transactions of fund managed by the adviser violated section 204A).

[12] As we noted in our proposing release, the obligation to safeguard sensitive client information would not preclude the adviser from providing necessary information to, for example, persons providing services to the adviser or the account such as brokers, accountants, custodians, and fund transfer agents, or in other circumstances when the client consents. In addition, if the adviser has supervised persons who are also associated persons of a broker-dealer, self-regulatory organization rules may require the broker-dealer to have certain information about the adviser's client accounts. Two commenters noted that, under certain circumstances, NASD rule 3040 requires the broker-dealer to supervise its registered representatives' activities for advisory accounts.

[13] Rule 204A–1(a)(3). We are not suggesting that the chief compliance officer must personally review all reports. In addition, we expect most advisers will designate another individual to review personal securities reports submitted by the chief compliance officer.

[14] Rule 204A–1(a)(3).

[15] Rule 17j–1 requires that fund advisers adopt written codes of ethics and have procedures in place to prevent their personnel from abusing their access to information about the fund's securities trading, and requires "access persons" to submit reports periodically containing information about their personal securities holdings and transactions. Rule 17j–1(c)(1) and (d) under the Investment Company Act. Most funds, and therefore most fund advisers, must have codes of ethics under rule 17j–1. Money market funds and funds that invest only in certain non-covered securities, however, are not required to adopt codes of ethics under rule 17j–1. Rule 17j–1(c)(1)(i). As of May 1, 2004, approximately 1500 advisers, or 18 percent of the firms registered with us, reported that they manage fund portfolios.

[16] For example, pre-clearance of personal securities transactions, *see infra* note and accompanying text, is mandated to some degree in most advisory firms that have adopted a code of ethics.

employees' personal securities trading.[17]

- Prior written approval before access persons can place a personal securities transaction ("pre-clearance").[18]
- Maintenance of lists of issuers of securities that the advisory firm is analyzing or recommending for client transactions, and prohibitions on personal trading in securities of those issuers.
- Maintenance of "restricted lists" of issuers about which the advisory firm has inside information, and prohibitions on any trading (personal or for clients) in securities of those issuers.
- "Blackout periods" when client securities trades are being placed or recommendations are being made and access persons are not permitted to place personal securities transactions.[19]
- Reminders that investment opportunities must be offered first to clients before the adviser or its employees may act on them, and procedures to implement this principle.[20]
- Prohibitions or restrictions on "short-swing" trading and market timing.[21]
- Requirements to trade only through certain brokers, or limitations on the number of brokerage accounts permitted.
- Requirements to provide the adviser with duplicate trade confirmations and account statements.
- Procedures for assigning new securities analyses to employees whose personal holdings do not present apparent conflicts of interest.[22]

2. "Access Persons" Subject to the Reporting Requirements

Under rule 204A–1, the adviser's code must require certain supervised persons, called "access persons," to report their personal securities transactions and holdings.[23] An access person is a supervised person who has access to nonpublic information regarding clients' purchase or sale of securities, is involved in making securities recommendations to clients or who has access to such recommendations that are nonpublic.[24] A supervised person who has access to nonpublic information regarding the portfolio holdings of affiliated mutual funds is also an access person.[25]

We are adopting the definition of "access person" as proposed. Some commenters suggested that we adopt a narrower definition covering only those employees who actually obtained nonpublic information, the approach rule 17j–1 takes for mutual fund advisers.[26] Others suggested that all advisory employees be covered.[27] Our approach takes the middle course. It treats as access persons employees who are in a position to exploit information about client securities transactions or holdings, and thus provides the adviser with a tool to protect its clients.

Access persons will include portfolio management personnel and, in some organizations, client service representatives who communicate investment advice to clients. These employees have information about investment recommendations whose effect may not yet be felt in the marketplace; as such, they may be in a position to take advantage of their inside knowledge. Administrative, technical, and clerical personnel may also be access persons if their functions or duties give them access to nonpublic information. Organizations in which employees have broad responsibilities, and where information barriers are few, may see a larger percentage of their staff subject to the reporting requirements. In contrast, organizations that keep strict controls on sensitive information may have fewer access persons.[28]

In many advisory firms, directors, officers and partners will also be access persons. Rule 204A–1, as proposed, contains a presumption that, if the firm's primary business is providing investment advice, then all of its directors, officers and partners are access persons.[29] Commenters supported this approach rather than rule 17j–1's special rules and revenue-based test for advisory firms "primarily engaged" in a business other than advising funds or advisory clients.[30]

[17] In addition to personal securities transaction procedures, the following is a list of other provisions that many advisers include in codes of ethics, and that advisers should consider when deciding what to include in their own codes: Limitations on acceptance of gifts; limitations on the circumstances under which an access person may serve as a director of a publicly traded company; detailed identification of who is considered an access person within the organization; and procedures for the firm and its compliance personnel to review periodically the code of ethics as well as to review reports made pursuant to it.

[18] In some organizations, all personnel must pre-clear all trades with the firm's compliance personnel. In other firms, only access persons must pre-clear, or only certain types of transactions must be pre-cleared. Some advisers have begun using compliance software to pre-clear personal trades on an automated basis, rather than have compliance personnel process the requests. Pre-clearance procedures may also identify who has authority to approve a trade request, the length of time an approval is valid, and procedures for revoking an approval, as well as procedures for verifying post-trade reports or duplicate confirmations against the log of pre-clearance approvals.

[19] Advisers may use blackout periods to guard against employees trading ahead of clients or on the same day as clients' trades are placed. *See In the Matter of Roger Honour*, Investment Advisers Act Release No. 1527 (Sept. 29, 1995). Prohibiting personal trading at the same time as client trading can also serve as a measure to prevent employees from allocating trades in a manner that defrauds clients. *See, e.g., In the Matter of Nicholas-Applegate Capital Management*, Investment Advisers Act Release No. 1741 (Aug. 12, 1998) (adviser's senior trader placed personal trades alongside trades for employee plan, allocating profitable trades to his personal account and unprofitable ones to the employee plan's account); *SEC* v. *Moran*, 922 F.Supp. 867 (S.D.N.Y. 1996) (advisory principal allocated shares to his family and personal accounts even though additional shares would need to be purchased for client accounts on the following day at higher prices). The Commission has previously indicated its approval of blackout periods for advisory personnel. *See* Report of the Securities and Exchange Commission on the Public Policy Implications of Investment Company Growth (1966) ("PPI Report") at 196 (noting with approval that the staff's 1962–63 Special Study of the Securities Markets had concluded that all funds and advisers should have policies precluding certain insiders from buying and selling securities at the same time as a fund they manage).

[20] In several of our enforcement cases involving personal trading, advisory personnel took investment opportunities for themselves (or for an account in which they had an interest) instead of for clients, even where the investment became available only because of the client's other securities purchases. *See In the Matter of Joan Conan*, Investment Advisers Act Release No. 1446 (Sept. 30, 1994); *In the Matter of Kemper Financial Services, Inc.*, Investment Advisers Act Release No. 1494 (June 6, 1995).

[21] Advisers that prohibit short-term trading generally mandate disgorgement of any profits if an employee effects a short-term trade.

[22] Initial and annual holdings reports will facilitate an adviser's assessment of whether an individual's personal securities holdings present a conflict of interest.

[23] Rule 204A–1(a)(3). Section 202(a)(25) of the Advisers Act [15 U.S.C. 80b–2(a)(25)] defines "supervised person." An adviser's supervised persons are its partners, officers, directors (or other persons occupying a similar status or performing similar functions) and employees, as well as any other persons who provide advice on behalf of the adviser and are subject to the adviser's supervision and control.

[24] Rule 204A–1(e)(1).

[25] *Id.* A supervised person would not be an access person solely because he has nonpublic information regarding the portfolio holdings of a client that is not an investment company. The individual is unlikely to be able to exploit that information in any way that would benefit himself.

[26] Rule 17j–1 includes individuals as access persons only if they make, participate in, or *obtain* information regarding, the purchase and sale of the fund's securities, or if their functions relate to the making of any recommendations for such transactions. Rule 17j–1(a)(1)(i), 17j–1(a)(2)(i).

[27] While the definition of "access person" under rule 204A–1 will not require all employees to submit personal securities transaction reports, some firms may elect to require reporting from all personnel. This approach, while not required, offers certainty as to whether reports are required from a given individual.

[28] As proposed, persons who are not "supervised persons" of the adviser would not be access persons. This represents a change from the current adviser recordkeeping rule, rule 204–2(a)(12). Commenters supported the change.

[29] Rule 204A–1(e)(1)(ii).

[30] Rule 17j–1(a)(1)(i)(A) and (B). *See also* current rule 204–2(a)(13)(iii)(D). Today we are also adopting parallel changes to 17j–1 to remove this revenue-based test. *See infra* Section II.J of this Release.

3. Initial and Annual Holdings Reports

The code of ethics must require a complete report of each access person's securities holdings, at the time the person becomes an access person and at least once a year thereafter.[31] Commenters supported these reporting requirements, which are similar to those required by rule 17j–1.[32] The holdings reports must be current as of a date not more than 45 days prior to the individual becoming an access person (initial report) or the date the report is submitted (annual report). We had proposed to require initial holdings reports to be current as of the date the individual becomes an access person, and annual reports to be current within 30 days prior to submission, but many commenters told us these requirements were not flexible enough to allow access persons to use brokerage statements as the basis of their reports.[33]

4. Quarterly Transaction Reports

The code of ethics must require quarterly reports of all personal securities transactions by access persons, which are due no later than 30 days after the close of the calendar quarter.[34] The code of ethics may excuse access persons from submitting transaction reports that would duplicate information contained in trade confirmations or account statements that the adviser holds in its records, provided the adviser has received those confirmations or statements not later than 30 days after the close of the calendar quarter in which the transaction takes place.[35]

We have not adopted a requirement we proposed that would have required access persons that had no personal securities transactions during the quarter to submit a report confirming the absence of transactions. Commenters argued that reports confirming absence of transactions were unnecessary and burdensome, particularly when the adviser was relying on transaction records received from the access person's broker-dealer during the course of the quarter.

5. Exceptions From Reporting Requirements

Rule 204A–1 permits three exceptions to personal securities reporting. No reports are required:

- With respect to transactions effected pursuant to an automatic investment plan.[36]
- With respect to securities held in accounts over which the access person had no direct or indirect influence or control.[37]
- In the case of an advisory firm that has only one access person, so long as the firm maintains records of the holdings and transactions that rule 204A–1 would otherwise require be reported.[38]

6. Reportable Securities

Access persons must submit holdings and transaction reports for "reportable securities" in which the access person has, or acquires, any direct or indirect beneficial ownership.[39] An access person is presumed to be a beneficial owner of securities that are held by his or her immediate family members sharing the access person's household.[40]

Rule 204A–1 treats all securities[41] as reportable securities, with five exceptions designed to exclude securities that appear to present little opportunity for the type of improper trading that the access person reports are designed to uncover:[42]

- Transactions and holdings in direct obligations of the Government of the United States.[43]
- Money market instruments—bankers' acceptances, bank certificates of deposit, commercial paper, repurchase agreements and other high quality short-term debt instruments.[44]
- Shares of money market funds.[45]
- Transactions and holdings in shares of other types of mutual funds, unless the adviser or a control affiliate acts as the investment adviser or principal underwriter for the fund.[46]
- Transactions in units of a unit investment trust if the unit investment trust is invested exclusively in unaffiliated mutual funds.[47]

[31] Rule 204A–1(b)(1).

[32] Rule 17j–1(d)(1)(i) and (iii). As under rule 17j–1, an access person can satisfy the initial or annual holdings report requirement by timely filing and dating a copy of a securities account statement listing all their securities holdings, if the statement provides all information required by the rule and the code of ethics. Similarly, if a supervised person has previously provided such statement to the adviser, or has previously been reporting or supplying brokerage confirms for all securities transactions and the adviser has maintained them as a composite record containing all the requisite information, the access person can satisfy the initial or annual holdings report requirement by timely confirming the accuracy of the statement or composite in writing. *See Personal Investment Activities of Investment Company Personnel*, Investment Company Act Release No. 23958 (Aug. 20, 1999) [64 FR 46821 (Aug. 27, 1999)] ("Rule 17j–1 1999 Adopting Release"), at n. 34. The rule would not, however, permit an access person to avoid filing an initial or annual holdings report simply because all information has been provided over a period of time in various transaction reports. One reason for requiring a holdings report is so that the adviser's compliance personnel and our examiners have ready access to a "snapshot" of the access person's holdings and are not required to piece the information together from transaction reports.

[33] We modeled our proposal on requirements in rule 17j–1. We are today adopting amendments to these requirements in rule 17j–1 to conform them to rule 204A–1. *See infra* Section II.J of this Release.

[34] Rule 204A–1(b)(2). In response to comments, we extended the deadline from the 10-day deadline we had proposed, and we have made similar changes to rule 17j–1. *See infra* Section II.J of this Release.

[35] The rule does not require all of the information required in a transaction report to appear in the duplicate trade confirmation or account statement. That is, some of the required information could appear in the confirmation or statement, and the remainder could be submitted by access persons in their reports.

[36] Rule 204A–1(b)(3)(ii). However, any transaction that overrides the pre-set schedule or allocations of the automatic investment plan must be included in a quarterly transaction report. We are also adopting a parallel exception under rule 17j–1. *See infra* Section II.J of this Release.

[37] Rule 204A–1(b)(3)(i).

[38] Rule 204A–1(d). We had proposed this exception for firms that have only one supervised person, because that individual would otherwise be required to make reports to himself; commenters suggested that we should extend to firms with one access person, because these are still essentially one-man shops. We agree that a sole proprietor who has a clerical assistant or bookkeeper for his business should still be able to use this exception so long as that employee is not also an access person. These small advisers would still be subject to the other provisions of the rule, including the requirements to adopt a code of ethics and safeguard material nonpublic client information.

[39] Rule 204A–1(b)(1)(i)(A) and (b)(2)(i). Rule 204A–1 provides that beneficial ownership is to be interpreted in the same manner as for purposes of rule 16a–1(a)(2) under the Securities Exchange Act of 1934 in determining whether a person has beneficial ownership of a security for purposes of section 16 of that Act. Rule 204A–1(e)(3). This is the same as the standard under rule 17j–1. Rule 17j–1 1999 Adopting Release, *supra* note. It is also the standard used under our current adviser recordkeeping rule. *See* rule 204–2(a)(12)(iii)(B). Rule 204A–1, again like rule 17j–1, provides that any required report may contain a disclaimer of beneficial ownership by the person making the report.

[40] Rule 16a–1(a)(2)(ii)(A) [17 CFR 240.16a–1(a)(2)(ii)(A)].

[41] The term "security" is defined in section 2(a)(18) of the Act. [15 U.S. 80b–2(a)(18)].

[42] Rule 204A–1(e)(10). No investment adviser is required to take advantage of these exceptions; an adviser is free to require its access persons to report their holdings and transactions in all securities, notwithstanding these exceptions.

[43] Rule 204A–1(e)(10)(i).

[44] Rule 204A–1(e)(10)(ii). We have interpreted "high quality short-term debt instrument" to mean any instrument having a maturity at issuance of less than 366 days and which is rated in one of the highest two rating categories by a Nationally Recognized Statistical Rating Organization, or which is unrated but is of comparable quality. *Personal Investment Activities of Investment Company Personnel and Codes of Ethics of Investment Companies and Their Investment Advisers and Principal Underwriters*, Investment Company Act Release No. 21341 (Sept. 8, 1995) [60 FR 47844 (Sept. 14, 1995)] (proposing amendments to rule 17j–1) at n. 66.

[45] Rule 204A–1(e)(10)(iii).

[46] Rule 204A–1(e)(9) and (10)(iv). Transactions and holdings in shares of closed-end investment companies would be reportable regardless of affiliation. The exception extends only to open-end funds registered in the U.S.; therefore, transactions and holdings in offshore funds would also be reportable.

[47] Rule 204A–1(e)(10)(v). This exception is aimed at variable insurance contracts that are funded by

Continued

The rule thus requires access persons to report shares of mutual funds advised by the access person's employer or an affiliate, and is designed to help advisers (and our examiners) identify abusive trading by personnel with access to information about a mutual fund's portfolio.[48]

D. Initial Public Offerings and Private Placements

The code of ethics must require that access persons obtain the adviser's approval before investing in an initial public offering ("IPO") or private placement.[49] Most individuals rarely have the opportunity to invest in these types of securities; an access person's IPO or private placement purchase therefore raises questions as to whether the employee is misappropriating an investment opportunity that should first be offered to eligible clients, or whether a portfolio manager is receiving a personal benefit for directing client business or brokerage.[50] Advisory firms with only one access person would not be required to have that access person pre-clear these investments.[51] We are adopting this provision as proposed.[52]

E. Reporting Violations

Under rule 204A–1, each adviser's code of ethics must require prompt internal reporting of any violations of the code.[53] Violations must be reported to the adviser's chief compliance officer. An investment adviser can choose to have supervised persons report violations to either the chief compliance officer or to other persons designated in the code of ethics. But an advisory firm that designates someone other than the chief compliance officer to receive reports of code violations from supervised persons must have procedures requiring that the chief compliance officer also receives reports periodically of all violations. We caution advisers, however, that it is incumbent on them to create an environment that encourages and protects supervised persons who report violations. Advisers should consider how they can best prevent retaliation against someone who reports a violation; many advisers may choose to permit anonymous reporting, others may decide that retaliation constitutes a further violation of the code, and still others may find other methods to ensure that concerned employees feel safe to speak freely.

We are not, as some commenters suggested, adopting a system of fines or other penalties for violations of a code of ethics, nor are we requiring codes of ethics to include a discussion of penalties. We note, however, that many advisers do so, so that employees have a meaningful understanding of the importance of the code and of the consequences of violating it.[54]

F. Educating Employees About the Code of Ethics

Under rule 204A–1, an adviser's code of ethics must require the adviser to provide each supervised person with a copy of the code of ethics and any amendments.[55] The code must also require each supervised person to acknowledge, in writing, his receipt of those copies.[56] While some commenters opposed this requirement, most who addressed it were supportive. Some commenters went further, and recommended we mandate that advisers educate employees as to the code of ethics. An investment adviser's procedures for informing its employees about its code of ethics are critical to obtaining good compliance and avoiding inadvertent violations of the code. Although we do not believe it is necessary to require employee education as an element of codes of ethics, we expect most advisory firms will ensure that their employees have received adequate training on the principles and procedures of their codes. Many firms that have already implemented codes of ethics hold periodic orientation or training sessions with new and existing employees to remind them of their obligations under the code; others may require employees to certify that they have read and understood the code of ethics, and require annual recertification that the employee has re-read, understands and has complied with the code. We are not mandating any of these procedures, but they are among best practices for advisers.

G. Adviser Review and Enforcement

Rule 204A–1 requires that advisers maintain and enforce their codes of ethics.[57] We expect that the adviser's chief compliance officer, or persons under his authority, will have primary responsibility for enforcing the adviser's code of ethics.[58] Enforcement of the code must include reviewing access persons' personal securities reports.[59] As discussed below, we are not adopting the proposed requirement that records of these reports be maintained in an accessible electronic database. However, we question seriously whether a larger investment advisory firm will be able adequately to review such reports manually or on paper. Review of personal securities holding and transaction reports should include not only an assessment of whether the access person followed any required internal procedures, such as pre-clearance, but should also compare the personal trading to any restricted lists; assess whether the access person is trading for his own account in the same securities he is trading for clients, and

insurance company separate accounts organized as unit investment trusts. Such separate accounts typically are divided into subaccounts, each of which invests exclusively in shares of an underlying open-end fund. Commenters suggested that these investments be excepted to the same extent as the underlying open-end funds.

[48] Portfolio managers' short-term trading in fund shares has been an issue in our recent enforcement actions. *See, e.g., Putnam, supra* note 3.

[49] Rule 204A–1(c).

[50] *See, e.g., In the Matter of Monetta Financial Services, Inc., Robert S. Bacarella, and Richard D. Russo,* Investment Advisers Act Release No. 2136 (Jun. 9, 2003) (investment adviser to mutual funds improperly allocated IPO shares in which funds could have invested to certain access persons of the funds without adequate disclosure or approval); *In the Matter of Ranald V. Speaker and Janus Capital Corporation,* Investment Company Act Release No. 22461 (Jan. 13, 1997) (portfolio manager made a profit on same day purchase and sale of debentures in which fund could have invested, and failed to disclose transactions to the fund or obtain prior consent of the fund); *U.S.* v. *Ostrander,* 999 F.2d 27 (2d Cir. 1993) (affirming conviction of portfolio manager for accepting unlawful compensation where she purchased privately offered warrants of a company whose securities she acquired for the fund).

[51] Rule 204A–1(d). Firms with only one access person are generally one-person operations. It would make little sense to require the individual to pre-clear investments with himself. *See supra* note 38.

[52] Advisers that elect to prohibit their access persons from investing in IPOs and private placements would not have to include this pre-clearance provision.

[53] Rule 204A–1(a)(4). We adopted a similar provision under section 406 of the Sarbanes-Oxley Act. *See* Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8177 (Jan 23, 2003) [68 FR 5109 (Jan. 31, 2003)].

[54] Our understanding is that penalties for violations vary from one firm to another, and depend on the type of violation involved. Employees may be required to cancel trades, disgorge profits or sell positions at a loss, and may face internal reprimands, fines, or firing.

[55] Rule 204A–1(a)(5).

[56] *Id.* These written acknowledgements may be made electronically.

[57] Rule 204A–1(a). Some firms may, in their code, reserve the right to waive compliance with certain of the code's provisions. Of course, if a code provision is required by new rule 204A–1 (or by rule 17j–1), the advisory firm cannot waive a supervised person's compliance with that provision.

[58] Advisers to investment companies must provide the investment company's board of directors with an annual report describing any issues arising under the code of ethics. *See* rule 17j–1(c)(2)(ii). Such annual report must include a discussion of any material violations of the code and whether any waivers that might be considered important by the board were granted during the period.

[59] Rule 204A–1(a)(3).

if so whether the clients are receiving terms as favorable as the access person takes for himself; periodically analyze the access person's trading for patterns that may indicate abuse, including market timing; investigate any substantial disparities between the quality of performance the access person achieves for his own account and that he achieves for clients; and investigate any substantial disparities between the percentage of trades that are profitable when the access person trades for his own account and the percentage that are profitable when he places trades for clients.

H. Recordkeeping

We are amending rule 204–2 under the Advisers Act to reflect new rule 204A–1. Because the codes of ethics will already cover personal securities transaction and holdings reports, we have been able to simplify rules 204–2(a)(12) and (13) significantly.[60] As amended, rule 204–2(a)(12) requires advisers to keep copies of their code of ethics, records of violations of the code and actions taken as a result of the violations, and copies of their supervised persons' written acknowledgement of receipt of the code. As discussed earlier, rule 204A–1 requires prompt internal reporting of violations of the code of ethics,[61] but we are not requiring advisers to keep records of these whistleblower reports.[62] Commenters have persuaded us that requiring these records could have a chilling effect on employees' willingness to report violations, particularly in smaller organizations. Rule 204–2(a)(13), as amended, covers records of access persons' personal trading. It requires advisers to keep a record of the names of their access persons, the holdings and transaction reports made by access persons, and records of decisions approving access persons' acquisition of securities in IPOs and limited offerings.

We proposed, but are not requiring, records of access persons' personal securities reports (and duplicate brokerage confirmations or account statements in lieu of those reports) to be maintained electronically in an accessible computer database. Commenters were concerned that the requirement would be unduly burdensome and would require them to input large quantities of data manually. Although we are not adopting this requirement, as discussed above, we have strong expectations that most advisers will need to maintain these records electronically in order to meet their responsibilities to review these records and monitor compliance with their codes.

The standard retention period required for books and records under rule 204–2 is five years, in an easily accessible place, the first two years in an appropriate office of the investment adviser.[63] Advisers must maintain the records required under amended rule 204–2(a)(12) and (13) for this standard period, subject to special holding requirements for certain categories of records as specified in amended rule 204–2(a)(12) and (13). Codes of ethics must be kept for five years after the last date they were in effect. Supervised person acknowledgements of the code must be kept for five years after the individual ceases to be a supervised person.[64] Similarly, the list of access persons must include every person who was an access person at any time within the past five years, even if some of them are no longer access persons of the adviser.[65]

I. Amendment to Form ADV

We are amending part II of Form ADV, as proposed, to require advisers to describe their codes of ethics to clients and, upon request, to furnish clients with a copy of the code of ethics.[66] This disclosure will serve two functions: first, it will help clients understand the adviser's ethical culture and standards, how the adviser controls sensitive information and what steps it has taken to prevent employees from misusing their inside positions at clients' expense. Clients will be able to select advisers whose ethical commitment meets their expectations. Second, disclosure will act as sunlight, encouraging advisers to implement more effective procedures by exposing them to view, and encouraging advisers to adhere strictly to the procedures they disclose.[67]

J. Amendments to Rule 17j–1

As proposed, we are revising a provision of rule 17j–1 to state that no report would be required under rule 17j–1 "to the extent that" the report would duplicate information required under the Advisers Act recordkeeping rules.[68] Currently, the rule contains an exception only if "all of" the information in the report would duplicate information required to be recorded under Advisers Act rules. The reports we are requiring under the Advisers Act are not identical to those required under rule 17j–1, and this amendment avoids unnecessary duplication.

In the proposing release, we also requested comment whether, to the extent rule 204A–1 as adopted differed from rule 17j–1, we should make conforming changes to rule 17j–1. With limited exception, commenters addressing this issue expressed a desire to keep the rules as parallel as possible and suggested that rule 17j–1 be modified in some respects. We are persuaded that four changes should be made to rule 17j–1. First, rule 17j–1 as amended provides that the information in initial and annual holdings reports must be current as of a date no more than 45 days prior to the individual becoming an access person under the rule (initial holdings report), or submitting the report (annual holdings report).[69] Second, quarterly transaction reports will be due no later than 30 days after the close of the quarter, rather than 10 days as currently provided.[70] Third, quarterly transaction reports need not be submitted with respect to transactions effected pursuant to an automatic investment plan.[71]

Fourth, we are revising the definition of "access person."[72] Under the amended rule, an access person includes an advisory person of a fund or its investment adviser. We are eliminating the revenue-based test for determining whether an investment

[60] Currently, these sections lay out fairly complex requirements for the information that an adviser must keep regarding personal securities transactions of "advisory representatives," which include the adviser's personnel, directors, officers and partners.

[61] *See supra* note 53.

[62] An adviser could, for example, record the facts and circumstances surrounding a violation of the code, but omit mention of the employee who brought the problem to the adviser's attention.

[63] Rule 204–2(e) (retention period of five years from the end of the fiscal year during which the last entry was made on such record).

[64] One commenter suggested that the acknowledgement be kept only for five years after it was made. We are not adopting this suggestion, because it could mean that an adviser would have no records of acknowledgement from long-term employees.

[65] In addition, records supporting decisions to approve access persons' acquisitions of IPOs or private placements must be retained for at least five years after the end of the fiscal year in which the approval is granted.

[66] We are amending Item 9 of Form ADV Part II, which asks whether the adviser or a "related person" (that is, a person that controls the adviser, is controlled by the adviser, or is under common control with the adviser) participates or has an interest in client transactions. In April 2000, we proposed a new version of part 2 that called for a narrative disclosure brochure, and which moved this disclosure topic to Item 10.

[67] An investment adviser that disclosed its policies and procedures but then materially deviated from them may be subject to action under section 206 of the Advisers Act.

[68] Rule 17j–1(d)(2)(iv).

[69] Rule 17j–1(d)(1)(i) and (iii).

[70] Rule 17j–1(d)(1)(ii).

[71] Rule 17j–1(d)(2)(vi).

[72] Rule 17j–1(a)(1)(i).

adviser's primary business is advising funds and other advisory clients. Advisers with other primary businesses used this test to exclude certain of their officers, directors and general partners from being considered access persons under the rule. We are replacing the revenue-based test with the same legal presumption we are adopting in new rule 204A–1—that directors, officers and general partners are presumed to be access persons if the firm's primary business is investment advisory.[73]

III. Effective Date

The effective date of the new rule and amendments is August 31, 2004. Advisers must comply with the new rule and rule amendments by January 7, 2005. By this compliance date, each adviser must have adopted its code of ethics and be prepared to maintain and enforce it. In addition to fundamentals such as articulating its chosen standards of conduct, each adviser's preparation will necessarily include identifying its access persons, providing a copy of the code of ethics to each supervised person and receiving their acknowledgement. Also by January 7, 2005, each adviser must have an initial holdings report from each access person, and must arrange for the submission of quarterly transaction reports. Access persons' personal securities transaction reports for the calendar quarter ended March 31, 2005 will be due no later than April 30, 2005. Until advisers begin to comply with new rule 204A–1, the amendments to rule 204–2, and the amendments to Form ADV Part II, they must continue to comply with the personal securities transaction recordkeeping requirements of our current rule 204–2(a)(12) and (13).

IV. Cost-Benefit Analysis

The Commission is sensitive to the costs and benefits resulting from our rules. The new rule we adopt today requires investment advisers to establish, maintain, and enforce codes of ethics for their supervised persons. These codes of ethics must establish standards of business conduct reflecting the fiduciary obligations of the adviser and its personnel and impose personal securities reporting measures designed to prevent access persons from abusing information about clients' securities transactions. We are also adopting related recordkeeping and client disclosure amendments under the Advisers Act and conforming amendments under the Company Act.[74]

In our Proposing Release, we carefully analyzed the costs and benefits of our proposed rule and amendments and requested comment regarding the costs and benefits. Most commenters supported requiring advisers to have written codes of ethics, although several commenters expressed reservations at the potential costs of the proposed electronic recordkeeping requirement for personal securities transactions. Only one commenter specifically addressed our cost-benefit analysis.

We are adopting the rule and amendments substantially as proposed, with some revisions in response to comments, including elimination of the proposed electronic recordkeeping requirement for personal securities transactions. We believe our original analyses regarding the benefits and costs of the rule and amendments remain accurate. Most of the benefits and costs under the new rule and amendments, however, are not quantifiable.

A. Benefits

Codes of ethics under new rule 204A–1 should benefit advisory clients as well as advisory firms. The codes will impress upon advisers' supervised persons the significance of the fiduciary aspects of their professional responsibilities, formulating these into standards of conduct to which their employers will hold these individuals accountable. Codes of ethics will also be an important part of advisers' efforts to prevent fraudulent personal trading by their supervised persons. As a result, these codes increase investor protection by forestalling supervised persons from engaging in misconduct that defrauds clients. In addition, the Form ADV amendments, which require advisers to describe their codes of ethics to clients and to furnish copies to clients upon request, put clients in a better position to evaluate whether their advisers' codes of ethics meet their expectations. If a client is not confident that an advisory firm has taken appropriate measures to prevent its personnel from placing their own interests ahead of their clients' interests, the client will be able to seek a different adviser whose measures he approves.

Rule 204A–1 will reinforce existing measures that require investment advisers to guard against employee misconduct. It goes beyond section 204A of the Advisers Act, which focuses on policies and procedures to prevent misuse of material nonpublic information by advisory firm personnel. Rule 204A–1 expands advisers' policies to address other situations in which such personnel could potentially benefit at the expense of firm clients. It also goes beyond Company Act rule 17j–1, which focuses on fraud in connection with securities held or to be acquired by an investment company advised by an adviser. Rule 204A–1 expands advisers' policies to address advisory personnel's holdings and transactions in shares of investment companies managed by the adviser. Codes of ethics will also assist advisers in meeting their obligations under Advisers Act rule 206(4)–7 to adopt policies and procedures reasonably designed to prevent their supervised persons from violating the Advisers Act.

Rule 204A–1 will benefit investment advisers by renewing their attention to their fiduciary and other legal obligations, and by increasing their vigilance against inappropriate behavior by employees. This may have the effect of diminishing the likelihood that their firms will be embroiled in securities violations, Commission enforcement actions, and private litigation. For an adviser, the potential costs associated with a securities law violation may consist of much more than merely the fines or other penalties levied by the Commission or civil liability. The reputation of an adviser may be significantly tarnished, resulting in lost clients. Advisers may be denied eligibility to advise funds.[75] In addition, advisers could be precluded from serving in other capacities.[76]

Our revision of advisers' recordkeeping obligations for personal securities transactions will also benefit investment advisers. The amended rules are easier to understand than the

[73] In addition, the directors, officers and general partners of a fund are presumed to be access persons of the fund.

[74] We are adopting amendments to rule 204–2, the recordkeeping rule under the Advisers Act, to address documentation of advisers' compliance with rule 204A–1. We are also amending Part II of Form ADV, which specifies certain information investment advisers must disclose to their clients, to require advisers to include a discussion of their codes of ethics and make copies available to clients upon request. We are adopting amendments to rule 17j–1, the code of ethics rule under the Company Act, to conform certain of its provisions to those in new rule 204A–1.

[75] Section 9(a) of the Investment Company Act [15 U.S.C. 80a–9(a)] prohibits a person from serving as an adviser to a fund if, within the past 10 years, the person has been convicted of certain crimes or is subject to an order, judgment, or decree of a court prohibiting the person from serving in certain capacities with a fund, or prohibiting the person from engaging in certain conduct or practice.

[76] *See, e.g.*, 29 U.S.C. 1111(a) (prohibiting a person from acting in various capacities for an employee benefit plan, if within the past 13 years, the person has been convicted of, or has been imprisoned as a result of, any crime described in section 9(a)(1) of the Investment Company Act [15 U.S.C. 80a–9(a)(1)]).

complex provisions currently contained in Advisers Act rule 204–2(a)(12) and (13). The requirement that advisers maintain information about their access persons' personal securities transactions will enable firms to detect trading patterns that may indicate abuse.[77] In addition, the requirement that each access person provide initial and annual holdings reports allows investment advisers to better monitor conflicts that may arise when an access person participates in investment decisions involving securities the access person holds in his or her portfolio, and to assess whether access persons are filing accurate quarterly transaction reports.

B. Costs

The new rule and amendments will result in some additional costs for advisers. It is possible that advisers may pass these costs along to their clients in the form of advisory fees.[78] Advisers, however, are already required to maintain various policies and procedures that would constitute core elements of their codes of ethics, and therefore many of these costs are already reflected in fees clients currently pay. Advisers are required, under section 204A of the Advisers Act, to maintain and enforce written policies and procedures reasonably designed to prevent the firm or its employees from misusing material nonpublic information. Also, the approximately 1,500 advisers who advise registered investment companies currently have codes of ethics to prevent their "access persons" from abusing their access to information about the fund's securities trading, pursuant to Company Act rule 17j–1.[79] In addition, advisers are required under Advisers Act rule 206(4)–7 to adopt policies and procedures reasonably designed to prevent their supervised persons from violating the Advisers Act. Accordingly, we believe requiring written codes of ethics will impose few new costs on advisers.

Similarly, our rule to require access persons to report personal securities transactions should cause only minor cost increases. Advisers are already required to maintain records of their advisory representatives' personal securities transactions on a quarterly basis under Advisers Act rules 204–2(a)(12) and (13). The additional reporting required of access persons under our new rule—an annual report of securities holdings—should impose only minor additional costs.[80] Because most SEC-registered investment advisers have so few employees, we believe the cost of these additional reports will be minor. As of December 2003, 49% of investment advisers registered with us reported that they had five or fewer non-clerical employees, and another 18% reported that they had only six to ten non-clerical employees.[81] The majority of larger SEC-registered advisers are already subject to Company Act rule 17j–1 because they advise investment companies, and consequently obtain annual reports from their "access persons" that contain virtually the same information as would be required under our proposals. These larger firms are also in a position to limit the number of supervised persons subject to the reporting requirements, by imposing stringent controls on who obtains access to client securities information.

Many commenters expressed concern regarding the cost of the proposed requirement that advisers maintain records of personal securities transactions electronically. The Commission is not adopting the proposed electronic recordkeeping requirement.

One commenter stated that significant costs would result from the new rule's requirement that advisers review supervised persons' securities holdings and transaction reports to monitor them for abuses. The Commission recognizes that advisers will experience costs in conducting their review. The benefits to investors and to advisory firms themselves in terms of improved detection and prevention of abuses will, however, justify these costs. Moreover, the incremental cost imposed by the new rule in this regard is diminished to the extent that advisers should already be conducting such a review. An adviser's fiduciary duty of loyalty to its clients may require it to take steps to protect clients from such abuses by the adviser's personnel, and section 204A of the Advisers Act requires the adviser to enforce its policies and procedures designed to prevent misuse of material nonpublic information.

We expect only minor cost increases from the new requirement that access persons obtain their advisers' approval before investing in an initial public offering or private placements. Our experience administering the same requirement under Company Act rule 17j–1 has been that such proposals are infrequent, even at larger advisory firms. We also believe that our new requirement that advisers describe their codes of ethics to clients in their Form ADV and provide copies on request will impose only minor cost increases. We expect few clients will request a copy of the code, and that the cost to provide it will be minimal.

V. Effects on Competition, Efficiency and Capital Formation

Section 202(c) of the Advisers Act [15 U.S.C. 80b–2(c)] mandates that the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

As discussed above, rule 204A–1 requires investment advisers to adopt codes of ethics applicable to their supervised persons. These codes of ethics must establish standards of business conduct reflecting the fiduciary obligations of the adviser and its personnel and impose personal securities reporting measures designed to prevent access persons from abusing their access to information about clients' securities transactions. We expect that the proposed rule may indirectly increase efficiency by forestalling supervised persons from engaging in misconduct that defrauds clients and harms the advisory firm, or by facilitating the adviser's early intervention to protect its clients. In addition, the existence of an industry-wide code of ethics requirement may enhance efficiency further by encouraging third parties to create new informational resources and guidance to which industry participants can refer in establishing and improving their codes.

Since the rule applies equally to all registered advisers, we do not anticipate that it introduces any competitive disadvantages. We expect that the rule may indirectly foster capital formation by bolstering investor confidence. To the extent that investors know that advisory firms have taken measures designed to prevent their supervised persons from placing their interests

[77] Although the Commission is not adopting the proposed requirement that advisers maintain these records electronically, as previously noted we have strong expectations that most advisers will need to maintain these records electronically in order to meet their responsibilities to review these records and monitor compliance with their codes.

[78] We understand, however, that many advisers have already adopted codes of ethics for their firm and their employees. We are unaware whether these firms charge higher advisory fees than firms that have not yet adopted codes of ethics.

[79] Based on our records of information submitted to us by investment advisers in Part 1 of Form ADV through December 10, 2003, approximately 1,500 advisers report that they manage portfolios for investment companies.

[80] The Commission is not adopting its proposal to require quarterly reports indicating that no transactions were effected.

[81] This is based on Form ADV data (under Item 5.A of Part 1A) submitted to us by 8,019 SEC-registered investment advisers through December 9, 2003.

ahead of their clients' interests, clients are more likely to make assets available through advisers for investment in the capital markets.

VI. Paperwork Reduction Act

As we discussed in the Proposing Release, the new rule and rule and form amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995.[82] These collections of information are mandatory. One of the collections of information is new. The title of this new collection is "Rule 204A–1," which the Commission submitted to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The OMB has approved this collection under control number 3235–0596 (expiring on March 31, 2007). The other collections of information take the form of amendments to currently approved collections titled "Rule 204–2," under OMB control number 3235–0278, and "Form ADV," under OMB control number 3235–0049. The Commission also has submitted the amendments to these collections to the OMB for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The OMB has approved these collections under control numbers 3235–0278 (expiring on July 31, 2007) and 3235–0049 (expiring on July 31, 2007), respectively. 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.

The collection of information under rule 204A–1 is necessary to establish standards of business conduct for supervised persons of investment advisers and to facilitate investment advisers' efforts to prevent fraudulent personal trading by their supervised persons. The collection of information is mandatory. The respondents are investment advisers registered with us, and certain of their supervised persons who must submit reports of their personal trading activities to their firms. These investment advisers use the information collected to control and assess the personal trading activities of their supervised persons. Responses to the reporting requirements will be kept confidential to the extent each investment adviser provides confidentiality under its particular practices and procedures.

The collection of information under rule 204–2 is necessary for the Commission staff to use in its examination and oversight program. This collection of information is mandatory. The respondents are investment advisers registered with us. Responses provided to the Commission in the context of its examination and oversight program are generally kept confidential.[83] The records that an adviser must keep in accordance with rule 204–2 must generally be retained for not less than five years.[84]

The collection of information under Form ADV is necessary to provide advisory clients and prospective clients with information about an adviser's code of ethics. This collection of information is mandatory. The respondents are investment advisers registered with us. Clients of these investment advisers use the information collected to assess measures the adviser has taken to prevent its supervised persons from placing their own interests ahead of the adviser's clients' interests. Responses to the disclosure requirements are not kept confidential.

A. Rule 204A–1

Rule 204A–1 requires SEC-registered investment advisers to establish a written code of ethics for their supervised persons.[85] We estimated in the Proposing Release that each adviser would spend six hours annually, on average, documenting its code of ethics, taking into consideration that investment advisers currently maintain policies and procedures that can be the basis for their code of ethics and that advisers to investment companies already have fully developed codes of ethics. Based on our estimate in the Proposing Release that 8,019 advisers would incur the burden, the burden estimate for establishing a written code of ethics was 48,114 hours.[86]

Rule 204A–1 also requires each adviser's code of ethics to include provisions under which the adviser provides each supervised person with a copy of the code of ethics and any amendments, and obtains written acknowledgment of receipt from the supervised person. Based on our estimates that, on average, each investment adviser has 100 supervised persons,[87] will hire 5 new supervised persons each year, and each adviser will amend their codes once every other year, that advisers will have to provide a copy of their codes of ethics and obtain an acknowledgment of receipt 55 times each year.[88] We further estimated in the Proposing Release that it will take an investment adviser 0.05 hours on average for each iteration, for an annual burden of 2.75 hours per adviser and a total burden of 22,052.25 hours for all advisers related to informing supervised persons of adviser codes of ethics.[89]

Lastly, rule 204A–1 also requires each adviser's code of ethics to include provisions under which the adviser's "access persons" report their personal securities transactions and holdings to the adviser.[90] To estimate the annual paperwork burden stemming from this requirement we relied on the following assumptions: (1) Advisers would treat all their non-clerical employees as access persons; (2) advisers have, on average, 84 non-clerical employees; [91] (3) initial and annual holdings reports will take 0.7 hours on average; and (4) quarterly transaction reports will take 0.6 hours on average annually.[92] Using these assumptions, we estimated in the Proposing Release that the total annual burden hours for all access persons under the proposed would be 875,675 hours.[93]

One significant amendment to rule 204A–1 that addressed commenters concerns materially reduces the paperwork burden on advisers. Because we are no longer requiring access persons to make quarterly reports when they do not have securities transactions, we are thus adopting rule 204A–1 with revised paperwork collection requirements. Accordingly, our estimate of the total annual burden for rule 204A–1 in the Proposing Release of

[82] 44 U.S.C. 3501 to 3520.

[83] *See* section 210(b) of the Advisers Act [15 U.S.C. 80b–10(b)].

[84] *See* rule 204–2(e) [17 CFR 275.204–2(e)].

[85] Rule 204A–1(a).

[86] 8,019 advisers × 6 hours = 48,114 total annual hours.

[87] This estimate is based on each adviser having on average 84 non-clerical and 16 clerical employees.

[88] Over any two-year period, 100 copies of amendments in year 1 + 10 copies of complete code for new supervised persons in year 1 through 2 = 110 copies, divided by 2 years = 55 copies.

[89] 0.05 hours per copy × 55 copies per year = 2.75 hours. 2.75 hours × 8,019 investment advisers = 22,052.25 hours total.

[90] Rule 204A–1(a)(3).

[91] This average is based on Form ADV data that asks for the total number of employees. We believe this estimate overstates the typical number of access persons for an adviser, since the data is skewed significantly higher by the largest (in terms of number of employees) 100 advisers.

[92] We estimated in the Proposing Release that quarterly transaction reports would take 0.6 hours per access person. In a change from the proposed rule, the adopted rule does not require quarterly reports for any quarter in which the access person makes no security transactions. In the Proposing Release, we assumed for purposes of estimating access person reporting that access persons would typically file transaction reports indicating no transactions in 3 out of the 4 quarters. Thus we have reduced by half the amount of time allocated for access person transaction reporting, as discussed below.

[93] (0.7 hours holdings report + 0.6 hours transactions report) × (84 access persons × 8,019 investment advisers) = 875,675 hours.

945,841.25 hours is reduced to 743,762.25 hours.[94]

B. Rule 204–2

In the Proposing Release, we estimated that the amendments to rule 204–2 would result in an approximate 10% net decrease from the currently approved annual aggregate collection of information burden.[95] Eliminating the requirement that advisers retain records relating to the personal securities transactions of advisory representatives reduces the annual average burden of the rule,[96] while the new recordkeeping requirements under the amendments to rule 204–2 add to the burden, as does the increase of 229 advisers registered with us.[97]

Many commenters objected to the proposed requirement to require advisers to maintain access person reports electronically. The amended rule does not include this requirement, but this amendment does not change the information collection burden estimate.[98] Our total hour burden estimate for the collection of information under rule 204–2 remains 1,537,883.8 burden hours, as we estimated in our proposal.[99]

[94] Eliminating these quarterly reports decreases the burden of quarterly transaction reporting on access persons from 0.6 hours to 0.3 hours, or a total of 202,079 hours (0.3 hours × 84 access persons × 8,019 advisers = 202,079). Our revised total burden is as follows: 48,114 hours by advisers to record their codes of ethics + 673,596 hours for reporting by access persons + 22,052.25 hours for advisers to deliver copies of codes and amendments = 743,762.25.

[95] Prior to the adoption of the amendments herein, the approved annual aggregate information collection burden was 1,651,324.2 hours (based on 7,790 advisers) or 211.98 hours per firm for rule 204–2.

[96] In the Proposing Release we estimated that the reduction would be 25.2 hours per firm (0.3 hours per access person to record the transactions × 84 access persons per firm). This results in a reduction on a per firm basis to 186.78 hours (211.98 − 25.2).

[97] The new recordkeeping obligations under the rule include the maintenance of access person holding and quarterly transaction reports, retention of the codes of ethics, supervised person acknowledgments, records of the names of the firm's access persons, records of any violation of the codes of ethics and any action taken, and records of any decision under rule 204A–1 to permit an access person to invest in an initial public offering or private placement. In the Proposing Release we estimated that these new collections would add 5 hours on average per adviser to the annual hour burden of the rule. This results in a per firm annual burden estimate of 191.78 hours (186.78 + 5).

[98] In the Proposing Release, we estimated no incremental burden in connection with the proposed requirement for advisers to maintain access person reports electronically. We estimated advisory firms would be able to use their existing computer software, taking transaction data electronically from the same broker-dealers that advisory firms use to obtain electronic information about client transactions.

[99] 191.78 hours per adviser × 8,019 advisers = 1,537,883.8 hours.

C. Form ADV

In the proposing release, we estimated that the amendments to Form ADV (requiring advisers to describe their codes of ethics and furnish a copy upon request) would increase the annual collection burden under Form ADV by 6.95 hours per adviser.[100] One trade group commenter recommended that we allow web site posting of the code of ethics in lieu of furnishing a copy upon request. We do not believe that web access is universal at this time so we are adopting amendments to Form ADV without change and, accordingly, our total burden hour estimate remains at 102,653 burden hours.[101]

VII. Final Regulatory Flexibility Analysis

The Commission proposed new rule 204A–1 and amendments to rule 204–2 and Form ADV under the Advisers Act, and amendments to rule 17j–1 under the Company Act, in a release on January 20, 2004 ("proposing release"). An Initial Regulatory Flexibility Analysis ("IRFA") was published in the proposing release. No comments were received specifically on the IRFA. The Commission has prepared the following Final Regulatory Flexibility Analysis ("FRFA") in accordance with 5 U.S.C. 604, regarding rule 204A–1 and amendments to rule 204–2 and Form ADV under the Advisers Act and amendments to rule 17j–1 under the Company Act.

A. Need for the Rule and Amendments

Sections I and II of this Release describe the background and reasons for the new rule and rule amendments. As we discussed in detail above, the rule and amendments are designed to promote compliance with fiduciary standards by advisers and their personnel.

B. Significant Issues Raised by Public Comment

The Commission received 44 letters from commenters in response to the proposing release. Commenters supported the proposal. As discussed in section II of this Release, the Commission is adopting the new rule and rule amendments substantially as proposed with some changes to respond to commenters' suggestions. Commenters opposed a proposed requirement that advisers keep records of access persons' personal securities reports electronically in an accessible database, and the Commission is not adopting this provision of the proposal. The Commission specifically requested comments with respect to the IRFA, but did not receive any comments specifically concerning the IRFA.

[100] 0.25 hours preparing a description of the code of ethics + 6.7 hours responding to requests for copies of the code of ethics (based on a 10% request rate by the 670 average number of clients per adviser and 0.1 hours for delivery).

[101] (0.25 hours + 6.7 hours) × 8,019 advisers = 55,732 hours. 46,921 hours (existing total) + 55,732 hour increase = 102,653 hours.

C. Small Entities Subject to Rule

The new rule and rule amendments under the Advisers Act apply to all advisers registered with the Commission, (and the amendments to rule 17j–1 apply to all investment companies) including small entities. In developing the new rule and amendments, we have considered their potential effect on small entities. Under Commission rules, for purposes of the Regulatory Flexibility Act, an investment adviser generally is a small entity if it: (i) Has assets under management having a total value of less than $25 million; (ii) did not have total assets of $5 million or more on the last day of its most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had $5 million or more on the last day of its most recent fiscal year.[102] The Commission estimates that approximately 570 SEC-registered investment advisers are small entities that are affected by the new rules and rule amendments.[103]

For purposes of the Regulatory Flexibility Act, a registered investment company ("fund") is a small business or small organization (collectively, "small entity") if the fund, together with other funds in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[104] The Commission estimates that approximately 204 registered investment companies are small entities.[105] As discussed in section II of this Release, the amendments to rule 17j–1 (i) allow advisers to rely on a reporting exception in the rule if the adviser already maintains duplicate

[102] 17 CFR 275.0–7(a).

[103] This estimate is based on the information submitted by SEC-registered advisers in part 1A of Form ADV as of May 1, 2004.

[104] 17 CFR 270.0–10.

[105] This estimate, which is current as of December 2003, is derived from analyzing information from Form N–SAR and various databases including Lipper. Some or all of these entities may contain multiple series or portfolios. If a registered investment company is a small entity, the portfolios or series it contains are also small entities.

information under records required by certain Advisers Act rules, (ii) exempt certain transactions from required reporting, and (iii) replace with a legal presumption a revenue-based test for the primary business of the adviser. Whether the amendments to rule 17j–1 affect small entities depends on whether the small entities rely on the reporting exception or use the exemption, and whether the small entity is primarily engaged in the business of advising investment companies or other advisory clients.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The amendment to Form ADV imposes a new reporting requirement on advisers, requiring that they make an additional disclosure statement in their brochures describing their codes of ethics and noting that copies of the codes are available from the adviser upon request. Although new rule 204A–1 and the other rule amendments under the Advisers Act impose no other new reporting requirements on registered advisers themselves, the new rule requires advisers' codes of ethics to impose a new reporting requirement on advisers' access persons by requiring certain new personal securities holdings and transaction reports. One rule amendment under the Company Act exempts certain personal securities transactions from existing quarterly reporting requirements.

The new rule and rule amendments create certain new recordkeeping and compliance requirements. The rule amendments impose new recordkeeping requirements by requiring that advisers maintain certain records pertaining to their codes of ethics and requirements of such codes (including records of personal securities holdings and transaction reports).[106] The new rule imposes new compliance requirements by requiring that SEC-registered investment advisers adopt codes of ethics, obtain written acknowledgments of their supervised persons' receipt of copies of the code and any amendments, review personal securities holdings and transaction reports filed by their access persons, and pre-approve investments by their access persons in IPOs and limited offerings.

[106] These records are: copies of the codes of ethics, records of violations of the codes of ethics, records of personal securities transactions and holdings reports, records of persons subject to reporting under the codes of ethics, records of decisions relating to approvals of investments in IPOs or limited offerings, and records of supervised person acknowledgments of the code of ethics. Advisers are generally required to retain these records for five years.

Small entities registered with the Commission as investment advisers are for the most part subject to these new reporting, recordkeeping and compliance requirements to the same extent as larger advisers. With regard to reporting of securities holdings and transactions and to pre-approvals of certain investments, however, certain small advisers, possibly including some that are small entities, are not subject to the new requirements. Additionally, we anticipate that most advisers will very rarely need to address violations to their codes of ethics and, similarly, should infrequently be asked by an access person to consider pre-approval of an investment in an IPO or limited offering. Small advisers will likely deal with violations or IPO and limited offering pre-approvals on an even more limited scale due to the smaller size of their operations. Furthermore, it is important to note that some of the new reporting, recordkeeping and compliance requirements replace, clarify or simplify existing requirements to which advisers, including those that are small entities, are already subject. To the extent that such requirements clarify or simplify existing requirements, the rule and amendments may actually alleviate reporting, recordkeeping, or compliance burdens on advisers, including those that are small entities.

E. Agency Action To Minimize Effect on Small Entities

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities.[107] In connection with the new rule and rule amendments, the Commission considered the following alternatives: (a) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (b) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (c) the use of performance rather than design standards; and (d) an exemption from coverage of the rule, or any part thereof, for such small entities.

With respect to the first alternative, the Commission believes that the flexibility built into the rules adequately addresses different compliance and reporting requirements. The Commission is not prescribing uniform codes of ethics, but gives each adviser the flexibility to design its own code in light of the firm's size and operational structure, and the particular types of conflicts encountered by the firm in connection with its business and clients. The amendments to rule 204–2 permit the use of brokerage confirmations and statements in lieu of separate reports, at the firm's option.

With respect to the second alternative, the Commission believes that clarification, consolidation, or simplification of the compliance and recordkeeping requirements under the rule for small entities unacceptably compromises the investor protections of the rule. Rule 204A–1 sets out minimum requirements for advisers' codes of ethics, which are designed to promote compliance with fiduciary standards by advisers and their personnel. Eliminating some or all of these requirements would potentially impede achievement of that objective. Similarly, in establishing the categories of records to be retained under amendments to rule 204–2, the records described by the rule are necessary for the Commission to evaluate advisers' compliance with rule 204A–1 as part of the Commission's inspection program.

With respect to the third alternative, the Commission believes that the compliance and reporting requirements contained in the new rule and rule amendments already appropriately use performance standards instead of design standards. The rule enumerates few elements required for codes of ethics, allowing all firms, including small firms, to tailor the remainder of their codes of ethics to the nature and scope of their business. Rule 204A–1 does not specify what standard of conduct an adviser must require of its supervised persons, but requires only that the adviser articulate a standard in its code of ethics. Similarly, the rule does not specify which supervised persons should have access to nonpublic information about client recommendations, trading and holdings, and does not prohibit or restrict personal securities transactions by access persons, but requires only that access persons report their personal securities trading and holdings to the adviser. Furthermore, the recordkeeping requirements under rule 204–2 do not specify the means by which an adviser must keep records to demonstrate its compliance with the rule.

Finally, with respect to the fourth alternative, the Commission notes that the rule exempts advisers with only one access person from personal securities reporting and pre-clearance of investments in IPOs and private placements. The codes of ethics are designed to promote advisers' fulfillment of their fiduciary duty to

[107] 5 U.S.C. 603(c).

clients and to guard against personal securities trading by advisers' access persons that may be contrary to clients' interests. Because the protections of the Advisers Act are intended to apply equally to clients of both large and small advisory firms, it would be inconsistent with the purposes of the Advisers Act to exempt small entities further from the rule and rule amendments or to specify different requirements for small entities.

VIII. Statutory Authority

We are adopting amendments to rule 17j–1 pursuant to our authority set forth in sections 17(j) and 38(a) of the Investment Company Act [15 U.S.C. 80a–17(j) and 80a–37(a)] and sections 206(4) and 211(a) of the Advisers Act [15 U.S.C. 80b–4 and 80b–11(a)].

We are adopting amendments to rule 204–2 pursuant to our authority set forth in sections 204 and 206(4) of the Advisers Act [15 U.S.C. 80b–4 and 80b–6(4)].

We are adopting rule 204A–1 pursuant to our authority set forth in sections 202(a)(17), 204A, 206(4) and 211(a) of the Advisers Act [15 U.S.C. 80b–2(a)(17), 80b–4a, 80b–6(4) and 80b–11(a)].

We are adopting amendments to Form ADV under section 19(a) of the Securities Act of 1933 [15 U.S.C. 77s(a)], sections 23(a) and 28(e)(2) of the Securities Exchange Act of 1934 [15 U.S.C. 78w(a) and 78bb(e)(2)], section 319(a) of the Trust Indenture Act of 1939 [15 U.S.C. 77sss(a)], section 38(a) of the Investment Company Act of 1940 [15 U.S.C. 78a–37(a)], and sections 203(c)(1), 204, and 211(a) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–3(c)(1), 80b–4, and 80b–11(a)].

Text of Rules and Form Amendments

List of Subjects in 17 CFR Parts 270, 275 and 279

Investment companies, Reporting and recordkeeping requirements, Securities.

■ For reasons set forth in the preamble, title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

■ 1. The authority citation for part 270 continues to read in part as follows:

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–34(d), 80a–37, and 80a–39, unless otherwise noted.

* * * * *

■ 2. Section 270.17j–1 is amended by:
■ a. Revising paragraph (a)(1)(i);
■ b. Revising paragraph (a)(2)(i);
■ c. Adding new paragraph (a)(11);
■ d. Revising the introductory text of paragraphs (d)(1)(i), (d)(1)(ii), and (d)(1)(iii);
■ e. Revising paragraph (d)(2)(iv); and
■ f. Adding new paragraph (d)(2)(vi).

The additions and revisions to read as follows:

§ 270.17j–1 Personal investment activities of investment company personnel.

(a) * * *

(1) * * *

(i) Any Advisory Person of a Fund or of a Fund's investment adviser. If an investment adviser's primary business is advising Funds or other advisory clients, all of the investment adviser's directors, officers, and general partners are presumed to be Access Persons of any Fund advised by the investment adviser. All of a Fund's directors, officers, and general partners are presumed to be Access Persons of the Fund.

* * * * *

(2) * * *

(i) Any director, officer, general partner or employee of the Fund or investment adviser (or of any company in a control relationship to the Fund or investment adviser) who, in connection with his or her regular functions or duties, makes, participates in, or obtains information regarding, the purchase or sale of Covered Securities by a Fund, or whose functions relate to the making of any recommendations with respect to such purchases or sales; and

* * * * *

(11) *Automatic Investment Plan* means a program in which regular periodic purchases (or withdrawals) are made automatically in (or from) investment accounts in accordance with a predetermined schedule and allocation. An Automatic Investment Plan includes a dividend reinvestment plan.

* * * * *

(d) * * *

(1) * * *

(i) *Initial Holdings Reports.* No later than 10 days after the person becomes an Access Person (which information must be current as of a date no more than 45 days prior to the date the person becomes an Access Person):

* * * * *

(ii) *Quarterly Transaction Reports.* No later than 30 days after the end of a calendar quarter, the following information:

* * * * *

(iii) *Annual Holdings Reports.* Annually, the following information (which information must be current as of a date no more than 45 days before the report is submitted):

* * * * *

(2) * * *

(iv) An Access Person to an investment adviser need not make a separate report to the investment adviser under paragraph (d)(1) of this section to the extent the information in the report would duplicate information required to be recorded under § 275.204–2(a)(13) of this chapter.

* * * * *

(vi) An Access Person need not make a quarterly transaction report under paragraph (d)(1)(ii) of this section with respect to transactions effected pursuant to an Automatic Investment Plan.

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

■ 3. The general authority citation for part 275 is revised to read in part as follows:

Authority: 15 U.S.C. 80b–2(a)(11)(F), 80b–2(a)(17), 80b–3, 80b–4, 80b–4a, 80b–6(4), 80b–6a, and 80b–11, unless otherwise noted.

* * * * *

■ 4. Section 275.204–2 is amended by revising paragraphs (a)(12), (a)(13), and (e)(1) to read as follows:

§ 275.204–2 Books and records to be maintained by investment advisers.

(a) * * *

(12)(i) A copy of the investment adviser's code of ethics adopted and implemented pursuant to § 275.204A–1 that is in effect, or at any time within the past five years was in effect;

(ii) A record of any violation of the code of ethics, and of any action taken as a result of the violation; and

(iii) A record of all written acknowledgments as required by § 275.204A–1(a)(5) for each person who is currently, or within the past five years was, a supervised person of the investment adviser.

(13)(i) A record of each report made by an access person as required by § 275.204A–1(b), including any information provided under paragraph (b)(3)(iii) of that section in lieu of such reports;

(ii) A record of the names of persons who are currently, or within the past five years were, access persons of the investment adviser; and

(iii) A record of any decision, and the reasons supporting the decision, to approve the acquisition of securities by access persons under § 275.204A–1(c), for at least five years after the end of the

fiscal year in which the approval is granted.

* * * * *

(e)(1) All books and records required to be made under the provisions of paragraphs (a) to (c)(1)(i), inclusive, and (c)(2) of this section (except for books and records required to be made under the provisions of paragraphs (a)(11), (a)(12)(i), (a)(12)(iii), (a)(13)(ii), (a)(13)(iii), (a)(16), and (a)(17)(i) of this section), shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in an appropriate office of the investment adviser.

* * * * *

■ 5. Section 275.204A–1 is added to read as follows:

§ 275.204A–1 Investment adviser codes of ethics.

(a) *Adoption of code of ethics.* If you are an investment adviser registered or required to be registered under section 203 of the Act (15 U.S.C. 80b–3), you must establish, maintain and enforce a written code of ethics that, at a minimum, includes:

(1) A standard (or standards) of business conduct that you require of your supervised persons, which standard must reflect your fiduciary obligations and those of your supervised persons;

(2) Provisions requiring your supervised persons to comply with applicable Federal securities laws;

(3) Provisions that require all of your access persons to report, and you to review, their personal securities transactions and holdings periodically as provided below;

(4) Provisions requiring supervised persons to report any violations of your code of ethics promptly to your chief compliance officer or, provided your chief compliance officer also receives reports of all violations, to other persons you designate in your code of ethics; and

(5) Provisions requiring you to provide each of your supervised persons with a copy of your code of ethics and any amendments, and requiring your supervised persons to provide you with a written acknowledgment of their receipt of the code and any amendments.

(b) *Reporting requirements.* (1) *Holdings reports.* The code of ethics must require your access persons to submit to your chief compliance officer or other persons you designate in your code of ethics a report of the access person's current securities holdings that meets the following requirements:

(i) *Content of holdings reports.* Each holdings report must contain, at a minimum:

(A) The title and type of security, and as applicable the exchange ticker symbol or CUSIP number, number of shares, and principal amount of each reportable security in which the access person has any direct or indirect beneficial ownership;

(B) The name of any broker, dealer or bank with which the access person maintains an account in which any securities are held for the access person's direct or indirect benefit; and

(C) The date the access person submits the report.

(ii) *Timing of holdings reports.* Your access persons must each submit a holdings report:

(A) No later than 10 days after the person becomes an access person, and the information must be current as of a date no more than 45 days prior to the date the person becomes an access person.

(B) At least once each 12-month period thereafter on a date you select, and the information must be current as of a date no more than 45 days prior to the date the report was submitted.

(2) *Transaction reports.* The code of ethics must require access persons to submit to your chief compliance officer or other persons you designate in your code of ethics quarterly securities transactions reports that meet the following requirements:

(i) *Content of transaction reports.* Each transaction report must contain, at a minimum, the following information about each transaction involving a reportable security in which the access person had, or as a result of the transaction acquired, any direct or indirect beneficial ownership:

(A) The date of the transaction, the title, and as applicable the exchange ticker symbol or CUSIP number, interest rate and maturity date, number of shares, and principal amount of each reportable security involved;

(B) The nature of the transaction (*i.e.*, purchase, sale or any other type of acquisition or disposition);

(C) The price of the security at which the transaction was effected;

(D) The name of the broker, dealer or bank with or through which the transaction was effected; and

(E) The date the access person submits the report.

(ii) *Timing of transaction reports.* Each access person must submit a transaction report no later than 30 days after the end of each calendar quarter, which report must cover, at a minimum, all transactions during the quarter.

(3) *Exceptions from reporting requirements.* Your code of ethics need not require an access person to submit:

(i) Any report with respect to securities held in accounts over which the access person had no direct or indirect influence or control;

(ii) A transaction report with respect to transactions effected pursuant to an automatic investment plan;

(iii) A transaction report if the report would duplicate information contained in broker trade confirmations or account statements that you hold in your records so long as you receive the confirmations or statements no later than 30 days after the end of the applicable calendar quarter.

(c) *Pre-approval of certain investments.* Your code of ethics must require your access persons to obtain your approval before they directly or indirectly acquire beneficial ownership in any security in an initial public offering or in a limited offering.

(d) *Small advisers.* If you have only one access person (*i.e.*, yourself), you are not required to submit reports to yourself or to obtain your own approval for investments in any security in an initial public offering or in a limited offering, if you maintain records of all of your holdings and transactions that this section would otherwise require you to report.

(e) *Definitions.* For the purpose of this section:

(1) *Access person* means:

(i) Any of your supervised persons:

(A) Who has access to nonpublic information regarding any clients' purchase or sale of securities, or nonpublic information regarding the portfolio holdings of any reportable fund, or

(B) Who is involved in making securities recommendations to clients, or who has access to such recommendations that are nonpublic.

(ii) If providing investment advice is your primary business, all of your directors, officers and partners are presumed to be access persons.

(2) *Automatic investment plan* means a program in which regular periodic purchases (or withdrawals) are made automatically in (or from) investment accounts in accordance with a predetermined schedule and allocation. An automatic investment plan includes a dividend reinvestment plan.

(3) *Beneficial ownership* is interpreted in the same manner as it would be under § 240.16a–1(a)(2) of this chapter in determining whether a person has beneficial ownership of a security for purposes of section 16 of the Securities

Exchange Act of 1934 (15 U.S.C. 78p) and the rules and regulations thereunder. Any report required by paragraph (b) of this section may contain a statement that the report will not be construed as an admission that the person making the report has any direct or indirect beneficial ownership in the security to which the report relates.

(4) *Federal securities laws* means the Securities Act of 1933 (15 U.S.C. 77a–aa), the Securities Exchange Act of 1934 (15 U.S.C. 78a–mm), the Sarbanes-Oxley Act of 2002 (Pub. L. 107–204, 116 Stat. 745 (2002)), the Investment Company Act of 1940 (15 U.S.C. 80a), the Investment Advisers Act of 1940 (15 U.S.C. 80b), title V of the Gramm-Leach-Bliley Act (Pub. L. 106–102, 113 Stat. 1338 (1999), any rules adopted by the Commission under any of these statutes, the Bank Secrecy Act (31 U.S.C. 5311–5314; 5316–5332) as it applies to funds and investment advisers, and any rules adopted thereunder by the Commission or the Department of the Treasury.

(5) *Fund* means an investment company registered under the Investment Company Act.

(6) *Initial public offering* means an offering of securities registered under the Securities Act of 1933 (15 U.S.C. 77a), the issuer of which, immediately before the registration, was not subject to the reporting requirements of sections 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)).

(7) *Limited offering* means an offering that is exempt from registration under the Securities Act of 1933 pursuant to section 4(2) or section 4(6) (15 U.S.C. 77d(2) or 77d(6)) or pursuant to §§ 230.504, 230.505, or 230.506 of this chapter.

(8) *Purchase or sale of a security* includes, among other things, the writing of an option to purchase or sell a security.

(9) *Reportable fund* means:

(i) Any fund for which you serve as an investment adviser as defined in section 2(a)(20) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(20)) (*i.e.*, in most cases you must be approved by the fund's board of directors before you can serve); or

(ii) Any fund whose investment adviser or principal underwriter controls you, is controlled by you, or is under common control with you. For purposes of this section, *control* has the same meaning as it does in section 2(a)(9) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(9)).

(10) *Reportable security* means a security as defined in section 202(a)(18) of the Act (15 U.S.C. 80b–2(a)(18)), except that it does not include:

(i) Direct obligations of the Government of the United States;

(ii) Bankers' acceptances, bank certificates of deposit, commercial paper and high quality short-term debt instruments, including repurchase agreements;

(iii) Shares issued by money market funds;

(iv) Shares issued by open-end funds other than reportable funds; and

(v) Shares issued by unit investment trusts that are invested exclusively in one or more open-end funds, none of which are reportable funds.

PART 279—FORMS PRESCRIBED UNDER THE INVESTMENT ADVISERS ACT OF 1940

■ 6. The authority citation for Part 279 continues to read as follows:

Authority: The Investment Advisers Act of 1940, 15 U.S.C. 80b–1, *et seq.*

■ 7. Form ADV (referenced in § 279.1) is amended by:

■ In part II, at the end of Item 9 add "Describe, on Schedule F, your code of ethics, and state that you will provide a copy of your code of ethics to any client or prospective client upon request."

Note: The text of Form ADV does not and this amendment will not appear in the Code of Federal Regulations.

Dated: July 2, 2004.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–15585 Filed 7–8–04; 8:45 am]

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Part IV

Department of Housing and Urban Development

24 CFR Parts 5 and 570
Equal Participation of Faith-Based Organizations; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 5 and 570

[Docket No. FR–4881–F–02]

RIN 2501–AD03

Equal Participation of Faith-Based Organizations

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: This final rule implements executive branch policy that, within the framework of constitutional church-state guidelines, faith-based organizations should be able to compete on an equal footing with other organizations for Federal funding. Executive Order 13279, entitled "Equal Protection of the Laws for Faith-Based and Community Organizations," establishes fundamental principles and policymaking criteria to guide Federal agencies in formulating and developing policies that have implications for faith-based and community organizations to ensure the equal protection of the laws for these organizations in federally-assisted social service programs. Consistent with the Executive Order, this final rule describes HUD's policy for the participation of faith-based organizations in HUD programs and activities. In addition, this final rule makes a conforming amendment to regulations for the State Community Development Block Grant (CDBG) program regarding the equal participation of faith-based organizations in the program. The final rule follows publication on March 3, 2004, of a proposed rule and takes into consideration the public comments received on the proposed rule. After careful consideration of the public comments, HUD has decided to adopt the proposed rule without change.

DATES: *Effective Date:* August 9, 2004.

FOR FURTHER INFORMATION CONTACT: Ryan Streeter, Director, Center for Faith-Based and Community Initiatives, Department of Housing and Urban Development, Room 10184, 451 Seventh Street, SW., Washington, DC 20410–0001; telephone (202) 708–2404 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

On March 3, 2004 (69 FR 10126), HUD published a proposed rule for public comment describing HUD's policy for the equal participation of faith-based organizations in HUD's programs and activities. The proposed rule was published to implement Executive Order 13279, entitled, "Equal Protection of the Laws for Faith-Based and Community Organizations," which was signed by President George W. Bush on December 12, 2002, and published in the **Federal Register** on December 16, 2002 (67 FR 77141). The Executive Order establishes fundamental principles and policymaking criteria to guide executive branch agencies in formulating and developing policies that have implications for faith-based and community organizations and to ensure the equal protection of the laws for these organizations in programs receiving Federal financial assistance.

Executive Order 13279 is part of the Administration's broader Faith-Based and Community Initiative. President Bush has directed the executive branch agencies, including HUD, to take steps to ensure that Federal policies and programs are fully open to faith-based and community organizations in a manner that is consistent with the Constitution. The Administration believes that all eligible organizations, including faith-based organizations, should be able to participate in Federal programs and activities and compete, where required, for Federal financial assistance on an equal footing.

II. This Final Rule

This final rule follows publication of the March 3, 2004, proposed rule and takes into consideration the public comments received on the proposed rule. After careful consideration of the public comments, HUD has decided to adopt the proposed rule without change. Section IV of this preamble contains a discussion of the public comments received on the proposed rule and HUD's responses to the significant issues raised by those who commented.

A. New § 5.109 Regarding Equal Participation of Faith-Based Organizations

The final rule adds a new § 5.109 to HUD's regulations in 24 CFR part 5, subpart A. The regulations in subpart A of part 5 contain the definitions and Federal requirements generally applicable to all of HUD's programs. By placing the requirements of Executive Order 13279 in those HUD regulations that contain across-the-board requirements, HUD is ensuring the broadest application of the faith-based requirements of Executive Order 13279.

The equal participation policies and requirements set forth in § 5.109 are generally applicable to faith-based organizations, which are referred to in the rule text as "religious organizations" that participate in HUD's programs or activities. More specific policies and requirements regarding the participation of faith-based organizations in individual HUD programs may be provided in the individual regulations for those programs. The policies and requirements set forth in § 5.109 are similar, and in many cases identical, to those contained in HUD's September 30, 2003, final rule (68 FR 56396) regarding the equal participation of faith-based organizations for several of its Community Planning and Development programs. Section III of this preamble provides an overview of the specific policies and requirements contained in the new § 5.109.

Two of the HUD programs that are affected by the regulatory changes are the Section 202 Supportive Housing for the Elderly Program and the Section 811 Supportive Housing for Persons with Disabilities Program. The regulations for these programs are located in 24 CFR part 891. Specifically, the equal participation requirements contained in this final rule permit faith-based organizations to take part in these programs as project owners. This is a change from the existing procedures governing these two programs, which prohibit a project owner from having a religious purpose in its articles of incorporation.

This final rule does not apply to HUD's Native American housing programs. HUD has determined that making the policies and procedures contained in this proposed rule applicable to its Native American programs requires prior consultation with Indian tribal governments in accordance with Executive Order 13175 (entitled "Consultation and Coordination with Indian Tribal Governments"). The Executive Order requires Federal departments and agencies, to the greatest extent practicable and permitted by law, to consult with tribal governments prior to taking actions that have substantial direct effects on Federally recognized tribal governments. HUD has consulted with Indian tribal governments regarding the applicability of these regulatory changes to its Native American housing programs and on June 21, 2004 (69 FR 34543) published a separate proposed rule to address the equal participation of faith-based organizations in these programs based on the outcome of the consultations.

B. Conforming Change to State CDBG Program Regulations

In addition to the establishment of new § 5.109, this final rule makes a conforming change to the regulations for the State Community Development Block Grant (CDBG) program regarding the equal participation of faith-based organizations. The final rule would clarify that the amendments made by HUD's September 30, 2003, final rule apply to the State CDBG program.

III. Overview of New 24 CFR 5.109

The specific policies and requirements codified in new § 5.109 by this final rule are as follows. As noted above, these requirements are unchanged from the proposals contained in HUD's March 3, 2004, proposed rule.

A. Equal Participation of Faith-Based Organizations in HUD Programs and Activities

This final rule clarifies that faith-based organizations are eligible, on the same basis as any other organization, to participate in HUD's programs and activities. The phrase "participate in HUD's programs and activities" and its variants are used in this rule to mean the full range of HUD programs and activities, including programs that make funds available through contracts, grants, cooperative agreements, or other instruments for eligible goods, services, and activities, and programs that do not make funds available, but involve other forms of benefit or resources. For example, certain Federal Housing Administration (FHA) programs do not provide funds, but make mortgage insurance or foreclosed properties available to qualifying organizations. Neither the Federal government, nor a State or local government, nor any other entity that administers any HUD program or activity shall discriminate against an organization on the basis of the organization's religious character or affiliation. Nothing in the rule, however, would preclude those administering Department-funded programs from accommodating religious organizations in a manner consistent with the Establishment Clause.

B. Inherently Religious Activities

Organizations that receive direct HUD funds under a HUD program or activity may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services directly funded under the HUD program or activity. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs, activities, or services supported by direct HUD funds, and participation must be voluntary for the beneficiaries of these programs, activities, or services.

As used in this final rule, the term "direct HUD funds" refers to direct funding within the meaning of the Establishment Clause of the First Amendment. For example, direct HUD funding may mean that the government or an intermediate organization with similar duties as a governmental entity under a particular HUD program selects an organization and purchases the needed services straight from the organization (*e.g.*, via a contract or cooperative agreement). In contrast, indirect funding scenarios may place the choice of service provider in the hands of a beneficiary, and then pay for the cost of that service through a voucher, certificate, or other similar means of payment.

C. Independence of Faith-Based Organizations

New § 5.109 clarifies that a faith-based organization that participates in a HUD program or activity will retain its independence from Federal, State, and local governments, and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not engage in any inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services supported by direct HUD funds. Among other things, faith-based organizations may use space in their facilities to provide services under a HUD program, without removing religious art, icons, scriptures, or other religious symbols. In addition, a faith-based organization participating in a HUD program retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members and otherwise govern itself on a religious basis, and include religious references in its organization's mission statements and other governing documents.

D. Exemption From Title VII Employment Discrimination Requirements

This final rule clarifies that a faith-based organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1), is not forfeited when the organization participates in a HUD program. Some HUD programs, however, contain independent statutory provisions that impose certain nondiscrimination requirements on all grantees. Accordingly, grantees should consult with the appropriate Department program office to determine the scope of any applicable requirements.

E. Nondiscrimination Requirements

This final rule clarifies that an organization that receives direct HUD funds shall not, in providing program assistance, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief. Organizations participating in HUD programs and activities must also comply with any other applicable Federal fair housing and nondiscrimination requirements.

F. Acquisition, Construction, and Rehabilitation of Structures

HUD funds may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used for inherently religious activities. HUD funds may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting eligible activities under a HUD program or activity. Where a structure is used for both eligible and inherently religious activities, HUD funds may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities in accordance with the cost accounting requirements applicable to the HUD program or activity. Sanctuaries, chapels, and other rooms that a HUD-funded religious congregation uses as its principal place of worship, however, are ineligible for HUD-funded improvements. Disposition of real property after use for the authorized purpose, or any change in use of the property for the authorized purpose, is subject to government-wide regulations governing real property disposition (*see, e.g.*, 24 CFR parts 84 and 85).

G. Commingling of Federal and State and Local Funds

This final rule clarifies that if a State or local government voluntarily contributes its own funds to supplement federally funded activities, the state or local government has the option to segregate the Federal funds or commingle them. However, if the funds are commingled, the requirements of new § 5.109 will apply to all of the commingled funds. If a state or local government is required to contribute matching funds to supplement a Federally funded activity, the matching

funds are considered commingled with the Federal assistance and therefore subject to the requirements of new § 5.109. Some HUD program requirements govern any project or activity assisted under those programs. Accordingly, grantees should consult with the appropriate HUD program office to determine the scope of applicable requirements.

IV. Discussion of the Public Comments on the March 3, 2004, Proposed Rule

The public comment period on the March 3, 2004, proposed rule closed on May 3, 2004. HUD received eight comments on the proposed rule. Comments were received from private individuals as well as from organizations concerned with civil rights, church-state, and free speech issues. This section of the preamble presents a summary of the significant issues raised by the public comments on the March 3, 2004, proposed rule and HUD's responses to these issues.

A. General Comments

Comment: Support for proposed rule. Two commenters expressed general support for the proposed rule, applauding both the goals of the rule and the specific proposed regulatory changes.

HUD Response. HUD appreciates the support of the commenters. HUD agrees that the final rule will clarify the Department's policy regarding the participation of faith-based organizations in HUD programs and activities. As noted earlier, after careful consideration of the public comments on the proposed rule, HUD has decided to adopt the proposed rule without changes.

Comment: Opposition to rule on constitutional grounds. Several commenters expressed concern that the proposed regulatory changes would conflict with the Establishment Clause and related Supreme Court decisions. Some of the commenters wrote that the rule impermissibly would authorize Federal funding for churches and other "pervasively sectarian organizations." Other commenters were concerned that the regulatory changes would lead to excessive entanglement between the Federal government and religious institutions.

HUD Response. HUD does not agree with these comments. As more fully discussed in the responses to the individual comments below, HUD believes that the policies and procedures contained in this final rule are fully within the bounds of constitutional church-state guidelines and consistent with recent Supreme Court decisions concerning the Establishment Clause.

Comment: Ensure the availability of secular alternative service providers. Several commenters wrote that HUD should ensure that beneficiaries have the ability to receive services from a different or non-religious provider. The commenters wrote that without reasonable secular alternatives, beneficiaries might be forced to participate in programs provided by faith-based organizations where they may be required to participate in religious activity in order to receive essential government-funded benefits.

HUD Response. HUD has not revised the rule in response to these comments. Under this final rule, directly funded religious organizations are prohibited from discriminating against program beneficiaries on the basis of "religion or religious belief." In addition, the rule provides that religious organizations may not use direct funding from HUD for inherently religious activities, that such activities must be offered separately, in time or location, from services directly funded by HUD, and that no beneficiary served by a HUD-funded provider directly funded by HUD will be required to participate in inherently religious activities as a condition of receiving services. These requirements sufficiently protect the rights of program beneficiaries. Moreover, HUD's general objective is to eliminate barriers to faith-based organizations, to welcome their participation in HUD programs, and most important, to ensure they are treated like other program participants. The commenters' recommendations run counter to the objectives that HUD is trying to achieve through this rule. To prevent a faith-based organization from providing HUD-funded programs or services unless there is a secular organization also providing the same programs or services would defeat the "neutrality" objective sought by this rulemaking.

Comment: Rule fails to establish adequate safeguards for indirect Federal funding of faith-based organizations. Three commenters wrote that the rule lacks regulatory safeguards to ensure that indirect HUD funding to faith-based organizations is not used inappropriately. One of the commenters wrote that the rule, in effect, establishes a mechanism for the provision of vouchers without meeting the requirements established by the Supreme Court for such programs (*e.g.*, that the program be completely neutral with respect to religion, that use of the vouchers at a religious institution be a wholly genuine and independent private choice, and that the voucher programs not provide incentives to choose a religious institution over a non-religious one, etc.). Other commenters were primarily concerned that the prohibition on discriminating against a program beneficiary on the basis of religious belief applies solely to direct HUD funds. These commenters wrote that the nondiscrimination requirements should be valid whether the funding is direct or indirect.

HUD Response. HUD has not revised the rule in response to these comments. Any HUD-funded programs that involve indirect funding must, of course, comply with Federal law (including current legal precedent), and nothing in the proposed regulation provides otherwise. As explained in the preamble of the proposed rule as well as the preamble of the final rule, the term "direct HUD funds" refers to direct funding within the meaning of the Establishment Clause of the First Amendment. In other words, HUD's use of the phrase "direct funding" in this rule incorporates current First Amendment jurisprudence into its definition. For example, direct HUD funding may mean that the government or an intermediate organization with similar duties as a governmental entity under a particular HUD program selects an organization and purchases the needed services straight from the organization (*e.g.*, via a contract or cooperative agreement). In contrast, indirect funding scenarios may place the choice of service provider in the hands of a beneficiary, and then pay for the cost of that service through a voucher, certificate, or other similar means of payment

HUD believes that, under current precedent, faith-based organizations that receive HUD funds as the result of the genuine and independent choice of a beneficiary (for example, where the entity administering HUD funds established a voucher, coupon, certificate, or similar funding mechanism) are permitted to offer assistance that integrates religion and social services and requires participation in all aspects of their programs. The religious freedom of beneficiaries in an indirect funding program is protected by the guarantee of genuine and independent private choice. A beneficiary has the right to select any eligible provider, and no beneficiary may be required to receive services from a provider to which the beneficiary has a religious objection. In other words, vouchers for services funded by the government must be available to eligible beneficiaries regardless of their religious belief, and

those who object to a religious provider may select an eligible alternative provider.

Finally, HUD notes that this final rule does not modify any statutory nondiscrimination requirements for HUD programs covered by the rule. To the extent that such requirements restrict the activities of indirectly funded organizations, those restrictions remain in effect. Accordingly, the statute that applies to each program should be reviewed for the scope of its applicability.

Comment: Rule should provide for stricter monitoring and enforcement. Several commenters wrote that the rule fails to provide for any oversight mechanisms or "firewalls" to prevent the religious use of government funds. The commenters wrote that the rule should require faith-based organizations to regularly account for the expenditures of funds and to undergo regular audits.

HUD Response. HUD has not revised the rule in response to these comments. HUD has a responsibility to monitor all program participants to ensure that HUD funds are used in accordance with HUD program and any governmentwide requirements. Inappropriate use of HUD funds or failure to comply with HUD requirements is not a possibility that arises only when program participants are faith-based organizations. Failure of any organization receiving Federal funds to ensure that the Federal portion of their funding is not used for prohibited purposes will subject the organization to the imposition of sanctions or penalties. All HUD program participants must carefully manage their various sources of Federal funds and abide by Office of Management and Budget (OMB) cost accounting circulars, where applicable, or other cost accounting methods that may be specified in individual program regulations. These existing procedures, therefore, more than suffice to address the concerns raised by the commenters.

Comment: The regulatory restrictions should not apply to non-financial assistance. One commenter expressed concern about the HUD programs covered by the rule, which included the "full range of HUD programs and activities, including programs that make funds available through contracts, grants, cooperative agreements, or other instruments for eligible goods, services, and activities, and programs that do not make funds available, but involve other forms of benefit or resources" (69 FR 10127, first column). The commenter expressed concern that application of all applicable regulatory requirements would place non-financial assistance under quite restrictive requirements.

HUD Response. HUD believes that the commenter has misunderstood the rule in part. Certain portions of the rule apply to all who "participate in HUD's programs and activities," while others apply more narrowly to organizations that receive direct HUD funds. For example, religious organizations are eligible, on the same basis as any other organization, to participate in HUD's programs and activities. Therefore, in administering HUD-supported financial and non-financial assistance, neither the Federal government nor a State government, local government, or other entity administering a HUD program or activity can discriminate against an organization on the basis of the organization's religious character or affiliation. In contrast, the restriction on inherently religious activities is limited to programs that receive direct HUD funds. Certain forms of non-financial assistance, such as HUD-supported mortgage insurance, do not fall within the definition of direct HUD funds. HUD, therefore, does not believe that further clarification in the regulatory text is needed.

B. Comments Regarding Employment and Non-Discrimination Provisions

Comment: Comments regarding the Title VII exemption. One commenter expressed support for the regulatory provision regarding the employment nondiscrimination exemption provided in Title VII of the Civil Rights Act of 1964. However, the commenter requested that HUD provide more specific guidance on how faith-based organizations may preserve their employment exemption, notwithstanding program-specific requirements. Other commenters questioned whether a faith-based organization retains its Title VII exemption after receipt of Federal funds. The commenters wrote that the exemption from Title VII was never intended to provide the basis for government-funded discrimination, and expressed concern that the rule will result in illegal employment discrimination.

HUD Response. As noted above in this preamble, this final rule clarifies that a faith-based organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of Title VII of the Civil Rights Act of 1964, is not forfeited when the organization participates in a HUD program. HUD believes that faith-based organizations should retain their fundamental civil rights, including their ability to take faith into account when they make employment decisions without running afoul of Title VII. Title VII recognizes that for a faith-based organization to define or carry out its mission, it must be able to choose its employees based on its vision and beliefs. Some HUD programs, however, contain independent statutory provisions that impose certain nondiscrimination requirements on all grantees. Accordingly, grantees should consult with the appropriate Department program office to determine the scope of any applicable requirements.

Comment: Rule should provide for applicability of State and local nondiscrimination requirements. Several commenters wrote that the proposed rule did not make clear that State and local civil rights laws continue to apply to organizations providing federally funded programs and activities. The commenters urged that the final rule should explicitly preserve the application of state and local nondiscrimination laws, particularly those concerning employment discrimination. However, a commenter writing in support of the Title VII exemption expressed a contrary view. This commenter requested that the final rule explicitly preempt any conflicting State or local restrictions on religious staffing when HUD funds are commingled with State or local funds.

HUD Response. The requirements that govern funding under the HUD programs at issue in these regulations do not directly address preemption of State or local laws. Federal funds, however, carry Federal requirements. No organization is required to apply for funding under these programs, but organizations that apply and are selected for funding must comply with the requirements applicable to the program funds. As noted earlier, if a State or local government voluntarily contributes its own funds to supplement federally funded activities, the State or local government has the option to segregate the Federal funds or commingle them. If the funds are commingled, this regulation applies to all the commingled funds.

Comment: The nondiscrimination provisions should be strengthened by explicitly prohibiting discrimination based on sexual orientation and gender identity. One commenter made this suggestion.

HUD Response. As noted earlier, this final rule does not modify any statutory nondiscrimination requirements for the HUD programs covered by the rule. The purpose of this rule is to ensure the

equal treatment of faith-based organizations participating in HUD programs. The purpose of this rule is not to establish nondiscrimination requirements or to alter existing nondiscrimination requirements. Current requirements of applicable statutes continue to apply to the HUD programs covered by this final rule, but HUD declines to impose additional requirements by regulation.

C. Comments Regarding Inherently Religious Activities

Comment: The restrictions on inherently religious activities require clarification. One commenter requested a more expansive definition of "inherently religious activities." The commenter wrote that while the rule defines "inherently religious activities" to include "worship, religious instruction, or proselytization," such guidance is insufficient to ensure that grantees do not run afoul of the constitutional restrictions.

HUD Response. The final rule continues to specify that inherently religious activities include "worship, religious instruction, or proselytization." It would be difficult to establish an acceptable list of all inherently religious activities. Inevitably, the regulatory definition would fail to include some inherently religious activities or include certain activities that are not inherently religious. Rather than attempt to establish an exhaustive regulatory definition, this final rule retains the language of the proposed rule, which provides examples of the general types of activities that are prohibited by the regulations. This approach is consistent with Supreme Court precedent, which likewise has not comprehensively defined inherently religious activities. For example, prayer and worship are inherently religious, but social services do not become inherently religious merely because they are conducted by individuals who are religiously motivated to undertake them or view the activities as a form of ministry. If HUD determines that additional guidance is needed regarding specific activities that are "inherently religious," HUD will provide this guidance.

Comment: Clarify the term "separation in time or location." One commenter requested that HUD clarify the separation "in time or location" restriction. The commenter wrote that the vagueness of the current language would lead to confusion among service providers. The commenter suggested that specifying that religious activities must be separated by both time and location could provide greater clarity.

HUD Response. HUD declines to adopt the suggestion made by the commenter. HUD does not agree that the separation of time or location requirement is ambiguous or necessitates the need for additional regulation for proper adherence. HUD believes that existing regulations and this rule are clear that faith-based organizations using direct Federal funds for certain activities must separate their inherently religious activities from the federally funded activities. HUD believes that a common sense approach to this regulation supported by HUD guidance, not a detailed regulatory approach, is the better one. HUD believes that requiring that inherently religious activities be separated from HUD-funded activities by both time and location is legally unnecessary. Further, such a requirement would impose an unnecessarily harsh burden on small faith-based organizations, which may have access to only one suitable location for the provision of HUD-funded services.

Comment: The requirement regarding "separation in time or location" fails to meet constitutional standards. One commenter wrote that the "time or location" restriction applies solely to inherently religious activities. According to the commenter, this seems to suggest that religious activity that is not inherently religious is permissible during the provision of HUD-funded programs or services. The commenter wrote that this is misleading and fails to meet the current constitutional standard, which requires that no government funds be diverted to religious indoctrination.

HUD Response. HUD has not revised the rule in response to this comment. The final rule, consistent with Supreme Court decisions interpreting the First Amendment to the Constitution, is clear that faith-based organizations using direct Federal funds must separate their inherently religious activities from the federally funded activities. However, prohibiting any and all references to religion or religious belief is legally unnecessary. As to the commenter's suggestion that the regulation should more clearly prohibit the use of government funds for religious indoctrination, HUD believes that the language of the proposed rule, which HUD has decided to retain, adequately addresses this concern. The rule provides examples of the general types of activities that are prohibited by the regulations: worship, religious instruction, and proselytizing. As to the commenter's suggestion that all "religious activity" must be separate from HUD-funded services, HUD notes that some religious organizations view the very provision of social services as a "religious" activity. HUD-funded services, however, do not become impermissibly religious merely because they are conducted by individuals who are religiously motivated to undertake them or view them as a form of "ministry." HUD believes that its approach is consistent with Supreme Court precedent.

D. Comments Regarding Other Rule Provisions

Comment: The rule should prohibit the display of religious art or iconography. Two commenters made this suggestion. The commenters wrote that the rule fails to recognize that proselytization, religious instruction, and worship can occur through art, icons, and images. Further, the commenters were concerned that the symbols might create a pervasively sectarian atmosphere in which members of a different religion may not feel comfortable or welcome.

HUD Response. HUD declines to impose this restriction on HUD program participants that are faith-based organizations. A number of Federal statutes affirm the principle embodied in this rule (*see e.g.*, 42 U.S.C. 290kk–1(d)(2)(B)). For no other program participants do HUD regulations prescribe the type of artwork, statues, or icons that may be placed within or without the structures in which HUD-funded services are provided. A prohibition on the use of religious icons would make it more difficult for many faith-based organizations to participate in the program than other organizations, and would thus be an inappropriate and excessive restriction.

Comment: The proposed rule allows the misuse of HUD funds to build structures used for religious purposes. Several commenters objected to the use of HUD funds in the acquisition, construction, or rehabilitation of religious structures. The commenters wrote that the provisions are contrary to Supreme Court decisions that prohibit spending government funds on structures that are not exclusively secular in their use. The commenters wrote that the "attribution" requirements are vague and that HUD will need to establish effective safeguards to avoid the perceived constitutional pitfalls.

HUD Response. HUD has not revised the rule in response to these comments. HUD believes that the prorated funding of improvements to a structure that has a mixed use—both religious and nonreligious—is not itself a violation of the Constitution. In a neutral program in

which the government directly funds the capital improvements of institutions that administer Federal social welfare programs, the government need only put in place safeguards to ensure that public money is not used to finance inherently religious activities. Therefore, the final rule's prohibition on the funding of capital improvements for sanctuaries, chapels, or any other rooms that a religious congregation uses as its principal place of worship simply provides extra assurance that HUD-funded capital improvements will not be used to support inherently religious activities, and HUD's rule is well within the bounds of the Constitution.

V. Findings and Certifications

Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866 (entitled "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 action, as provided under section 3(f)(1) of the Order). Any changes made to the rule subsequent to its submission to OMB are identified in the docket file, which is available for public inspection in the Regulations Division, Room 10276, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–0500.

Regulatory Flexibility Act

The Secretary, 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. The final rule will not impose any new costs, or modify existing costs, applicable to HUD grantees. Rather, the purpose of the final rule is to ensure the equal participation of faith-based organizations (irrespective of size) in HUD's programs.

Environmental Impact

This final rule sets forth nondiscrimination standards. Accordingly, under 24 CFR 50.19(c)(3), this final rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (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 mandate on State, local, or tribal government or the private sector within the meaning of UMRA.

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has Federalism implications and either imposes substantial direct compliance costs on State and local governments and is not required by statute or preempts state law, unless the relevant requirements of section 6 of the Executive Order are met. Consistent with the consultation requirements of the Executive Order, HUD specifically solicited comment from State and local government officials on the March 3, 2004, proposed rule, but received no such comments. This final rule does not impose substantial direct costs on State or local governments and therefore does not have Federalism implications under this Executive Order.

Catalog of Federal Domestic Assistance Numbers

The regulatory amendments contained in this final rule apply to all HUD assistance programs for which faith-based organizations are eligible to participate. The Catalog of Federal Domestic Assistance number for a particular HUD program may be found on the CFDA Web site at: *http://www.cfda.gov.*

List of Subjects

24 CFR Part 5

Administrative practice and procedure, Aged, Claims, Drug abuse, Drug traffic control, Grant programs—housing and community development, Grant programs—Indians, Individuals with disabilities, Loan programs—housing and community development, Low and moderate income housing, Mortgage insurance, Pets, Public housing, Rent subsidies, 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 described in the preamble, HUD amends 24 CFR parts 5 and 570 as follows:

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

■ 1. The authority citation for 24 CFR part 5 continues to read as follows:

Authority: 42 U.S.C. 3535(d), unless otherwise noted.

■ 2. Add § 5.109 to read as follows:

§ 5.109 Equal Participation of Religious Organizations in HUD Programs and Activities.

(a) *Purpose.* Consistent with Executive Order 13279 (issued on December 12, 2002, 67 FR 77141, 3 CFR, 2002 Comp., p. 258), entitled "Equal Protection of the Laws for Faith-Based and Community Organizations," this section describes HUD's policy for the equal participation of religious organizations in HUD's programs and activities. The equal participation policies and requirements contained in this section are generally applicable to religious organizations in all HUD programs and activities. More specific policies and requirements regarding the participation of religious organizations in individual HUD programs may be provided in the regulations for those programs.

(b) *Equal participation of religious organizations in HUD programs and activities.* Religious organizations are eligible, on the same basis as any other organization, to participate in HUD's programs and activities. Neither the Federal government, nor a State or local government, nor any other entity that administers any HUD program or activity shall discriminate against an organization on the basis of the organization's religious character or affiliation.

(c) *Inherently religious activities.* Organizations that receive direct HUD funds under a HUD program or activity may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded under a HUD program or activity. If an organization conducts such inherently religious activities, the inherently religious activities must be offered separately, in time or location, from the programs, activities, or services supported by direct HUD funds and participation must be voluntary for the beneficiaries of the programs, activities or services provided under the HUD program.

(d) *Independence of religious organizations.* A religious organization that participates in a HUD program or activity will retain its independence from Federal, State, and local governments, and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not engage in any inherently religious activities, such as worship, religious instruction, or proselytization as part of the programs or services supported by direct HUD funds. Among other things, religious organizations may use space in their facilities to provide services under a HUD program without removing religious art, icons, scripfures, or other religious symbols. In addition, a religious organization participating in a HUD program retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents.

(e) *Exemption from Title VII employment discrimination requirements.* A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–1), is not forfeited when the organization participates in a HUD program. Some HUD programs, however, contain independent statutory provisions that impose certain nondiscrimination requirements on all grantees. Accordingly, grantees should consult with the appropriate HUD program office to determine the scope of applicable requirements.

(f) *Nondiscrimination requirements.* An organization that receives direct HUD funds shall not, in providing program assistance, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief.

(g) *Acquisition, construction, and rehabilitation of structures.* HUD funds may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used for inherently religious activities. HUD funds may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting eligible activities under a HUD program or activity. Where a structure is used for both eligible and inherently religious activities, HUD funds may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities in accordance with the cost accounting requirements applicable to the HUD program or activity. Sanctuaries, chapels, and other rooms that a HUD-funded religious congregation uses as its principal place of worship, however, are ineligible for HUD-funded improvements. Disposition of real property after use for the authorized purpose, or any change in use of the property from the authorized purpose, is subject to governmentwide regulations governing real property disposition (*see, e.g.*, 24 CFR parts 84 and 85).

(h) *Commingling of Federal and State and local funds.* If a state or local government voluntarily contributes its own funds to supplement Federally funded activities, the State or local government has the option to segregate the Federal funds or commingle them. However, if the funds are commingled, the requirements of this section apply to all of the commingled funds. Further, if a State or local government is required to contribute matching funds to supplement a Federally funded activity, the matching funds are considered commingled with the Federal assistance and therefore subject to the requirements of this section. Some HUD programs' requirements govern any project or activity assisted under those programs. Accordingly, grantees should consult with the appropriate HUD program office to determine the scope of applicable requirements.

PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS

■ 3. The authority citation for 24 CFR part 570 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 5301–5320.

■ 4. Add § 570.480(e) to read as follows:

§ 570.480 General.

* * * * *

(e) Religious organizations are eligible to participate under the State CDBG Program as provided in § 570.200(j).

Dated: July 6, 2004.

Alphonso Jackson,

Secretary.

[FR Doc. 04–15677 Filed 7–8–04; 8:45 am]

BILLING CODE 4210–32–P

Federal Register

Friday,
July 9, 2004

Part V

Environmental Protection Agency

40 CFR Part 131

Water Quality Standards for Coastal and Great Lakes Recreation Waters; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[OW–2004–0010; FRL–7785–6]

RIN 2040–AE63

Water Quality Standards for Coastal and Great Lakes Recreation Waters

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to establish water quality criteria for bacteria for coastal recreation waters in specific States and Territories. The States and Territories covered by this proposed rule do not have water quality standards for bacteria that comply with the requirements of section 303(i) of the Clean Water Act. Under these circumstances, the Act requires EPA to promptly propose such standards. The criteria proposed today apply to coastal and Great Lakes waters that specific States and Territories have designated for swimming, bathing, surfing, or similar water contact activities and for which the State or Territory does not have in place EPA-approved bacteria criteria that are as protective of human health as EPA's 1986 recommended bacteria criteria. If this proposal is promulgated, the Federally designated water quality criteria will be added to the States' and Territories' water quality criteria applicable to coastal recreation waters. If a State or Territory subsequently adopts and EPA approves water quality standards that meet the requirements of section 303(i), EPA will withdraw the Federal standards for that State's or Territory's coastal recreation waters.

DATES: EPA will accept public comments on this proposed rule until August 9, 2004.

ADDRESSES: Submit your comments, identified by Docket ID No. OW–2004–0010, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the online 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 online instructions for submitting comments.
- E-mail: *wilcut.lars@epa.gov*.
- Fax: (202) 566–0409.
- Mail: Water Quality Standards for Coastal and Great Lakes Recreation Waters, Environmental Protection Agency, Mailcode: 4305 T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of three copies.
- Hand Delivery: EPA Docket Center Public Reading Room, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. Please include a total of three copies.

Instructions: Direct your comments to Docket ID No. OW–2004–0010. 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. For additional information about EPA's public docket visit EDOCKET on-line or see the May 21, 2002 **Federal Register** (67 FR 38102). For additional instructions on submitting comments, go to section I.B. of the **SUPPLEMENTARY INFORMATION** section of this document.

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 Water Quality Standards for Coastal and Great Lakes Recreation Waters 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 Water Quality Standards for Coastal and Great Lakes Recreation Waters Docket is (202) 566–2422.

FOR FURTHER INFORMATION CONTACT: Lars Wilcut, Standards and Health Protection Division, Office of Science and Technology (4305 T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 566–0447; fax number: (202) 566–0409; e-mail address: *wilcut.lars@epa.gov*.

SUPPLEMENTARY INFORMATION:

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I. General Information

A. Does This Action Apply to Me?

State and Territorial agencies responsible for adopting and implementing water quality standards in the States and Territories identified in 40 CFR 131.41 are the only entities directly affected by the proposed rule. People concerned with water quality in Coastal and Great Lakes States may be interested in this proposed rule. Facilities discharging pollutants to certain waters of the United States in Coastal and Great Lakes States could be indirectly affected by this proposed rule since water quality standards are used in determining water quality-based National Pollutant Discharge Elimination System (NPDES) permit limits. In addition, beach managers and businesses in beach areas could also be indirectly affected by this proposed rule since water quality standards are used in making decisions regarding beach advisories and closures. Categories and entities that may indirectly be affected include:

Category	Examples of potentially affected entities
Industry	Industries discharging pollutants to the waters of the States and Territories identified in § 131.41.
Municipalities	Publicly-owned treatment works discharging pollutants to the waters of the States and Territories identified in § 131.41.
Other	Beach owners and managers, beach goers

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your facility may be affected by this action, you should carefully examine the language in § 131.41 of today's proposed rule. If you have questions regarding the applicability of this action to a particular entity, consult one of the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit information claimed as CBI to EPA through EDOCKET, 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 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.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Docket Copying Costs.* The first 266 pages are free. Additional copying incurs a $25 administrative fee and each additional page is $0.15.

II. Background

A. Statutory and Regulatory Background

1. Clean Water Act

Section 303 (33 U.S.C. 1313) of the Clean Water Act (CWA) directs States, Territories, and authorized Tribes, with oversight by EPA, to adopt water quality standards to protect the public health and welfare, enhance the quality of water and serve the purposes of the CWA. Under section 303, States, Territories, and authorized Tribes are to develop water quality standards for navigable waters of the United States within the State, Territory, or authorized Tribe. Section 303(c) provides that water quality standards shall include the designated use or uses to be made of the water and water quality criteria necessary to protect those uses. The designated uses to be considered by States, Territories, and authorized Tribes in establishing water quality standards are specified in the CWA: Public water supplies, propagation of fish and wildlife, recreation, agricultural uses, industrial uses and navigation. States, Territories, and authorized Tribes are to review their water quality standards at least once every three years and, if appropriate, revise or adopt new standards. The results of this triennial review must be submitted to EPA, and EPA must approve or disapprove any new or revised standards.

Section 303(c) of the CWA authorizes the EPA Administrator to promulgate water quality standards to supersede State, Territorial, or authorized Tribal standards that have been disapproved or in any case where the Administrator determines that a new or revised standard is needed to meet the CWA's requirements. EPA regulations implementing CWA section 303(c) are published at 40 CFR part 131. Under these rules, the minimum elements that must be included in a State's, Territory's, or authorized Tribe's water quality standards include: Use designations for all water bodies in the State, Territory, or authorized Tribe, water quality criteria sufficient to protect those use designations, and an antidegradation policy (see 40 CFR 131.6).

2. The BEACH Act of 2000

The Beaches Environmental Assessment and Coastal Health (BEACH) Act of 2000 amended the CWA in part by adding section 303(i). Section 303(i)(1)(A) requires that not later than April 10, 2004, "each State having coastal recreation waters shall adopt and submit to the Administrator water quality criteria and standards for the coastal recreation waters of the State for those pathogens and pathogen indicators for which the Administrator has published criteria under section 304(a)." EPA's *Ambient Water Quality Criteria for Bacteria—1986* (EPA 440/5–

84–002) is the relevant criteria document published by the Administrator under CWA section 304(a).

Section 303(i)(2)(A) requires that, "[i]f a State fails to adopt water quality criteria and standards in accordance with [section 303(i)(1)(A)] that are as protective of human health as the criteria for pathogens and pathogen indicators for coastal recreation waters published by the Administrator, the Administrator shall promptly propose regulations for the State setting forth revised or new water quality standards for pathogens and pathogen indicators described in [section 303(i)(1)(A)] for coastal recreation waters of the State."

The BEACH Act also added section 502(21) to the CWA, which defines "coastal recreation waters" as "(i) the Great Lakes; and (ii) marine coastal waters (including coastal estuaries) that are designated under section 303(c) by a State for use for swimming, bathing, surfing, or similar water contact activities." Section 502(21) explicitly excludes from the definition of coastal recreation waters "inland waters; or waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea."

B. 1986 Ambient Water Quality Criteria for Bacteria

In 1986, EPA published *Ambient Water Quality Criteria for Bacteria—1986*. This document contains EPA's current recommended water quality criteria for bacteria to protect people from gastrointestinal illness in recreational waters, *i.e.*, waters designated for primary contact recreation or similar full body contact uses. Primary contact recreation is typically defined by States and Territories to encompass activities that could be expected to result in the ingestion of, or immersion in, water, such as swimming, water skiing, surfing, kayaking, or any other activity where immersion in the water is likely. The main route of exposure to illness-causing organisms in recreational waters is through accidental ingestion of fecally-contaminated water while engaging in these activities.

EPA's water quality criteria for bacteria are based on levels of indicator bacteria, namely *Escherichia coli* (*E. coli*) and enterococci, that demonstrate the presence of fecal pollution. Indicator organisms such as these have long been used to protect people from illnesses that may be contracted from engaging in recreational activities in surface waters contaminated by fecal pollution. These organisms generally do not cause illness directly, but have demonstrated characteristics that make them good indicators of fecal contamination and thus the potential presence of pathogens capable of causing human illnesses such as gastroenteritis. Gastroenteritis is a term for a variety of diseases that affect the gastrointestinal tract and are rarely life-threatening. Symptoms of the illness include nausea, vomiting, stomachache, diarrhea, headache, and fever. Prior to its publication of the 1986 bacteria criteria document, EPA recommended the use of fecal coliforms as an indicator organism to protect people from gastrointestinal illness in recreational waters. However, EPA conducted epidemiological studies and evaluated the use of several organisms as indicators, including fecal coliforms, *E. coli*, and enterococci. EPA subsequently recommended the use of *E. coli* or enterococci for fresh recreational waters and enterococci for marine recreational waters, because levels of these organisms were more accurate predictors of acute gastrointestinal illness than levels of fecal coliforms.

In EPA's epidemiological studies, *E. coli* and enterococci exhibited the strongest correlation to swimming-associated gastroenteritis, the former in fresh waters only and the latter in both fresh and marine waters (*Ambient Water Quality Criteria for Bacteria—1986*, January, 1986, EPA 440/5–84–002; *Health Effects Criteria for Fresh Recreational Waters*, August, 1984, EPA 600/1–84–004; *Health Effects Criteria for Marine Recreational Waters*, August, 1983, EPA 600/1–80–031). In marine waters, the stronger correlation may be due to enterococci's ability to survive longer than coliforms, similar to the pathogens of concern. In addition, fecal coliforms are sometimes detected where fecal contamination is absent, possibly resulting in inaccurate assessments of recreational safety. For example, *Klebsiella* spp., a bacterial organism that is part of the fecal coliform group but which is generally not harmful to humans, is often present in pulp and paper and textile mill effluents (Archibald, F., Water Qual. Res. J. Canada 35(1):1–22, 2000; Dufour, Journal WPCF, 48:872–879) .

Table 1 contains the water quality criteria values for the protection of primary contact recreation that EPA recommended in the 1986 bacteria criteria document (*Ambient Water Quality Criteria for Bacteria—1986*). These values were developed based on the concentrations of *E. coli* and enterococci from EPA-sponsored epidemiological studies that roughly correlated to the estimated illness rate associated with EPA's previously recommended fecal coliform criterion. This illness rate was estimated to be approximately 0.8% of swimmers exposed in freshwater and 1.9% of swimmers exposed in marine waters. EPA's 1986 bacteria criteria document indicates the illness rates are "only approximate" and that the 1986 values that appear in Table 1 were based on these approximations. The 1986 bacteria criteria document provides geometric mean densities (represented as average densities over the swimming season) as well as single sample maximum (SSM) values (representing an unacceptably high value for a single sample).

A geometric mean represents the central tendency of a series of data points. Using a geometric, as opposed to an arithmetic, mean helps to minimize the effect of measurements that might otherwise be considered outliers. The best way to interpret a series of bacterial measurements taken over a period of time is in comparison to the geometric mean. With a large number of measurements, the calculated geometric mean is expected to be "close" to the "true" mean of bacterial concentrations in the waterbody. In contrast, a single sample with a high value does not necessarily indicate that the waterbody as a whole has high bacterial levels. The SSM values in the 1986 bacteria criteria document correspond to probabilities of getting a particular single sample result when the true mean meets the criterion. A 75% confidence level value corresponds to the level above which individual sample values would occur only 25% of the time if the mean level in the waterbody still meets the standard. Statisticians say that a single sample reading at this level indicates, with 75% confidence, that the standard is not being met. The best way to interpret any single measurement (or small number of measurements) is in comparison to the SSM. Selecting a lower SSM (*e.g.*, 75%) for comparison to single measurements will result in a more conservative estimate of whether the standard is being met. That is, it will set a relatively low bar (75% confidence) for a determination that the standard has been exceeded. This will be protective of public health but may result in a greater number of determinations that the standard was violated. In contrast, selecting a higher SSM (*e.g.*, 95%) for comparison to single measurements will result in a less cautious (*i.e.*, less protective) decision rule but greater certainty that a reading above the SSM really does indicate that bacteria levels in the waterbody as a whole exceed the standard.

The 1986 bacteria criteria document includes a table of four SSM values for each geometric mean based on beach

usage, which in turn are based on different confidence levels. In general, where there is a greater potential for exposure in a given area, a higher degree of protectiveness (*i.e.*, a lower bar for determining an exceedance) is warranted. The 1986 bacteria criteria document categorizes the four SSMs as follows: "designated bathing beach" for the 75 percent (most protective) confidence level, "moderate use for bathing" for the 82 percent confidence level, "light use for bathing" for the 90 percent confidence level, and "infrequent use for bathing" for the 95 percent confidence level. The lowest SSM was assigned to designated bathing beach areas because a high degree of caution should be used to evaluate the statistical significance of a measured single value above the criteria for these areas. The 1986 bacteria criteria document stated that bathing beach areas are "frequently lifeguard protected, provide parking and other public access and are heavily used by the public." The document does not specifically describe in greater detail the potential use frequency differences of the 82 percent, 90 percent, and 95 percent confidence levels.

TABLE 1.—CRITERIA FOR INDICATORS FOR BACTERIOLOGICAL DENSITIES

Acceptable swimming associated gastroenteritis rate per 1000 swimmers	Steady state geometric mean indicator density	Single sample maximum allowable density			
		Designated beach area (upper 75% C.L.)	Moderate full body contact recreation (upper 82% C.L.)	Lightly used full body contact recreation (upper 82% C.L.)	Infrequently used full body contact recreation (upper 95% C.L.)
Freshwater:					
Enterococci—8	33/100 ml [1]	61	78	107	151
E. coli—8	126/100 ml [2]	235	298	409	575
Marine Water:					
Enterococci—19	35/100 ml [3]	104	158	276	501

NOTES:
[1] Calculated to nearest whole number using equation: (mean enterococci density) = antilog$_{10}$ ((illness rate/1000 people + 6.28)/9.40).
[2] Calculated to nearest whole number using equation: (mean *E. coli* density) = antilog$_{10}$ ((illness rate/1000 people + 11.74)/9.40).
[3] Calculated to nearest whole number using equation: (mean enterococci density) = antilog$_{10}$ ((illness rate/1000 people − 0.20)/12.17).
[4] Single sample limit = antilog10 (log10 indicator geometric mean density/100 ml + (factor determined from areas under the Normal probability curve for the assumed level of probability * log10 standard deviation)). The appropriate factors for the indicated one sided confidence levels are: 75% C.L.—.675; 82% C.L.—.935; 90% C.L.—1.28; 95% C.L.—1.65.
[5] Based on the observed log standard deviations during the EPA studies: 0.4 for freshwater *E. coli* and enterococci; and 0.7 for marine water enterococci. Each jurisdiction should establish its own standard deviation for its conditions which would then vary the single sample limit.

III. Proposed Criteria for Pathogen Indicators in Coastal Recreation Waters

A. Scope of Proposed Rule

The requirements of the BEACH Act are limited to "coastal recreation waters," which are defined in CWA section 502(21) as the Great Lakes and marine coastal recreation waters (including coastal estuaries) that are designated under CWA section 303(c) by a State for use for swimming, bathing, surfing, or similar water contact activities. The definition explicitly excludes "inland waters or waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea." EPA interprets CWA section 502(21) to apply only to those Great Lakes waters that are designated for swimming, bathing, surfing, or similar water contact activities, consistent with the purpose of the BEACH Act to protect the public from the health risks associated with swimming in polluted water. Therefore, today's proposal applies only to those Great Lakes and marine waters designated by a State or Territory for swimming, bathing, surfing, or similar water contact activities.

The BEACH Act clearly envisioned and intended that States, Territories, and authorized Tribes with coastal recreation waters adopt into their water quality standards bacteria criteria as protective of human health as EPA's 1986 ambient water quality criteria for bacteria. Under EPA's water quality standards regulations at 40 CFR part 131, States, Territories, and authorized Tribes have broad discretion to designate specific uses to specific waters. They are not required to designate all waters for swimming, bathing, surfing, or similar water contact activities (*i.e.*, primary contact recreation), as long as they have conducted a use attainability analysis that supports the decision that full attainment of CWA section 101(a) uses ("fishable/swimmable") is not feasible for those waters (40 CFR 131.10(g)). For example, Ohio has designated all of its portion of Lake Erie as "bathing waters." In contrast, Pennsylvania has designated a portion of Lake Erie as incidental, or secondary, contact recreation. As explained in the preceding paragraph, today's proposal applies only to those waters designated by a State or Territory for swimming, bathing, surfing, or similar water contact activities, not to waters designated for uses that only involve incidental contact. However, States, Territories, and authorized Tribes are to continue to work towards the goal of achieving full attainment of CWA section 101(a) uses ("fishable/swimmable") in waters that do not currently attain such uses. Further, any waters with designated uses that do not include the uses specified in CWA section 101(a)(2) must be re-examined every three years to determine if any new information has become available (40 CFR 131.20(a)). If such new information indicates that the uses specified in CWA section 101(a)(2) are attainable, the State, Territory, or authorized Tribe is required to revise its water quality standards accordingly. EPA expects States, Territories, and authorized Tribes to continue this process and revise their water quality standards where appropriate. States, Territories, and authorized Tribes may remove a designated use that is not an existing use if it conducts a use attainability analysis to demonstrate that the designated use is not attainable (40 CFR 131.10(g)).

B. Proposed Criteria for Pathogen Indicators

EPA's *Ambient Water Quality Criteria for Bacteria—1986* were developed to protect primary contact recreation uses in ambient waters. The criteria have two components: a geometric mean, which has the most direct relationship to risk over the course of a recreation season,

and a single sample maximum (SSM) which is the best value against which to compare individual measurements. A geometric mean represents the central tendency of a series of measurements: in this case, measurements of bacteria levels. This helps to minimize the effect of measurements that might otherwise be considered outliers. EPA is proposing a geometric mean of 126/100 ml for *E. coli* in fresh waters and four different SSMs, which vary for coastal recreation fresh waters based on intensity of use. EPA is proposing a geometric mean of 35/100 ml for enterococci in marine waters and four different SSMs, which vary for coastal recreation marine waters based on intensity of use. These are the same values as in the 1986 bacteria criteria document.

TABLE 2.—PROPOSED AMBIENT FRESH WATER QUALITY CRITERIA FOR BACTERIA

A indicator	B geometric mean	C single sample maximum (per 100 ml)			
		C1 designated bathing beach (75% confidence level)	C2 moderate use coastal recreation waters (82% confidence level)	C3 light use coastal recreation waters (90% confidence level)	C4 infrequent use coastal recreation waters (95% confidence level)
E. coli	126/100 ml [a]	235 [b]	298 [b]	409 [b]	575 [b]

Footnotes to table in paragraph (c)(1):
[a] This value is for use with analytical methods 1106.1 or 1600 or any equivalent viable method.
[b] Calculated using the following: single sample maximum = geometric mean * 10^(confidence level factor * log standard deviation), where the confidence level factor is: 75%: 0.68; 82%: 0.94; 90%: 1.28; 95%: 1.65. The log standard deviation from EPA's epidemiological studies is 0.4.

TABLE 3.—PROPOSED AMBIENT MARINE WATER QUALITY CRITERIA FOR BACTERIA

A indicator	B geometric mean	C single sample maximum (per 100 ml)			
		C1 designated bathing beach (75% confidence level)	C2 moderate use coastal recreation waters (82% confidence level)	C3 light use coastal recreation waters (90% confidence level)	C4 infrequent use coastal recreation waters (95% confidence level)
Enterococci	35/100 ml [a]	104 [b]	158 [b]	276 [b]	501 [b]

Footnotes to table in paragraph (c)(2):
[a] This value is for use with analytical methods 1103.1, 1603, or 1604 or any equivalent viable method.
[b] Calculated using the following: single sample maximum = geometric mean * 10^(confidence level factor * log standard deviation), where the confidence level factor is: 75%: 0.68; 82%: 0.94; 90%: 1.28; 95%: 1.65. The log standard deviation from EPA's epidemiological studies is 0.7.

With respect to identifying an acceptable risk level, *Ambient Water Quality Criteria for Bacteria—1986* includes an estimate of the historically accepted illness rate associated with the previously recommended geometric mean value for the fecal coliform criterion. Based on ratios of *E. coli* and enterococci to fecal coliform densities, the historically accepted risk levels for gastrointestinal symptoms were estimated to be 0.8% of swimmers at fresh water beaches and 1.9% of swimmers at marine beaches. However, the analysis upon which these estimates is based is inherently uncertain because there was little correlation between illness rate and fecal coliform density. These estimated risk levels were used to calculate the specific bacteria density values presented in tabular form in the 1986 bacteria criteria document. These estimated illness rates are described in the 1986 bacteria criteria document as approximate and as EPA's best estimates at the time. Moreover, it is clear that there is uncertainty both in estimating the actual historically-accepted risk levels and in translating these values into corresponding concentration criteria for *E. coli* and enterococci in fresh and marine waters. It is also clear that because the 1986 bacteria criteria document was published before the BEACH Act added section 303(i) to the CWA, the specific values presented in tabular form in the 1986 bacteria criteria document were only recommendations representing one acceptable choice of risk level to apply to the criterion. At the time the 1986 bacteria criteria document was published, EPA did not expect that the specific geometric mean and SSM values would necessarily be used for establishing uniform Federal water quality criteria for coastal recreation waters in multiple States, or establish a fixed benchmark for assessing the protectiveness of State/Territorial water quality standards for bacteria.

There is no a priori reason to establish a higher level of protection for fresh waters than for marine waters. The difference in acceptable risk levels in the 1986 bacteria criteria document (8 illnesses per 1000 swimmers in fresh waters v. 19 per 1000 in marine waters) was based solely on the calculated risk levels for the previously recommended criterion of 200 fecal coliforms per 100 ml, which were different in marine and fresh waters. If the science supported a reliable correlation between bacteria concentrations and illness rates, the EPA could, in judging whether a fresh water criterion is "as protective of human health as" EPA's 1986 bacteria criteria, consider fresh water criteria associated with risk levels up to 1.9% of swimmers to be sufficient. However, EPA cannot determine, based on the available data that relate *E. coli* and enterococci levels to illness rates, what bacteria concentration would correlate with risk levels over 1.0% in freshwater. Therefore, the data that relate risk levels to bacteria concentrations in freshwater are not reliable beyond 1.0% risk to swimmers. Recent peer review of EPA's analysis of the study data relating illness rates to bacteria concentrations supports the conclusion that the existing data do not support the

relationship between rates beyond the level of 1.0% of swimmers and their correlating bacteria concentrations (External Peer Review of EPA Analysis of Epidemiological Data from EPA Bacteriological Studies, February 2004). The peer reviewers said that EPA should not extrapolate beyond the 1.0% risk level, based on the observed data. Based on that peer-reviewed information, EPA does not believe, at this juncture, that it can justify a criterion for fresh water based on any geometric mean or SSM higher than the levels associated with an illness rate of 1.0% of swimmers as being as protective of human health as EPA's 1986 bacteria criteria. However, EPA is considering adopting a geometric mean and SSM values for fresh water that correspond to an illness rate of 1.0% of swimmers, which would be slightly higher than the criteria in this proposed rule, which correspond to an illness rate of 0.8% of swimmers. The *E. coli* criteria corresponding to an illness rate of 1.0% of swimmers would be a geometric mean of 206/100 ml and SSM values of 385/100 ml, 489/100 ml, 668/100 ml, and 940/100 ml, corresponding to the 75, 82, 90, and 95 percent confidence levels. EPA solicits comment on its choice of illness rate for calculating the criteria.

1. Use of the Single Sample Maximum

EPA is proposing all four SSMs included in the 1986 bacteria criteria document for each geometric mean. The SSM values allow decision makers to quantitatively determine, based on a single sample, when water quality at a particular site may not be associated with long-term protective conditions (*i.e.*, when overall bacteria concentrations are likely to exceed the protective central tendency). This is especially important for beaches that are infrequently monitored or prone to short term spikes in bacteria concentrations (*e.g.*, waters that may be affected by a combined sewer overflow outfall). The 1986 bacteria criteria document does not interpret the meaning of the term "single sample maximum". One interpretation is that it is a single value never to be exceeded. EPA is soliciting comment on this interpretation.

An alternative option would be to allow for exceedance of the SSM when making attainment decisions because bacterial measurements are inherently variable, due to a number of factors that may not necessarily reflect underlying water quality. Under this option, an unacceptably high value for any given individual sample may be used to trigger a beach advisory or closing or additional monitoring, or it might be evaluated with other sample results, but would not necessarily be used alone to determine nonattainment of the water quality standards.

EPA recognizes that the 1986 bacteria criteria document discusses SSMs solely in the context of beach closures. SSMs are particularly important in this context because States and Territories generally use one or two samples to make beach opening or closure decisions. EPA could thus interpret the 1986 bacteria criteria document as recommending the use of SSMs only for decisions related to public health at beaches. Under this interpretation, the SSMs would be part of the water quality criteria, but only used for making beach closure and opening decisions. States and Territories could use only the geometric mean for other CWA purposes, such as NPDES permitting, TMDLs, and waterbody assessments. EPA solicits comment on each of the above interpretations of the term "single sample maximum." Based on its consideration of these comments, EPA may decide to include an explicit interpretation or definition of this term in the final regulatory text.

The 1986 bacteria criteria document describes the analysis used to calculate the criteria. EPA conducted a series of epidemiological studies in coastal and Great Lakes waters. At each water studied, EPA calculated the geometric mean of the summer bacterial density, and correlated this with the summer average gastrointestinal illness rate. EPA used this correlation as the basis of the geometric mean criterion. Thus, the geometric mean has the most direct relationship to the illness rate. With this in mind, EPA could interpret the phrase "as protective of human health as" the 1986 bacteria criteria document to apply only to the geometric mean. Under this interpretation, EPA would promulgate only the geometric mean in the final rule. The SSMs would be available for use as an implementation tool for making beach opening and closure decisions but would not be part of the applicable water quality standards. States and Territories would have the flexibility to use the SSMs in this or any other application of the water quality standards as they deem appropriate. EPA is soliciting comment on this interpretation.

2. Categories of Coastal Recreation Waters

Only one SSM would apply to each category of coastal recreation water: designated bathing beach waters, moderate use coastal recreation waters, light use coastal recreation waters, and infrequent use coastal recreation waters. In the 1986 bacteria criteria document, EPA associated these categories (corresponding to decreasing exposure potential) with increasing confidence level thresholds on which an exceedance determination would be based. EPA is proposing the following definitions for each category of waterbody:

- *Designated bathing beach waters* are those coastal recreation waters that, during the recreation season, are heavily-used and may have: a lifeguard, bathhouse facilities, or public parking for beach access. States may include any other waters in this category even if the waters do not meet these criteria.
- *Moderate use coastal recreation waters* are those coastal recreation waters that are not designated bathing beach waters but typically, during the recreation season, are used by at least half of the number of people as at typical designated bathing beach waters within the State. States may also include light use or infrequent use coastal recreation waters in this category.
- *Light use coastal recreation waters* are those coastal recreation waters that are not designated bathing beach waters but typically, during the recreation season, are used by less than half of the number of people as at typical designated bathing beach waters within the State, but are more than infrequently used. States may also include infrequent use coastal recreation waters in this category.
- *Infrequent use coastal recreation waters* are those coastal recreation waters that are rarely or occasionally used.

Examples of infrequent use coastal recreation waters might include waters that are at remote locations, difficult to access, or infrequently used for primary contact recreation due to commerce or navigation. States and Territories could, at their discretion, place waters in more protective categories. For example, States and Territories could choose to provide "light use" protection to waters that might otherwise be considered "infrequent use" waters. EPA is soliciting comment on the proposed definitions of the four categories, and describes the basis for deriving the definitions in the following paragraph.

The 1986 bacteria criteria document describes designated bathing beach waters as those that are frequently lifeguard protected, provide parking and other public access, and are heavily used by the public. EPA conducted its epidemiological studies using these types of waters. The 1986 bacteria criteria document does not define or otherwise describe the other usage

categories. EPA recognizes that in order for the public and beach authorities to understand which SSMs apply to which waters, the terms in the 1986 bacteria criteria document (designated bathing beach, moderate use for bathing, light use for bathing, and infrequent use for bathing) need to be defined. EPA reviewed Web sites in various fields of study (*e.g.*, meteorology, human health risk characterization, and urban planning) that use such terminology to differentiate intensities. EPA observed that moderate rainfall is considered to be about 40% of heavy rainfall, that moderate alcohol consumption is about 50% of heavy consumption, and that moderate traffic is about 50% of heavy traffic ("The Effects of Moderate Alcohol Consumption on Mortality After Heart Attack," *www.coloradohealthsite.org/CHNReports/alcohol_heart(1).html;* "What Constitutes Moderate, Significant, and Major Events?," *www.wxrisk.com/Pages/glossary_geography.htm;* "The Beaufort Wind Scale," *www.crh.noaa.gov/lot/webpage/beaufort*). Therefore, EPA proposes that moderate use coastal recreation waters be defined as waters that are about 50% less intensely used than are designated bathing beach waters. EPA also observed that a light breeze is considered to be about half that of a moderate breeze, which led to EPA's proposal that light use coastal recreation waters have less use than moderate use coastal recreation waters.

a. State Identification of Coastal Recreation Waters by Category. EPA intends in today's proposal to objectively define the four categories so that the public can clearly identify to which category each coastal recreation water belongs based on its intensity of use for primary contact recreation. EPA does not have sufficient information regarding frequency of use of each specific coastal recreation water covered by this proposal to list all those waters in the rule according to the four categories defined in 40 CFR 131.41(b). Therefore, EPA is proposing not to list individual coastal recreation waters by intensity of use category. EPA recommends that States and Territories evaluate existing use information and identify which individual coastal recreation waters belong to each category and make this information publicly available (*e.g.*, on a State's or Territory's Web site). Even in the absence of such a listing, EPA believes the proposed definitions can be objectively applied when CWA actions are taken based on the proposed rule. A State or Territory would be required to use the 75 percent confidence level SSM when developing TMDLs for, or issuing permits to facilities discharging into, coastal recreation waters that meet the definition of designated bathing beach waters. Similarly, a State or Territory would be required to use an SSM that is no less stringent than the 95 percent confidence level when developing TMDLs for, or issuing permits to facilities discharging into, coastal recreation waters that meet the definition of infrequent use coastal recreation waters. As States and Territories developed TMDLs and issued permits consistent with the SSMs, the public would have the opportunity to review and comment upon the application of SSMs as part of the TMDL and permitting processes. EPA would use its oversight authority under CWA section 402(d) to ensure that States and Territories apply the appropriate SSMs when conducting these types of activities.

EPA's *National Beach Guidance and Required Performance Criteria for Grants* (June, 2002, EPA–823–B–02–004) outlined elements that States and Territories with BEACH Act implementation grants are to consider in developing tiered monitoring plans. States with BEACH Act implementation grants are required to tier their beaches according to potential risk to human health and beach use. The monitoring frequency and methodology would likely differ depending on how a beach is tiered. Because most coastal States and Territories are recipients of BEACH Act implementation grants, States and Territories could use their existing beach tiering process as a source of information for determining frequency in categorizing a coastal recreation water for purposes of determining the applicable SSM. EPA is soliciting comment on this approach.

b. *Alternative Options for Categorization of Coastal Recreation Waters.* EPA recognizes that some States and Territories may not have enough data regarding the intensity of the use of their coastal recreation waters to easily and quickly categorize them according to the four categories specified in the proposed rule. For example, some States have designated bathing beach waters, but do not further categorize the remainder of their coastal recreation waters as to intensity of use. Therefore, EPA is considering another approach by which the final rule would include only two SSMs for coastal recreation waters: the 75 percent confidence level for all designated bathing beaches and a single other confidence level (the 82 percent, 90 percent, or 95 percent confidence level SSM) for all other coastal recreation waters. If EPA promulgates this approach in the final rulemaking, the rule would include two columns for SSMs, one column for designated bathing beach waters and the other column for all other coastal recreation waters. EPA would select the specific percent confidence levels from the 1986 bacteria criteria document based on comments received during the public comment period. In addition, the final rule would not include the definitions for moderate, light, and infrequent use coastal recreation waters. The final rule would continue to include a definition of designated bathing beach waters where the SSM corresponding to a 75 percent confidence level would apply. In all waters that are not designated bathing beach waters the other SSM would apply. As in the proposed option, in implementing SSMs, States and Territories would apply the designated bathing beach SSM consistent with the proposed definition of designated bathing beach waters in 40 CFR 131.41(b). EPA expects that a State or Territory would use the 75 percent confidence level SSM when developing TMDLs for, or issuing permits to facilities discharging into, coastal recreation waters that meet the definition of designated bathing beach waters, and would use the other SSM when conducting these activities for other coastal recreation waters. As States and Territories develop TMDLs and issue permits consistent with the SSMs, the public would have the opportunity to review and comment upon the application of SSMs as part of the TMDL and permitting processes. EPA would use its oversight authority under CWA section 402(d) to ensure that States and Territories appropriately apply the SSMs. EPA is soliciting comment on this approach.

EPA is also considering promulgating only the 75 percent confidence level SSM that would apply to all coastal recreation waters of the States and Territories included in the final rulemaking. This approach applies the most stringent SSM to all coastal recreation waters and is thus more protective than the 1986 bacteria criteria. However, it also simplifies the application of the standards by eliminating the need to delineate which SSM applies to specific coastal recreation waters. Seven States have already adopted the 1986 bacteria criteria for some or all of their coastal recreation waters using this approach. However, the 1986 bacteria criteria document clearly recognized that "one size does not fit all," and that it is reasonable to have different SSMs

depending on use intensity. EPA is soliciting comment on this approach.

EPA is also requesting comment on an approach under which an SSM would be identified only for designated bathing beach waters. Since these are the types of waters in which the epidemiological studies on which the criteria are based were conducted, and since the primary focus of the 1986 bacteria criteria document is protecting users of these types of waters, EPA could interpret the phrase "as protective of human health as" the 1986 criteria to require an SSM only for designated bathing beach waters, with attainment decisions and other CWA actions in other coastal recreation waters relying on the geometric mean only. EPA is also considering an approach where the SSM is not part of the criterion, but rather part of the water quality standards implementation process (see Section III.A.1.). If EPA selects this approach in the final rule, EPA would not need the proposed definitions of designated bathing beach waters, moderate use coastal recreation waters, light use coastal recreation waters, or infrequent use coastal recreation waters in the final rule because these definitions would only be needed in applying an SSM.

c. *Intrastate vs. Interstate Determinations of Use Intensity.* EPA's proposed SSMs apply to categories based on definitions of intensity, and EPA is proposing that they be interpreted on an intrastate basis (*i.e.*, the comparison of frequency of use would be made relative to only the waters within that State). Using this approach, a State or Territory would categorize its most frequently used coastal recreation waters as designated bathing beach waters and all others in comparison to those. An alternative option that EPA is considering is for States and Territories to apply these categories to particular waters using interstate comparisons. For example, the number of people at beaches in a State with a cooler climate (*e.g.*, Washington) may be considerably less than the number of people at beaches in a State with a much warmer climate (*e.g.*, Florida). As a result, the number of people at what a cooler State would designate as a "moderate use coastal recreation water" may be more characteristic of the number of people at an "infrequent use coastal recreation water" for a warmer State. States and Territories could apply these definitions so as to achieve a consistent level of protection at beaches in the same category nationally. However, to do so, States and Territories would need national beach use information to be able to categorize their coastal recreation waters. EPA is not aware that this information is available. EPA is soliciting comment on whether these definitions should be applied using either an intrastate or interstate (national) comparison of frequency of use or whether it should give States and Territories the option to choose the basis for comparison. EPA also solicits comment on where information on beach usage may be found and whether it is appropriate for use in applying the definitions. EPA is also seeking comment on the potential consequences of a nationally-based comparison in States with cooler climates.

d. *State Calculation of Site-specific SSMs.* EPA is proposing SSMs based on the 75, 82, 90, and 95 percent confidence levels and is proposing to include in the rule the equation to calculate site-specific SSMs. Bacteria measurements are typically highly variable from day to day. As the SSMs are derived based on a distribution around a central tendency, the standard deviation of measurements plays an important role in the width of that distribution. The standard deviations observed in EPA's epidemiological studies may not be the same as that for a particular waterbody. Therefore, EPA encourages States and Territories to collect enough data to calculate site-specific standard deviations. EPA recognizes that States and Territories might not have the data to calculate their own standard deviation; in such a case, those States and Territories would be required to use EPA's calculated SSMs.

EPA is proposing to require that the data set needed to provide a site-specific standard deviation used for calculating a revised SSM contain at least thirty samples for a single recreation season (see 40 CFR 131.41(c)(3)). EPA recognizes that the 1986 bacteria criteria document contemplates use of a site-specific log standard deviation, but notes that the document does not provide any information to guide States and Territories in developing a site-specific log standard deviation. The 1986 bacteria criteria document references the log standard deviations observed in EPA epidemiological studies, but does not specify the number of values used to compute the log standard deviations. EPA recognizes that the number of values has an effect on the confidence one places on the standard deviation. For example, in the *Technical Support Document for Water Quality-based Toxics Control* (EPA/505/2–90–001, March 1991, revised June 1992) EPA displays the effect of the number of values on the precision of the calculated coefficient of variation (standard deviation divided by the mean). This display shows that for one coefficient of variation, the 90 percent confidence interval around the standard deviation is ±62% for five values, ±42% for 10 values, ±30% for 20 values, and ±25% for 30 values, with the confidence intervals not changing much for more than 30 values. (See *Technical Support Document for Water Quality-based Toxics Control*, page 55.)

EPA believes that when a State or Territory calculates an SSM using a site-specific log standard deviation, the State or Territory should use a site-specific standard deviation that is based on a large enough sample size. Ideally, the sample size is large enough that the "Central Limit Theorem" holds. The central limit theorem demonstrates that in large enough samples, the distribution of a sample mean approximates a normal curve regardless of the shape of the distribution from which it is sampled. The larger the sample size, the better the approximation to the normal distribution. A sample size of thirty is generally accepted by statisticians as the smallest sample size where the sample standard deviation will approximate the true standard deviation in a statistically meaningful way (Walpole, R.E., Probability and Statistics for Engineers and Scientists, 1989). Therefore, EPA believes that States and Territories should use at least thirty samples to compute the site-specific log standard deviation. EPA recognizes that a data set of 30 samples represents a significant amount of data for States and Territories to collect. EPA also recognizes that it recommended in the *Technical Support Document for Water Quality-based Toxics Control* that permit writers use at least 10 data points for calculating site-specific coefficients of variations for effluents when developing permit limits. EPA solicits comments on what constitutes an adequate data set for calculating site-specific SSMs and whether EPA should specify a minimum data requirement in the final rule.

3. Choice of Pathogen Indicator for Fresh Coastal Recreation Waters

EPA's 1986 bacteria criteria document shows that either enterococci or *E. coli* is an acceptable indicator in fresh waters. EPA is proposing *E. coli* for all Great Lakes States with coastal recreation waters because it is consistent with the 1986 bacteria criteria and because all Great Lakes States have either adopted or are in the process of adopting *E. coli* as a criterion into their water quality standards. Should a Great Lakes State express a preference for enterococci rather than *E.*

coli before EPA promulgates the final rule, EPA would promulgate the equivalent enterococci values for that State's fresh coastal recreation waters. EPA is also soliciting comment on whether it would be more appropriate to promulgate both *E. coli* and enterococci criteria for Great Lakes States and allow each State to choose which indicator to apply to its coastal recreation waters at the time of implementation.

C. Applicability of the Proposed Rule

1. Applies in Addition to any State/Territory Criteria

Today's proposed Federal criteria do not replace existing bacteria criteria for coastal recreation waters already adopted by States and Territories (and for those adopted after May 30, 2000, approved by EPA). Rather, today's proposed criteria apply in addition to any other existing CWA-effective criteria for coastal recreation waters already adopted (and for those adopted after May 30, 2000, approved by EPA). For states and territories included in today's proposal, permitting under the National Pollutant Discharge Elimination System (NPDES), as well as monitoring and assessment based on applicable CWA water quality standards, would need to be based on the applicable standards for bacteria in the final rule, in addition to any other applicable standards for bacteria previously adopted by the State or Territory to protect uses other than primary contact recreation. This will ensure that, where commercial shellfishing and primary contact recreation occur in the same coastal recreation waters, both uses will be adequately protected by existing State and Territorial standards (which generally still use fecal coliform) and the new standards for either *E. coli* or enterococci. States and Territories may also continue to use existing criteria for fecal coliform to supplement the new indicators for the purposes of water body assessment and other purposes where ambient data are needed. The dual sets of bacteria criteria also will enable regulatory decisions and actions to continue while collecting data for the newly adopted *E. coli* or enterococci criteria. For States and Territories included in today's proposal, EPA expects that States and Territories will be actively collecting data on *E. coli* and/or enterococci and working to incorporate *E. coli* and/or enterococci water quality criteria into their water quality programs, *e.g.*, NPDES, CWA section 305(b), and CWA section 303(d) programs. As they accomplish this, States and Territories may phase out their use of fecal coliform as a supplemental indicator to protect primary contact recreation, provided this does not result in less protective determinations. While EPA cannot remove or revise existing State or Territorial standards, EPA believes that it would not be an efficient use of resources for States and Territories to base CWA actions related to protection of primary contact recreation on both fecal coliform and the new, preferred indicators if the fecal coliform criteria do not provide any additional protection. States and Territories are also encouraged to expeditiously revise their water quality standards to remove fecal coliform criteria that have been replaced by the new indicators in their implementation of the CWA. EPA solicits comment on this approach to transitioning from existing standards to the new standards in this proposed rule.

EPA recognizes that some States and Territories are in the process of adopting water quality standards to be as protective of human health as EPA's 1986 bacteria criteria. Once a State or Territory submits the adopted standards to EPA, the Agency will use CWA sections 303(c) and 303(i) to guide its review of the standards. Water quality standards do not become effective for Clean Water Act purposes until EPA approves them (40 CFR 131.21). Once EPA approved a State's or Territory's standards as being as protective of human health as EPA's 1986 bacteria criteria, EPA would remove that State or Territory from 40 CFR 131.41. However, there will be some indefinite period of time between EPA's approval and EPA removing the State or Territory from 40 CFR 131.41. As a result, EPA is proposing rule language which would make the EPA-approved bacteria criteria in State or Territorial water quality standards effective for CWA purposes upon their approval such that EPA's promulgated criteria would no longer apply. See 40 CFR 131.41(d)(1). EPA would still plan to remove the State or Territory from 40 CFR 131.41 but any delay in that process would not delay the approved State criteria in becoming the sole applicable criteria. EPA solicits comment on this approach of making the approved State or Territorial criteria the applicable criteria without first undertaking APA rulemaking to withdraw the Federal rule for that State or Territory.

2. Role of State/Territorial General Rules of Applicability

Section 131.41(d)(2) provides that the Federal criteria in today's rule would be subject to States' general rules of applicability in the same way and to the same extent as are other Federally-adopted or State-adopted numeric criteria for coastal recreation waters. For example, if State or Territorial regulations would authorize mixing zones in deriving effluent limitations for discharges of bacteria to coastal recreation waters, such regulations would apply to permit limitations implementing the criteria in today's rule. As another example, some State's or Territory's regulations specify the dilution equations used to develop TMDLs or calculate permit limits; such regulations would apply using the criteria proposed in today's rule. EPA is requesting comment on this approach.

IV. EPA Review of State and Territorial Standards

A. How Did EPA Decide Which States and Territories To Include in Today's Proposed Rule?

As required by CWA section 303(i)(1)(A), EPA evaluated the water quality standards for bacteria for all 35 coastal States and Territories using five considerations to determine whether the water quality standards are as protective of human health as the *Ambient Water Quality Criteria for Bacteria—1986*. If a State's or Territory's water quality standards for bacteria for coastal recreation waters are as protective of human health as the 1986 bacteria criteria as of the signature date of the proposed rule, EPA is not including the State or Territory in the proposed rule. If a State or Territory included in the proposed rule adopts criteria satisfying CWA section 303(i), and EPA approves them, prior to promulgation of the final rule, EPA will not include that State or Territory in the final rule. EPA encourages States and Territories that are in the process of adopting such criteria to expeditiously complete this process. EPA believes it is preferable for a State or Territory to adopt its own such standards than for EPA to promulgate Federal standards for that State or Territory. The following paragraphs describe the five considerations.

1. Are the Standards Based on EPA's Recommended Indicators?

EPA interprets CWA section 303(i)(1)(A) to require that States and Territories must adopt and submit water quality criteria for enterococci in marine waters and either enterococci or *E. coli* in fresh waters. Section 303(i)(1)(A) requires that States and Territories submit criteria "* * * for the pathogens and pathogen indicators for which the Administrator has published criteria under section 304(a)." EPA's *Ambient*

Water Quality Criteria for Bacteria—1986 is the CWA section 304(a) criteria referred to in CWA section 303(i)(1)(A). The *Ambient Water Quality Criteria for Bacteria—1986* recommended the use of *E. coli* and enterococci as pathogen indicators for fresh waters and enterococci for marine waters. This represented a major shift, as fecal coliform had historically been the preferred indicator of fecal matter in coastal waters. As described in *Ambient Water Quality Criteria for Bacteria—1986*, EPA does not believe that fecal coliform is a reliable indicator of human illness risk from full body contact recreation in coastal recreation waters. Therefore, EPA believes that any State or Territory with fecal coliform as the only bacteria criterion for some or all of its coastal recreation waters is not fully compliant with the BEACH Act and has thus included it in today's proposal. EPA solicits comment on its interpretation of 303(i). If the commenter disagrees that States and Territories must adopt criteria for E. coli or enterococci, EPA requests that the commenter address what type and amount of information should be sufficient for EPA to determine that fecal coliform (or any other pathogen indicator) is as protective of human health as the 1986 bacteria criteria. EPA also solicits comment on its assessment of each State's and Territory's standards.

2. Are the Standards for E. coli and Enterococci Derived From a Scientifically-Defensible Methodology That Links Them Quantitatively to an Acceptable Risk Level Under CWA Section 303(i)?

States and Territories have the flexibility to determine an acceptable risk level within the context of the statutory requirement in CWA section 303(i) that their water quality standards be "as protective of human health as" the 1986 bacteria criteria. That flexibility is constrained by the bounds of acceptable risk articulated by EPA in *Ambient Water Quality Criteria for Bacteria—1986*. However, as discussed in the legislative history of the BEACH Act, a State's criteria may be as protective of human health as the 1986 bacteria criteria document "without being numerically equivalent" but the criteria would have to be scientifically defensible. (S. Rep. No. 106–366, at 4 (2000)).

Section III.B. of the preamble explains that the risk levels in the 1986 bacteria criteria document for gastrointestinal symptoms were 0.8% of swimmers at fresh water beaches and 1.9% of swimmers at marine beaches. These estimated illness rates are described in the 1986 bacteria criteria document as approximate and as EPA's best estimates at the time. Section III.B. of the preamble explains why EPA believes that fresh water criteria corresponding to risk levels up to 1.0% of swimmers would satisfy the protectiveness requirement of CWA section 303(i), and also why EPA cannot determine, based on the available data that relate *E. coli* and enterococci levels to illness rates, what bacteria concentration would correlate with risk levels over 1.0% in freshwater. EPA solicits comment on its acceptance of criteria associated with risk levels up to 1.0% in freshwater.

3. Do the Standards Include Appropriate SSMs?

In the 1986 bacteria criteria document, EPA recommended that States and Territories adopt appropriate SSM values that correspond to specific use intensity categories of coastal recreation waters (*e.g.*, 75 percent confidence level SSM for designated bathing beaches, 82 percent confidence level SSM for moderate use coastal recreation waters, *etc.*). Tables 2 and 3 in Section III.B include qualitative descriptors of beach usage categories associated with different confidence levels.

EPA's *Ambient Water Quality Criteria for Bacteria—1986* also recommends that States and Territories use a site-specific log standard deviation in calculating the SSM in recognition of the possibility that States and Territories may observe significant differences in the log standard deviation of bacterial measurements. The 1986 bacteria criteria document explicitly recommends that States and Territories base the SSM values on a site-specific log standard deviation or, if site data are insufficient, to use the values EPA observed in its studies. EPA believes that States and Territories should not be required to rely on frequency distributions observed in EPA's epidemiological studies when sufficient site-specific data are available. In determining whether State and Territory bacteria criteria are as protective of human health as EPA's 1986 bacteria criteria, EPA evaluates whether the data set is robust enough to adequately characterize the distribution. If a State or Territory chooses not to collect adequate data and not calculate site-specific SSM values, the State/Territory would need to use the standard deviations from EPA's studies in *Ambient Water Quality Criteria for Bacteria—1986*.

EPA reviewed State and Territorial submissions of CWA section 303(i) standards for coastal recreation waters for the adoption of both a geometric mean and an SSM value. Because the criteria are used for several purposes under the CWA, adoption of both a geometric mean and an SSM value gives States and Territories the necessary components to implement bacteria criteria when developing water quality-based effluent limits, determining whether a waterbody is attaining its water quality standards, and issuing beach notifications and advisories. For example, the SSM value gives States and Territories a practical tool for making daily decisions to open or close beaches. In contrast, a geometric mean gives States and Territories a practical tool for assuring the appropriate level of treatment at NPDES-regulated facilities to protect human health over the long term.

EPA proposes to consider water quality standards for bacteria for coastal recreation waters to be as protective of human health as *Ambient Water Quality Criteria for Bacteria—1986* if they include at least one SSM and if designated bathing areas have an SSM based on at least the 75 percent confidence level. EPA reviewed State and Territorial standards for SSM values, and found that many States and Territories used "designated beach area" as a designation for a subset of their primary contact recreation waters and assigned the 75 percent confidence level to those water bodies, while assigning the 95 percent confidence level to all other water bodies. Other States and Territories had three categories, while other States and Territories only had one. EPA solicits comments on this approach for evaluating State and Territory SSM values in relation to the requirements of the BEACH Act.

4. Do the Standards Exempt Fecal Contamination From Non-Human Sources?

The *Ambient Water Quality Criteria for fBacteria—1986* included a background discussion of non-human sources under the heading "Limitations and Extrapolations of Criteria." The text of the 1986 bacteria criteria document recommends that States and Territories apply the *E. coli* and enterococci criteria to all full body contact recreation waters unless (1) sanitary and epidemiological studies show the sources of the indicator bacteria to be non-human, and (2) the indicator densities are not indicative of a health risk to those swimming in such waters. CWA section 303(i) provides that if a State or Territory fails to adopt standards "that are as protective of human health as the criteria for pathogens and pathogen

indicators for coastal recreation waters published by the Administrator," EPA must promptly propose water quality standards for pathogens and pathogen indicators. In reviewing State or Territorial water quality standards to determine whether the bacteria criteria are "as protective of human health as" EPA's 1986 bacteria criteria document, EPA examined whether the State or Territorial bacteria criteria exempted non-human sources. If a State's or Territory's water quality standards included such an exemption, EPA looked to see whether that exemption has the same basis as that presented in the 1986 bacteria criteria document, namely, that sanitary and epidemiological studies show the sources are non-human and that the bacterial densities are not indicative of a health risk to those swimming in such waters. EPA is including in today's proposal those States and Territories where the criteria include exemptions for non-human sources that are inconsistent with the plain language of EPA's 1986 bacteria criteria document, as described above.

EPA's approach in developing this proposed rule has been to rely as much as possible on the actual language in the 1986 bacteria criteria document. EPA has taken this approach because CWA section 303(i)(2)(A) requires EPA to promptly propose criteria for States and Territories that are "as protective of human health as" EPA's 1986 bacteria criteria in cases where a State or Territory has failed to do so. However, EPA's scientific understanding of pathogens and pathogen indicators has evolved since 1986. As a result, EPA has, over the course of the last 18 years, applied its new scientific understanding to the formulation of policy in the area of how non-human sources are addressed in water quality standards. For example, in EPA's 1994 *Water Quality Standards Handbook,* EPA articulated a policy that States and Territories may apply water quality criteria for bacteria to waterbodies designated for recreation with the rebuttable presumption that the indicators show the presence of human fecal contamination. This 1994 policy stated:

> States may apply bacteriological criteria sufficient to support primary contact recreation with a rebuttable presumption that the indicators show the presence of human fecal pollution. Rebuttal of this presumption, however, must be based on a sanitary survey that demonstrates a lack of contamination from human sources. The basis for this option is the absence of data demonstrating a relationship between high densities of bacteriological water quality indicators and increased risk of swimming-associated illness in animal-contaminated waters.

In short, under this policy, a State or Territory could justify a decision not to apply the criteria to a particular waterbody when bacterial indicators were found to be of animal origin. EPA is soliciting comment on a second approach that uses the rebuttable presumption approach articulated in the 1994 Handbook to be "as protective of human health as" EPA's 1986 bacteria criteria. This approach would require States and Territories to presume that the source of *E. coli* or enterococci is of human origin unless a sanitary survey demonstrates a lack of contamination from human sources. This approach would effectively allow for the exclusion of any animal sources if a State or Territory can demonstrate that the source of contamination is not human waste.

Some recent studies suggest there may be some risk posed to humans as a result of exposure to non-human fecal contamination, particularly those animal sources with which humans regularly come into contact, *i.e.*, livestock and other domestic animals. Livestock, domestic pets, and wildlife are carriers of human pathogens and can transmit these pathogens to surface waters as well as contribute significant numbers of indicator bacteria to waterbodies (Centers for Disease Control and Prevention *Morbidity and Mortality Report Surveillance for Waterborne Disease Outbreaks,* 1993, 1996, 1998, 2000; *Waterborne Pathogens in Agricultural Watersheds,* USDA, June 2000).

Outbreaks of enterohemorrhagic *E. coli* O157:H7, *Salmonella, Giardia,* and *Cryptosporidium* are frequently of animal origin. Incidents where these pathogens have been spread to humans through water have been documented in recent years. In the case of *E. coli* O157:H7, several cases have been cited in which fecal contamination from animals was the probable source of the pathogen. The most prominent examples include contamination of water supplies, including an outbreak in Alpine, Wyoming, in June, 1998, affecting 157 people, and a major outbreak in Walkerton, Ontario, in May and June of 2000 causing more than 2,300 people to become ill and causing seven deaths (Olsen, S.J., CDC Emerging Infectious Diseases, Vol. 8, No. 4, April 2002; CDC Morbidity and Mortality Weekly Report, 2000; Ontario's Ministry of the Attorney General, 2000). In the Alpine, Wyoming case, contamination by wildlife of the community water supply is the suspected source, and in Walkerton, Ontario, heavy rains causing agricultural runoff to leak into city wells is suspected. The 1993 Milwaukee *Cryptosporidium* outbreak is a well-known example of water supply contamination that resulted in 403,000 illnesses and approximately 100 deaths. The source of the oocysts was not identified, but suspected sources include agricultural runoff from dairies in the region, wastewater from a slaughterhouse and meat packing plant, and municipal wastewater treatment plant effluent (Casman, E.A., Interstate Commission on the Potomac River Basin Report No. 96–6, 1996; USDA National Animal Health Monitoring System Report: *Cryptosporidium parvum* Outbreak, 1993). In addition, *Cryptosporidium* was the known cause of 15 other outbreaks associated with drinking and recreational water affecting 5,040 individuals in the U.S. between 1991 and 1994 (Gibson, C.J., Parasitology 117 (Supp.): S205–S212, 1998). While many of the reported outbreaks have occurred through the consumption of contaminated drinking water, other incidences of *E. coli* O157:H7 infection from exposure to surface waters have been documented (CDC Morbidity and Mortality Weekly Report, 2000, 2002). While non-human sources are capable of transmitting pathogens that can cause the specific kinds of gastrointestinal illness identified in EPA's original epidemiological studies, the specific risk from these sources has not been fully determined.

The risk presented by fecal contamination of waters by non-human sources is possibly less significant than the risk presented by fecal contamination of waters by human sources. However, the increasing number of cases such as those described above, in which animals are suspected as being the likely cause of the contamination and resulting illness, present a case for not exempting these sources where human contact or consumption are likely to occur. In addition, because the presence of bacterial indicators provides evidence of fecal pollution, high levels of these indicator organisms originating from animal sources may also indicate the presence of pathogens capable of causing other human illnesses in addition to acute gastroenteritis.

Animals are more likely to carry or be infected with human pathogens when those animals are in close proximity to humans and their waste. The closer the association between animals and humans, the more likely it is that human pathogens will pass back and forth between humans and animals. The

more crowded an animal herd, the more likely it is that human pathogens will be shared between animals of the herd. These pathogens are transmitted to others in the herd because of the direct contact between animals and their fecal matter. Fecal contamination from these infected herds, unless sufficiently treated or contained, can find its way into surface or ground waters and present a potential exposure route for people using the contaminated waters for recreation or drinking. This scenario potentially applies not only to animal feeding operations but also to herds of wildlife (*e.g.*, deer). However, the threat from livestock herds is likely to be greater given the larger typical herd size and the resultant greater quantity of fecal wastes. Wild herds are typically more dispersed and smaller and therefore likely represent a smaller risk to watersheds. In addition, wildlife are not typically in routine daily contact with humans, as may be the case for livestock and other domestic animals. Therefore, EPA is considering a third approach for addressing non-human sources of fecal contamination in establishing water quality standards that apply the criteria only to bacteria from human and non-wildlife animal sources.

In summary, the preceding paragraphs describe three possible approaches in reviewing exemptions for non-human sources of fecal contamination:

(1) Require sanitary and epidemiological studies before excluding non-human sources;

(2) Require only sanitary surveys before excluding non-human sources; or

(3) Exclude only wildlife sources.

EPA is soliciting comment on all of the above approaches. Should EPA revise its approach in the final rule addressing non-human sources of *E. coli* and enterococci, States and Territories that exempt non-human sources and are included in today's proposal may not be included in the final rule.

5. Has EPA Approved the Standards?

Under section 303(i)(2)(A) of the CWA, EPA must determine whether a State or Territory has failed to adopt water quality standards as protective of human health as EPA's 1986 bacteria criteria. Moreover, under 40 CFR 131.21, EPA must approve State or Territorial water quality standards that are adopted after May 30, 2000, in order for those standards to be in effect for CWA purposes. Therefore, EPA must have approved State and Territorial standards for enterococci or *E. coli* that are consistent with CWA section 303(i) for the State or Territory to be excluded from the proposed rule if the standards were adopted after May 30, 2000. State and Territorial standards adopted prior to May 30, 2000 that are consistent with CWA section 303(i) are in effect for CWA purposes even without explicit EPA approval.

B. Which States and Territories Are Included in Today's Proposed Rule?

EPA researched the status of water quality standards for bacteria for each State and Territory with coastal recreation waters. On April 20, 2004, EPA sent letters to the Commissioners of every coastal and Great Lakes State and Territory to inform them of this impending proposed rule and of EPA's understanding at that time of their water quality standards. These letters stated that EPA would propose to include in this rule all States and Territories with coastal recreation waters (*i.e.*, those coastal and Great Lakes waters designated for swimming, bathing, surfing and similar water contact activities) that do not have CWA-effective water quality standards for pathogen indicators as protective of human health as EPA's 1986 bacteria criteria. In preparing these letters, EPA conducted a preliminary review of the water quality standards of the thirty-five States and Territories with coastal recreation waters. In some cases, EPA has received additional or updated information since sending the letters. EPA's current understanding of each State's and Territory's water quality standards is reflected in the discussion in this section. EPA solicits comment to confirm whether EPA has accurately characterized the current status of water quality standards for coastal recreation waters, and seeks information on the progress of States' and Territories' adoption of the *E. coli* and enterococci criteria.

Alabama

On April 20, 2004, Alabama adopted criteria for all of its coastal recreation waters consistent with EPA's 1986 bacteria criteria, and EPA approved these on June 25, 2004. The criteria are for enterococci and have a geometric mean of 35/100 ml and an SSM of 104 for coastal waters designated by Alabama as "Outstanding Alabama Waters", "Swimming", and "Shellfish Harvesting". Waters designated by Alabama as "Public Water Supply" and "Fish and Wildlife" include water contact sports as a use only from June through September. The enterococci criteria for those months have a geometric mean of 35/100 ml and an SSM of 158/100 ml. From October through May, Public Water Supply and Fish and Wildlife waters are not designated for recreation. EPA considers these criteria to be as protective of human health as EPA's 1986 bacteria criteria and Alabama is therefore not included in this proposal.

Alaska

Alaska has not adopted criteria as protective of human health as EPA's 1986 bacteria criteria. Therefore, EPA is including Alaska in today's proposal. Alaska has notified EPA of the State's intention to initiate rulemaking to adopt criteria consistent with EPA's 1986 bacteria criteria by taking public comment in Summer 2004. The State anticipates adoption of the criteria into State water quality standards by December, 2004.

American Samoa

On November 16, 1999, American Samoa adopted criteria for all of its coastal recreation waters consistent with EPA's 1986 bacteria criteria, and EPA approved these on May 2, 2001. The criteria are for enterococci with a geometric mean of 35/100 ml and an SSM value of 104/100 ml for Pago Pago Harbor, Fagatele Bay, and Pala Lagoon; the criteria have a geometric mean of 35/100 ml and an SSM value of 124/100 ml for open coastal waters; and the criteria have a geometric mean of 35/100 ml and an SSM value of 276/100 ml for those ocean waters beyond the 600-foot depth contour seaward. EPA considers these criteria to be as protective of human health as EPA's 1986 bacteria criteria, and American Samoa is therefore not included in this proposal.

California

California has adopted criteria consistent with EPA's 1986 bacteria criteria for some but not all of its coastal recreation waters. The Los Angeles Regional Board (RB4) adopted criteria on July 18, 2002, and EPA approved them on September 25, 2002. The RB4 criteria are for enterococci and have a geometric mean of 35/100 ml and an SSM of 104/100 ml. The other Regional Boards with coastal recreation waters have not yet adopted bacteria criteria as protective of human health as EPA's 1986 bacteria criteria. The California Ocean Plan, which was adopted on March 22, 1990, applies enterococcus monitoring requirements to nearshore ocean waters; however, it does not establish State water quality criteria. State Health Regulations adopted by the State pursuant to Assembly Bill 411 apply enterococcus requirements to all coastal waters; however, these regulations are separate from State water quality standards. Therefore, EPA is including California in today's proposal,

except for waters covered by RB4's approved standards.

Commonwealth of Northern Mariana Islands

The Commonwealth adopted a geometric mean criterion for enterococci on January 20, 1997, and EPA approved it on February 3, 1997. However, the Commonwealth has not adopted SSM values. Therefore, EPA is including the Commonwealth in today's proposal but only with respect to the SSM portion of the rule. EPA could remove the Commonwealth from the final rule depending on which SSM option EPA chooses in the final rule. The Commonwealth has initiated the rule-making process to adopt SSM values. The Commonwealth published the amendment to the standards in the Commonwealth Register on April 23, 2004, and the amendment is scheduled to be adopted before September, 2004.

Connecticut

On November 7, 2001, Connecticut adopted criteria for all of its coastal recreation waters consistent with EPA's 1986 bacteria criteria, and EPA approved these on December 17, 2002. Connecticut's enterococci criteria include a geometric mean of 35/100 ml and an SSM of 104/100 ml for "Designated Swimming" waters, which include areas designated by state or local authorities as bathing areas, and a geometric mean of 35/100 ml and an SSM of 500/100 ml for "All Other Recreational Uses", which are applied to other coastal waters (see Connecticut Water Quality Standards, Appendix B). The Connecticut water quality standards include General Standards 8 and 25, which include special additional provisions regarding application of Connecticut standards. Standard 8 provides that water quality criteria do not apply to conditions brought about by natural causes which may include normal land uses. Standard 25 provides that exceedance of bacteria criteria should be investigated by means of a sanitary survey or other appropriate means to determine sources of elevated indicator bacteria levels. In practice, Connecticut uses the numeric criteria established for enterococci in Appendix B of the Connecticut WQS regardless of source in coastal recreation waters for CWA purposes. For example, Connecticut's 2002 CWA section 303(d) list includes waters that are impaired due to bacteria from nonpoint sources and waterfowl. EPA considers these criteria to be as protective of human health as EPA's 1986 bacteria criteria, and Connecticut is therefore not included in this proposal.

Delaware

Delaware adopted enterococci criteria on July 15, 1999, and EPA approved these on December 2, 1999. Delaware's CWA-effective standards include criteria for enterococci with a geometric mean of 10/100 ml but no corresponding SSM. In addition, the Delaware standards apply only to human sources of fecal contamination. Therefore, EPA is including Delaware in today's proposal. EPA could remove Delaware from the final rule depending on which SSM option and which nonhuman source option EPA chooses in the final rule. Delaware is in the process of adopting and submitting to EPA revised standards for bacteria.

Florida

Florida has not yet adopted criteria consistent with EPA's 1986 bacteria criteria. Therefore, EPA is including Florida in today's proposal. Florida has initiated internal discussions and the State plans to initiate adoption of criteria consistent with EPA's 1986 bacteria criteria this year.

Georgia

Georgia has not yet adopted criteria consistent with EPA's criteria, nor has it initiated any regulatory process to adopt water quality standards consistent with EPA's bacteria criteria. Therefore, EPA is including Georgia in today's proposal.

Guam

On June 18, 2002, Guam adopted criteria for all of its coastal recreation waters consistent with EPA's 1986 bacteria criteria, and EPA approved these on July 24, 2002. The criteria are for enterococci and have a geometric mean of 35/100 ml for all marine waters. The SSM is 104/100 ml for whole body contact recreation waters and is 276/100 ml for limited body contact recreation. EPA considers these criteria to be as protective of human health as EPA's 1986 bacteria criteria and Guam is therefore not included in this proposal.

Hawaii

Hawaii has adopted criteria consistent with EPA's 1986 bacteria criteria for some but not all of its coastal recreation waters. Hawaii has adopted, and EPA has approved, a geometric mean criterion of 7 for enterococci in non-estuarine marine recreational waters within 300 meters (1,000 feet) of the shoreline. Hawaii is in the process of adopting an SSM criterion for non-estuarine marine waters within 300 meters of shore and both components of the enterococci criteria for coastal estuaries, consistent with EPA's 1986 bacteria criteria. Hawaii has no numeric criteria protecting State waters beyond 300 meters from shore, although these waters are designated for recreation in the State's water quality standards. Therefore, EPA is including Hawaii in this proposal.

Illinois

Illinois has not yet adopted criteria consistent with EPA's 1986 bacteria criteria. Therefore, EPA is including Illinois in today's proposal. Illinois has informed EPA that it will initiate the rulemaking process to adopt revised standards for bacteria by September 30, 2004.

Indiana

On December 13, 1989, Indiana adopted criteria for all of its coastal recreation waters consistent with EPA's 1986 bacteria criteria, and EPA approved these on May 7, 1990. The criteria are for *E. coli* and include a geometric mean of 125/100 ml and an SSM of 235/100 ml. EPA considers these criteria to be as protective of human health as EPA's 1986 bacteria criteria, and therefore Indiana is not included in this proposal.

Louisiana

Louisiana has not yet adopted criteria consistent with EPA's 1986 bacteria criteria, nor has the State initiated any regulatory process to meet BEACH Act requirements. Therefore, EPA is including Louisiana in today's proposal.

Maine

Maine made effective enterococci criteria for its coastal recreation waters classified as "SB" and "SC", and EPA approved these criteria on July 16, 1986. The enterococci criteria include a geometric mean of 8/100 ml and a single sample maximum of 54/100 ml in the State's waters classified as "SB." Class "SB" waters are those that are "suitable for the designated uses of recreation in and on the water" as well as other uses. (ME. REV. STAT. ANN. tit. 38 § 465–B (2003)). Additionally, the enterococci criteria include a geometric mean of 14/100 ml and an SSM of 94/100 ml for the State's waters classified as "SC." Class "SC" waters are also those that are "of such quality that they are suitable for recreation in and on the water" as well as other uses. (ME. REV. STAT. ANN. tit. 38 § 465–B (2003)). Although Maine's criteria numbers are lower than EPA's, Maine's criteria pertain only to enterococci of human origin. Based on the non-human source discussion in Section IV.A.4. of this preamble, EPA does not believe that Maine's criteria would be as protective of human health as EPA's 1986 bacteria criteria in cases

where the enterococci are of non-human origin. The 1986 bacteria criteria document recommends that States and Territories apply the *E. coli* and enterococci criteria to all full body contact recreation waters unless both (1) sanitary and epidemiological studies show the sources of the indicator bacteria to be non-human, and (2) the indicator densities are not indicative of a health risk to those swimming in such waters. EPA recognizes that Maine's approach for addressing non-human pathogen sources is consistent with an option for addressing recreational uses that is included in EPA's 1994 Water Quality Standards Handbook, and Maine is cited in this document as an example of a State that has successfully implemented such an approach. When EPA approved the Maine pathogen standards in 1986, it did so using the requirements of 40 CFR 131.5 and 131.6, which requires water quality criteria be sufficient to protect the designated uses. However, the BEACH Act of 2000 added CWA section 303(i) which requires that the pathogen criteria be "as protective of human health as" EPA's 1986 bacteria criteria document. This is a different standard of review than articulated in 40 CFR 131.5 for other water quality standards. Based on the comparison of Maine's approach for nonhuman sources to that in EPA's 1986 bacteria criteria document, and using its proposed non-human source option, EPA does not find Maine's approach to be "as protective of human health as" EPA's bacteria criteria document. Therefore, EPA is proposing to include Maine in today's rule for limited purposes. EPA could remove Maine's SB and SC waters from the final rule depending on which nonhuman source option EPA chooses in the final rule. EPA is aware that independent of this proposed rule, it is Maine's intent to revise the applicability of its bacteria criteria to include enteroccoci from domestic animals as well as enterococci of human origin. This revision is expected during Maine's next legislative session in January 2005.

EPA's proposed criteria would not apply to Maine's SB and SC waters if the enterococci bacteria are of human origin. In these cases, Maine's criteria would apply. Should EPA receive information during the public comment period showing that there are only human sources of fecal contamination in Maine Class SB and SC coastal recreation waters, EPA would remove Maine from the promulgation of the final rule for Class SB and SC waters because Maine's criteria would apply to all sources of enterococci to coastal recreation waters.

Maine also has as its most protective class, "SA" waters. Class SA "shall be the highest classification and shall be applied to waters which are outstanding natural resources" and "shall be of such quality that they are suitable for designated uses of recreation in and on the waters" as well as other uses. (ME. REV. STAT. ANN. tit. 38 § 465–B (2003). The bacteria content of Class SA waters "shall be as naturally occurs." EPA believes that this narrative criterion for bacteria—"as naturally occurs"—is consistent with the objective of the CWA at Section 101(a) to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Naturally occurring bacteria levels should not present more risk than the 19 illnesses per 1000 swimmers accepted in the 1986 bacteria criteria document. Although storm water discharges to Class SA waters are allowed, EPA understands Maine's standards to not authorize storm water discharges that exceed bacteria levels that would otherwise occur naturally in the receiving water absent the storm water discharges. For these reasons, EPA is not including Maine's Class SA waters in today's proposal.

Maryland

Maryland has not yet adopted criteria consistent with EPA's 1986 bacteria criteria. Therefore, EPA is including Maryland in today's proposal. Maryland is completing its rulemaking process and expects to submit newly adopted criteria to EPA in the near future. Maryland has been working with EPA to assure the development of state water quality standards that are consistent with EPA's 1986 bacteria criteria.

Massachusetts

Massachusetts has not yet adopted criteria consistent with EPA's 1986 bacteria criteria. Therefore, EPA is including Massachusetts in today's proposal. Massachusetts has initiated the rulemaking process and expects to adopt criteria consistent with EPA's 1986 bacteria criteria by December 31, 2004.

Michigan

On May 20, 1994, Michigan adopted criteria for all of its coastal recreation waters consistent with EPA's 1986 bacteria criteria, and EPA approved these on August 11, 1994. The State standards include *E. coli* with a geometric mean of 130/100 ml and an SSM value of 300/100 ml for total body contact recreation and an SSM of 1000/100 ml for partial body contact recreation. Michigan's criteria are considered to be within the acceptable risk level range of 0.8% to 1.0%. (This range was described in Section IV.A.2.). Therefore, EPA interpreted Michigan's *E. coli* geometric mean of 130/100 ml to be as protective of human health as EPA's 1986 bacteria criteria, which recommended a geometric mean of 126/100 ml. EPA considers these criteria to be as protective of human health as EPA's 1986 bacteria criteria, and Michigan is therefore not included in this proposal.

Minnesota

Minnesota has not yet adopted criteria consistent with EPA's 1986 bacteria criteria. Therefore, EPA is including Minnesota in today's proposal. Minnesota has initiated the rulemaking process and expects to adopt criteria consistent with EPA's 1986 bacteria criteria by July 2005.

Mississippi

Mississippi has not yet adopted criteria consistent with EPA's 1986 bacteria criteria. Therefore, EPA is including Mississippi in today's proposal. Mississippi has initiated internal discussions and expects to adopt a geometric mean criterion by August 2004. The State will be conducting beach user studies in the summer of 2004 to determine the appropriate SSM based on usage of certain areas and expects to adopt SSM criteria by August 2005.

New Hampshire

On July 2, 1991, New Hampshire adopted EPA's 1986 bacteria criteria for all of its coastal recreation waters and the criteria became effective for CWA purposes on August 31, 1991. The standards include enterococci and have a geometric mean of 35/100 ml and an SSM of 104/100 ml for all coastal recreation waters. EPA considers these criteria to be as protective of human health as EPA's 1986 bacteria criteria, and New Hampshire is therefore not included in this proposal.

New Jersey

On July 14, 1989, New Jersey adopted criteria for all of its coastal recreation waters consistent with EPA's 1986 bacteria criteria, and EPA approved these on April 23, 1991. New Jersey's bacteria criteria include enterococci and have a geometric mean of 35/100 ml and an SSM of 104/100 ml for all coastal recreation waters. For the Delaware Bay, New Jersey incorporates by reference the water quality standards adopted by the Delaware River Basin Commission (DRBC) (N.J.A.C. 7:9B–1.13). The DRBC

adopted enterococci criteria with a geometric mean of 35/100 ml, but no SSM, for the Delaware Bay. However, New Jersey's standards include a provision that applies New Jersey water quality criteria to the Delaware Bay if the DRBC has not established criteria (N.J.A.C. 7:9B–1.14(d)). Therefore, New Jersey's water quality standards include an SSM that applies to the Delaware Bay in the absence of an SSM in the DRBC's standards, as explained in a May 19,. 2004, letter from Brad Campbell, Commissioner of the New Jersey Department of Environmental Protection to Ben Grumbles, Acting Assistant Administrator for Water, U.S. EPA. EPA considers New Jersey's criteria to be as protective of human health as EPA's 1986 bacteria criteria, and New Jersey is therefore not included in this proposal.

New York

New York has not yet adopted criteria consistent with EPA's 1986 bacteria criteria. Therefore, EPA is including New York in today's proposal. New York has informed EPA that it will initiate its rulemaking process to adopt revised standards for bacteria shortly. The State anticipates final adoption of revised bacteria criteria in 2005.

North Carolina

North Carolina has not yet adopted criteria consistent with EPA's 1986 bacteria criteria. Therefore, EPA is including North Carolina in today's proposal. The State has started internal discussions and has exchanged draft language with EPA.

Ohio

Ohio has adopted a geometric mean consistent with EPA's 1986 bacteria criteria for all waters in Lake Erie in addition to fecal coliform standards. Ohio had previously adopted fecal coliform as its recreational water quality criteria. The standards for *E. coli* include a geometric mean of 126/100 ml for designated bathing waters and for designated primary contact waters. However, the Ohio water quality standards allow the use of either *E. coli* or fecal coliform and specify that compliance with the criteria can be demonstrated by attainment of either criterion. Because Ohio's standards allow the use of either indicator, and fecal coliform is not as protective of human health as EPA's 1986 bacteria criteria, EPA is including Ohio in today's proposal. In addition, EPA is including Ohio in today's proposal because the State does not have an SSM, as EPA interprets the term (see Section III.B.1). Instead, Ohio's standards include *E. coli* values not to be exceeded in more than ten percent of the samples taken during any thirty-day period: 235/100 ml for designated bathing waters and 298/100 ml for designated primary contact waters. These values are identical to EPA's SSM values for the 75 and 82 percent confidence levels respectively, but they are not expressed as SSMs because they allow 10 percent of the samples to exceed the SSM.

Should EPA receive information during the public comment period showing that Ohio applies its *E. coli* criterion for all Clean Water Act implementation purposes in Lake Erie, and applies its upper bound values in a manner as stringent as the approach EPA takes for the SSM in the final rule, EPA would remove Ohio from the final rule.

Oregon

Oregon has not yet adopted criteria consistent with EPA's 1986 bacteria criteria, nor has the State initiated any regulatory process to meet the BEACH Act requirements. Therefore, EPA is including Oregon in today's proposal.

Pennsylvania

Pennsylvania has not yet adopted criteria consistent with EPA's 1986 bacteria criteria. Pennsylvania has initiated a modification to its Department of Health regulations relating to the bacteriological standards and monitoring of its Great Lake public bathing beaches but has not yet submitted any revision of its water quality standards to EPA. Therefore, EPA is including Pennsylvania in today's proposal.

Puerto Rico

The Commonwealth of Puerto Rico's water quality criteria for recreational waters applies to those Class SB (coastal) waters which are intensely used for primary contact recreation, like special bathing zones (beaches), and the Class SC waters for which EPA recently completed a rulemaking (40 CFR 131.40) to establish a designated use and applicable water quality criteria (including the 1986 bacteria criteria for enterococci) to protect primary contact recreation. The remaining Class SB waters, which are not designated bathing beaches but are coastal recreation waters, do not have bacteria criteria as protective of human health as EPA's 1986 bacteria criteria. Therefore, EPA is including Puerto Rico, except for coastal recreation waters intensely used for primary contact recreation and those covered by the recent EPA rule, in today's proposal. Puerto Rico has informed EPA of its intent to adopt criteria consistent with EPA's 1986 bacteria criteria for the remaining Class SB waters.

Rhode Island

Rhode Island has not yet adopted criteria consistent with EPA's 1986 bacteria criteria. Therefore, EPA is including Rhode Island in today's proposal. Rhode Island has informed EPA of its intent to adopt criteria consistent with EPA's 1986 bacteria criteria and has initiated the rulemaking process. Rhode Island plans to adopt EPA's criteria by the end of 2004.

South Carolina

South Carolina has not yet adopted criteria consistent with EPA's 1986 bacteria criteria. Therefore, EPA is including South Carolina in today's proposal. South Carolina has initiated the rulemaking process and expects to adopt EPA's criteria or submit them for EPA review by July 2004.

Texas

On July 26, 2000, Texas adopted criteria for all of its coastal recreation waters consistent with EPA's 1986 bacteria criteria, and EPA approved these on June 30, 2004. Texas' bacteria criteria include enterococci and have a geometric mean of 35/100 ml and an SSM of 89/100 ml for all coastal recreation waters. The water quality standards also include criteria for fecal coliform. Kathleen Hartnett White, Chair of the Texas Commission on Environmental Quality, sent two letters dated June 16 and June 29, 2004, explaining Texas' interpretation of the State's standards. Ms. White acknowledged that, under these revised standards, Texas has discretion to use fecal coliform as an alternative recreational indicator. At the time Texas adopted these standards, in 2000, it included this discretion for three reasons: (1) Texas wanted time to transition from monitoring for fecal coliform to enterococci for waters designated for contact recreation; (2) Texas was concerned about monitoring resources and laboratory equipment needed to sustain monitoring for both enterococci and fecal coliform in Oyster Waters, and (3) Texas wanted to allow for the possibility that additional data and evaluation of the two indicators would show that the Oyster Water criterion for fecal coliform would be a protective surrogate for enterococci. Ms. White also explained in her June 2004 letters that currently the State is monitoring for enterococci in all of its coastal recreation waters, including Oyster Waters. In addition, she expressly recognized that, at this time, the relationship between fecal coliform

and enterococci has not been demonstrated for Texas coastal waters. Finally, in the letter of June 29, 2004, Texas explicitly states that the enterococci criteria are in effect for all CWA purposes for all coastal recreation waters, including those designated as Oyster Waters. With this additional information, EPA considers enterococci to be the applicable criteria in all of Texas' coastal recreation waters for all CWA purposes. EPA considers these criteria to be as protective of human health as EPA's bacteria criteria, and Texas is therefore not included in this proposal.

United States Virgin Islands

The Virgin Islands have not yet adopted criteria consistent with EPA's 1986 bacteria criteria. Therefore, EPA is including the Virgin Islands in today's proposal. The Virgin Islands have initiated the rulemaking process and expect to adopt EPA's criteria by September 30, 2004.

Virginia

On February 12, 2002, Virginia adopted EPA's 1986 bacteria criteria for all of its coastal recreation waters, and EPA approved these on November 8, 2002. The standards include enterococci and have a geometric mean of 35/100 ml for all coastal waters and an SSM value of 104/100 ml. The standards also have fecal coliform for shellfish waters in addition to enterococci. EPA considers the enterococci criteria to be as protective of human health as EPA's 1986 bacteria criteria, and Virginia is therefore not included in this proposal.

Washington

Washington has not yet adopted criteria consistent with EPA's 1986 bacteria criteria. In a letter dated May 11, 2004, Washington explained its view that the State's data show that where the geometric mean of fecal coliform concentrations are at or below 14 counts/100 ml, the corresponding geometric mean of enterococci bacteria are at or below EPA's 1986 marine criterion of 35 counts/100 ml. EPA is reviewing this information and requests comment on it. The data submitted by Washington are available in the official public docket for this rulemaking. Because EPA has not yet determined that the data demonstrate that Washington's standards satisfy the requirements of section 303(i), EPA is including Washington in today's proposal.

Wisconsin

Wisconsin has not yet adopted criteria consistent with EPA's 1986 bacteria criteria. Therefore, EPA is including Wisconsin in today's proposal. Wisconsin has initiated the rulemaking process and intends to adopt criteria consistent with EPA's bacteria criteria by winter 2005–2006.

Tribes

No Tribes are included in this proposal. EPA has determined there are about 40 Federally-recognized Tribes located next to either coastal or Great Lakes waters. As of the date of this proposal, none of these Tribes have coastal recreation waters (*i.e.*, coastal or Great Lakes waters designated for swimming, bathing, surfing or similar water contact activities). EPA is not including these Tribes in today's proposal because the requirements of CWA section 303(i) only apply to coastal recreation waters. EPA recognizes that the criteria in today's proposal will help inform Agency decisions related to its review of current and future Tribal water quality standards submissions to EPA. EPA has contacted those Tribes identified as having coastal or Great Lakes waters to inform them of the potential future impact this proposal could have on Tribal waters. EPA solicits comment on its interpretation of CWA section 303(i) as it applies to coastal Tribal waters that have not been designated for swimming, bathing, surfing, or similar water contact activities.

C. Under What Conditions Will States and Territories Be Removed From a Final Rule?

As discussed in Section II of this preamble, the water quality standards program has been established with an emphasis on State primacy. Although this proposed rule has been developed to promulgate Federal bacteria criteria for certain States and Territories, EPA prefers that States and Territories maintain primacy and revise their own standards to meet CWA sections 303(c) and 303(i) requirements. EPA is hopeful that today's proposed rulemaking will provide additional impetus for States and Territories to adopt the criteria for bacteria necessary to comply with CWA section 303(i).

For States and Territories that adopt criteria that EPA approves as meeting CWA section 303(i) requirements before publication of the final rulemaking, EPA will not include them in the final rulemaking. At any point in the process prior to final promulgation, a State or Territory can ensure that it will not be affected by this action by adopting the necessary criteria pursuant to State or Territorial law and receiving EPA approval. EPA will make every effort to issue timely approval of revised criteria submitted before promulgation of the final rule.

Following a final promulgation of this rule, removal of Federal standards for a State or Territory will require rulemaking by EPA according to the requirements of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*). When a State or Territory adopts standards as protective of human health as EPA's 1986 bacteria criteria, EPA will undertake such a rulemaking to withdraw the Federal criteria. However, as discussed in Section III.C.1, EPA is proposing that State and Territorial standards for bacteria approved by EPA pursuant to CWA sections 303(c) and 303(i) will be in effect for CWA purposes, and the Federal criteria for this rule will no longer apply even before EPA withdraws the Federal criteria for that State or Territory.

V. Alternative Regulatory Approaches and Implementation Mechanisms

In developing a final rule, EPA will consider any data or information submitted to the Agency during the comment period. However, it is possible that relevant information for particular coastal recreation waters covered by this proposed rule may become available after completion of this rulemaking. If EPA ultimately promulgates a Federal *E. coli* and enterococci criteria for coastal recreation waters for some or all of the States and Territories covered by this proposal, there are several ways to ensure that the primary contact recreation use and its implementing mechanisms appropriately take into account such future information.

A. Designating Uses

States and Territories have considerable discretion in designating uses. A State or Territory may find that changes in use designations are warranted. EPA will review any new or revised use designations adopted by the States or Territories for coastal recreation waters covered by this proposed rule to determine if the standards meet the requirements of the CWA and implementing regulations. In adopting recreation uses, the States and Territories may wish to consider additional categories of recreation uses. If States and Territories change the designated use of a waterbody consistent with CWA section 303(c) and the regulations at 40 CFR 131, such that they are no longer designated for swimming, bathing, surfing, or similar water contact activities then the waterbody would not be covered by the BEACH Act definition of "coastal recreation waters".

EPA reminds the States and Territories that they must conduct use attainability analyses as required by 40 CFR 131.10(g) when adopting water quality standards with uses not specified in CWA section 101(a)(2) or with subcategories of designated uses specified in CWA section 101(a)(2) that require less stringent criteria (see 40 CFR 131.10(j)).

B. Compliance Schedules

A compliance schedule refers to an enforceable sequence of interim requirements in a permit leading to ultimate compliance with water quality-based effluent limitations (WQBELs) in accordance with the CWA. In an NPDES permit, WQBELs are the value determined by selecting the most stringent of the effluent limits calculated using all applicable water quality criteria for a specific point source to a specific receiving water for a given pollutant (See NPDES Permit Writers Manual, EPA–833–B–96–003, December, 1996).

Although many States and Territories have adopted regulations that are effective for CWA purposes authorizing compliance schedules for WQBELs, some have not done so. Therefore, EPA is proposing that where a State or Territory does not have a regulation that is in effect for CWA purposes authorizing compliance schedules for WQBELs, this proposed rule would authorize, but would not require, the permit issuing authority to include such compliance schedules in permits under appropriate circumstances. If a State or Territory does have a regulation that is in effect for CWA purposes authorizing compliance schedules, that compliance schedule regulation would continue to apply and would not be affected by today's proposed rule. It may be that a State or Territory that does not have a regulation authorizing compliance schedules has chosen that it does not want such a regulation. Thus, if a State or Territory notifies EPA in writing prior to promulgation that it does not want to authorize compliance schedules in permits implementing the bacteria criteria, then EPA would exclude that State or Territory from the compliance schedule provision contained in the final rule. Deferring to each State's or Territory's compliance schedule decisions would be consistent with the CWA's approach of giving the States and Territories the primary authority over water pollution control (CWA section 101(b)).

In States and Territories where this proposed rule's compliance schedule provision would apply, the permitting authority authorized to administer the National Pollutant Discharge Elimination System (NPDES) program would exercise its discretion when deciding if a compliance schedule is justified because of the technical or financial (or other) infeasibility of immediate compliance. A provision authorizing compliance schedules is included in today's proposed rule because of the potential for existing dischargers to have new or more stringent effluent limitations for which immediate compliance would not be possible or practicable.

EPA supports the States and Territories in adopting statewide provisions independent of or as part of their effort to readopt statewide water quality control plans, or in adopting individual basin-wide compliance schedule provisions. The States and Territories have broad discretion to adopt such provisions, including discretion on reasonable lengths of time for final compliance with WQBELs. EPA recognizes that practical time frames within which to set interim goals may be necessary to achieve meaningful, long-term improvements in water quality.

New and Existing Pathogen Dischargers: The provision would allow compliance schedules only for an "existing pathogen discharger" which would be defined as any discharger which is not a "new pathogen discharger." EPA is proposing to define a "new pathogen discharger" as any building, structure, facility, or installation from which there is or may be a discharge of pathogens, the construction of which commenced after the effective date of the final rule. This definition is modeled after the definition of a new Great Lakes discharger at 40 CFR 132.2 which EPA created to implement the compliance schedule provision of 40 CFR Part 132 Appendix F, Procedure 9. The definition of "new pathogen discharger" only includes new sources if the new source commences construction after the effective date of the final rule. Other new sources that commence construction before the effective date of the final rule would be treated as "existing pathogen dischargers." EPA solicits comment on the utility of these definitions for implementing a compliance schedule for the proposed enterococci and *E. coli* criteria in 40 CFR 131.41.

For "existing pathogen dischargers" whose permits are reissued or modified to contain new or more stringent limitations based upon certain water quality requirements, the permit could allow up to five years to comply with such limitations. The provision would apply to new or more stringent effluent limitations based on the criteria in this proposed rule. EPA has included "increasing dischargers" within the category of "existing pathogen dischargers"' for purposes of this rule since "increasing dischargers" are existing facilities with a change—an increase—in their discharge. Such facilities may include those with seasonal variations. "Increasing dischargers" will already have treatment systems in place for their current discharge, thus, they are constrained in the types of efficiencies they can gain from their existing treatment system processes. In contrast, a new discharger can design and build a new treatment system which most efficiently will meet the new water quality-based requirements. Allowing existing facilities with an increasing discharge a compliance schedule in appropriate circumstances would avoid placing the discharger at a competitive disadvantage vis-a-vis other existing dischargers who are eligible for compliance schedules.

Today's proposed rule would not prohibit the use of a short-term "shake down period" for new pathogen dischargers as is provided for new sources or new dischargers in 40 CFR 122.29(d)(4). These regulations would require that the owner or operator of (1) a new source; (2) a new discharger (as defined in 40 CFR 122.2) which commenced discharge after August 13, 1979; or (3) a recommencing discharger shall install and implement all pollution control equipment to meet the conditions of the permit before discharging. The facility would also be required to meet all permit conditions in the shortest feasible time (not to exceed 90 days). This shake-down period is not a compliance schedule, some types of facilities that are eligible for a "shake down period" may also be eligible for a compliance schedule if they are existing pathogen dischargers. This approach would be used to address violations which may occur during a new facility's start-up, especially where permit limits are water quality-based and biological treatment is involved.

The burden of proof to show the necessity of a compliance schedule would be on the discharger, and the discharger would be required to request approval from the permit issuing authority for a schedule of compliance. The discharger should submit a description of the minimum required actions or evaluations that must be undertaken in order to comply with the new or more restrictive discharge limits. Dates of completion for the required actions or evaluations should be included, and the proposed schedule

should reflect the shortest practicable time to complete all minimum required actions.

Duration of Compliance Schedules: Today's proposed rule would provide that compliance schedules may provide for up to five years from date of permit issuance, reissuance, or modification to meet new or more stringent effluent limitations in those circumstances where the permittee can demonstrate to the permit authority that an extended schedule is warranted. EPA's regulations at 40 CFR 122.47 require compliance with standards as soon as possible. This means that permit authorities should not allow compliance schedules where the permittee fails to demonstrate their necessity. This provision should not be considered a default compliance schedule duration for all existing facilities. In instances where dischargers find that their current level of disinfection or other treatment is not sufficient to achieve the *E. coli* or enterococci criterion, dischargers will need to increase their current level of disinfection or evaluate and install new treatment technology. EPA believes that five years is sufficient time within which to complete this process.

Under this proposed rule, where a schedule of compliance exceeds one year, interim requirements are to be specified and interim progress reports would be required to be submitted at least annually to the permit issuing authority.

The proposed rule would allow all compliance schedules to extend up to a maximum duration of five years. Under the proposal, an existing pathogen discharger may obtain a compliance schedule when the existing permit for that discharge is issued, reissued or modified to contain more stringent limits based on the water quality criteria in today's proposed rule. Such compliance schedules, however, would not be able to be extended indefinitely because the compliance schedule provision in this rule limits the length of a compliance schedule for any facility to a maximum of five years.

EPA recognizes that where a permit is modified during the permit term, and the permittee needs the full five years to comply, the five-year schedule may extend beyond the term of the modified permit. In such cases, the rule allows for the modified permit to contain a compliance schedule with an interim limit to be achieved by the end of the permit term. When the permit is reissued, the permit authority may extend the compliance schedule in the next permit, provided that, taking into account the amount of time allowed under the previous permit, the entire compliance schedule contained in the permit shall not exceed five years. Final permit limits and compliance dates will be included in the record for the permit. Final compliance dates for any WQBEL must occur within five years from the date of permit issuance, reissuance, or modification.

Antibacksliding: EPA wishes to address the potential concern over antibacksliding where revised permit limits based on new information are the result of the completion of additional studies. The Agency's interpretation of the CWA is that the antibacksliding requirements of section 402(o) of the CWA do not apply to revisions to effluent limitations made before the scheduled date of compliance for those limitations.

EPA is requesting comment on the setting and use of compliance schedules to provide permitted dischargers time to meet their permit effluent limitations based on today's proposed bacteria criteria. Compliance schedules can be set as part of the water quality standard or as part of the implementing regulations; in this specific case, the standard is authorizing the use of compliance schedules in cases where the permitting authority determines it would be appropriate. EPA is interested in views concerning the duration of the schedule. Today's proposal limits compliance schedules to a period not to exceed five years. It also requires interim limits where the five year term exceeds the length of time remaining in the permit after modification and requires specific milestones and reporting on an annual basis. EPA is interested in whether the limitation of five years for compliance schedules is reasonable or should longer schedules be allowed for certain permit activities that require extensive studies and construction activities (*e.g.*, long term control plans associated with combined sewer overflows).

VI. Economic Analysis

These water quality standards may serve as a basis for development of NPDES permit limits. Many of the affected jurisdictions (*i.e.*, States and Territories) are the NPDES permitting authorities, which retain considerable discretion in implementing standards. EPA evaluated the potential costs to NPDES dischargers in affected jurisdictions associated with future State and Territorial implementation of EPA's Federal standards. This analysis is documented in "Economic Analysis for Proposed Water Quality Standards for Coastal Recreation Waters,'" which can be found in the record for this rulemaking.

Any NPDES-permitted facility that discharges to water bodies affected by this proposed rule could potentially incur costs to comply with the rule's provisions. The types of affected facilities may include industrial facilities and publicly owned treatment works (POTWs) discharging sanitary wastewater to surface waters (*i.e.*, point sources). EPA addresses discharges of bacteria from municipal separate storm sewer systems, combined sewer overflows (CSOs), and sanitary sewer overflows (SSOs) to coastal waters in existing and anticipated regulations and policies, and has tallied potential control costs as part of analyses for these actions. Controls for these types of discharges, which are not based on numeric limits are not likely to be substantially affected by the revised indicators in the proposed rule, at least in the near future. Therefore, to avoid double counting, EPA did not estimate costs for such discharges for this rule. EPA did not evaluate concentrated animal feeding operations (CAFOs) because section 301(a) of the CWA prohibits point sources, including CAFOs, from discharging to surface waters without a permit (except in compliance with CWA section 402 and other specified sections of the CWA), and because NPDES permits for CAFOs in turn prohibit discharges except in unusual circumstances (*i.e.*, very large storms) that are unlikely to be affected by the revised indicators. EPA does not have data to quantify the effects of the proposed rule on total maximum daily loads for pathogen-impaired waters. Finally, EPA did not evaluate the potential for costs to nonpoint sources, such as agricultural runoff, and did not attempt to quantify the potential benefits of the proposed rule.

EPA recognizes that a State or Territory may decide to require controls for nonpoint sources (*e.g.*, agricultural runoff) or point source discharges (*e.g.*, CSOs and SSOs) due to wet weather events. However, as a technical matter, these sources are difficult to model and evaluate with respect to potential costs impacts because they are intermittent, highly variable, and occur under different hydrologic or climatic conditions than continuous discharges from industrial and municipal facilities, which EPA evaluates under critical low flow or drought conditions. Also, data on instream and discharge levels of bacteria after States have implemented controls to meet current water quality standards based on fecal coliform are not available. Therefore, trying to determine which sources would not achieve standards based on *E. coli* or

enterococci after complying with existing regulations and policies may not be possible, or would be extremely time and resource intensive. Finally, it is likely that any controls needed to meet existing standards (*i.e.*, based on fecal coliform) would also address any water quality problems indicated by standards based on *E. coli* or enterococci.

A. Identifying Affected Facilities

EPA identified approximately 850 point source facilities from 28 States and Territories that may be affected by the proposed rule. Of these potentially affected facilities, 362 are classified as major dischargers, and 488 are minor dischargers. EPA did not include general permit facilities in its analysis because data for such facilities are extremely limited, and flows are usually negligible. Furthermore, EPA could not determine if any of these facilities actually discharge to the affected water bodies because location information is not available in EPA's PCS database.

EPA assumed that only facilities located in jurisdictions included in the proposed rule that discharge within 2 miles of coastal waters or the Great Lakes may be affected. EPA identified these facilities by relating facility information to the potentially affected waters using GIS software. EPA also assumed that only wastewater treatment plants or facilities with similar effluent characteristics (*i.e.*, facilities having the potential to discharge bacteria) would potentially be affected by the proposed rule. For those facilities for which latitude/longitude data are not included in PCS, EPA included only facilities for which the receiving water body name in PCS indicates a coastal water (*e.g.*, Pacific Ocean, Lake Erie). Table 4 summarizes these potentially affected facilities by type and category.

TABLE 4.—POTENTIALLY AFFECTED FACILITIES [1]

Category	Number of facilities			Total
	Major [2]	Minor		
		Municipal	Other [3]	
Coastal	298	283	108	689
Great Lakes	64	76	21	161
Total	362	359	129	850

[1] Facilities from States and Territories included in the proposed rule that discharge within two miles of coastal waters or the Great Lakes.

[2] No major industrial facilities are affected by the proposed rule. However, 6 other facilities (SIC codes 9711 and 9999) are included because their names indicate that they are wastewater treatment plants.

[3] Includes the following SICs: Eating places (5812), drinking places (5813), operators of nonresidential buildings (6512), operators of apartment buildings (6513), operators of dwellings other than apartment buildings (6514), operators of residential mobile home sites (6515), hotels and motels (7011), recreational vehicle parks and campsites (7033), organization hotels and lodging houses (7041), physical fitness facilities (7991), amusement and recreation services (7999), skilled nursing care facilities (8051), general medical and surgical hospitals (8062), elementary and secondary schools (8211), colleges, universities, and professional schools (8221), civic, social, and fraternal associations (8641), private households (8811). Also includes the following SICs if the facility name suggests that they may discharge sanitary waste: Operative builders (1531), sanitary services, not elsewhere classified (4959), real estate agents and managers (6531), business associations (8611), religious organizations (8661), services not elsewhere classified (8999), air and water resource and solid waste management (9511), nonclassifiable establishments (9999).

B. Method for Estimating Potential Compliance Costs

To estimate costs, EPA evaluated the 15 major municipal facilities with design flows greater than 120 mgd, thus ensuring that the facilities with potential for the largest costs would be evaluated. For the remaining facilities, EPA evaluated a sample of facilities to represent discharger type and category.

The proposed standards are for the affected waters, and permitting authorities have flexibility in implementing the criteria. Facilities in some States that have adopted the 1986 criteria have effluent limits for *E. coli* or enterococci, and in other such States, facilities do not have bacteria limits. To be conservative (*i.e.*, err on the side of higher costs), EPA assumed that potentially affected facilities would be required to meet both the applicable geometric mean and SSM (although EPA's bacteria implementation guidance indicates that the intent of the SSM value is not for permitting).

PCS does not contain *E. coli* or enterococci effluent data for any of the sample facilities. Therefore, to evaluate potential costs associated with the *E. coli* criteria, EPA assumed that 100% of the fecal coliform measured is *E. coli* because *E. coli* is a type of fecal coliform. EPA estimated that facilities with average monthly effluent levels, based on the last 3 years of data, exceeding a geometric mean of 126 fecal coliform/100 mL, or maximum daily levels exceeding 235 fecal colonies/100 mL, would need treatment controls to meet potential permit limits based on the proposed criteria.

Enterococci are fecal bacteria in the fecal streptococcus group, and their relationship to fecal coliform bacteria is uncertain. Therefore, for coastal facilities, EPA used data and information in the literature regarding the ratio of fecal coliform to enterococci in untreated sewage, and the inactivation of both of these bacteria at minimum disinfection levels, to identify the concentrations of fecal coliform that may indicate a need for controls. Data in the literature indicate that the ratio of fecal coliform to fecal streptococcus in untreated sewage ranges from about 4 to 28. EPA used the most conservative (*i.e.*, erring on the side of overestimating costs) ratio of 4 (*i.e.*, fecal coliform levels are 4 times fecal streptococcus levels) to estimate the fecal coliform levels at which facilities would need treatment to comply with the proposed enterococci criteria. Again, EPA compared fecal coliform levels over the last three years to both the proposed geometric mean and SSM enterococci criteria values.

Experiences from facilities currently meeting the proposed *E. coli* and enterococci criteria, as well as the current fecal coliform criteria, suggest that chlorination processes can be upgraded or adjusted to produce the levels of bacteria necessary for compliance with the proposed rule. Therefore, EPA estimated that optimization of existing disinfection processes would enable the sample facilities to comply with the proposed rule. Process optimization usually involves process analysis and process modifications, and EPA's cost estimates include both capital and operating and maintenance costs.

C. Results

Based on the potential costs for the 15 facilities with flows greater than 120 mgd, and extrapolating costs for a sample of 60 facilities to the remaining 835 facilities potentially affected by the proposed rule, EPA estimated a total annual cost of approximately $22 million ($15 million for coastal facilities, and $7 million for Great Lakes facilities). EPA estimates that approximately 110 major and 30 minor permittees could incur control costs as a result of modified permits to comply with the revised criteria. However, this estimate is considered conservative because it is based on assumptions regarding how States and Territorial will implement the proposed standards that may overstate the actual cost impacts and two States (Alabama and Texas) included in EPA's cost analysis are not part of today's proposed rule.VII.

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 the regulatory action is "significant" and therefore subject to OMB review and the requirements of the 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 obligations 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 a "significant regulatory action" because the rule raises novel policy issues arising out of the BEACH Act. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). It does not include any information collection, reporting, or record-keeping requirements.

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 unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.*, 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 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 proposed rule on small entities, small entity is defined as: (1) A small business according to RFA default definitions for small business (based on SBA size standards); (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. This proposed rule will not impose any requirements on small entities. The RFA requires analysis of the impacts of a rule on the small entities subject to the rule's requirements. See *United States Distribution Companies* v. *FERC*, 88 F.3d 1105, 1170 (DC Cir. 1996). Today's proposed rule establishes no requirements applicable to small entities, and so is not susceptible to regulatory flexibility analysis as prescribed by the RFA. ("[N]o [regulatory flexibility] analysis is necessary when an agency determines that the rule will not have a significant economic impact on a substantial number of small entities *that are subject to the requirements of the rule*," *United Distribution* at 1170, quoting *Mid-Tex Elec. Co-op* v. *FERC*, 773 F.2d 327, 342 (DC Cir. 1985) (emphasis added by *United Distribution* court).) 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.

CWA section 303(i)(2)(A) requires that if a State or Territory fails to adopt water quality criteria and standards in accordance with paragraph (1)(A) that are as protective of human health as the criteria for pathogen indicators for coastal recreation waters published by the Administrator, the Administrator shall promptly propose regulations for the State or Territory setting forth revised or new water quality standards for pathogen indicators described in paragraph (1)(A) for coastal recreation waters of the State or Territory. These State standards (or EPA-promulgated standards) are implemented through various water quality control programs including the NPDES program, which limits discharges to navigable waters except in compliance with an NPDES permit. The CWA requires that all NPDES permits include any limits on discharges that are necessary to meet applicable water quality standards.

Thus, under the CWA, EPA's promulgation of water quality standards establishes standards that the State generally implements through the NPDES permit process. In this case, EPA Regional Offices are the NPDES permitting authority in five of the States and Territories subject to today's proposal. EPA Regions 1, 2, 9 and 10 are the permitting authorities for Massachusetts, Puerto Rico, the Commonwealth of the Northern Mariana Islands, for some permits in Hawaii, and Alaska, respectively. As such, EPA Regions 1, 2, 9, and 10 have discretion

in developing discharge limits as needed to meet the standards. While these Regions' implementation of Federally promulgated water quality standards may result in new or revised discharge limits being placed on small entities, the standards themselves do not apply to any discharger, including small entities.

Today's proposed rule, as explained earlier, does not itself establish any requirements that are applicable to small entities. As a result of this action, States, Territories, and EPA Regional offices will need to ensure that permits they issue include any limitations on discharges necessary to comply with the standards established in the final rule. In doing so, the States, Territories, and EPA Regions will have a number of choices associated with permit writing. While the implementation of the rule may ultimately result in some new or revised permit conditions for some dischargers, EPA's action today does not impose any of these as yet unknown requirements on small entities.

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. The definition of "State" for the purposes of UMRA includes "a territory or possession of the United States." 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 one 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 of 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.

Today's proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) that may result in expenditures to State, local and Tribal governments, or the private sector, in the aggregate of $100 million or more in any one year. Therefore, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

EPA has determined that this proposed rule contains no regulatory requirements that might significantly or uniquely affect small governments. Thus, this proposed rule is not subject to the requirements of section 203 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 rule 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. EPA's authority and responsibility to promulgate Federal water quality standards when State standards do not meet the requirements of the CWA is well established and has been used on various occasions in the past. The proposed rule would not substantially affect the relationship of EPA and the States and Territories, or the distribution of power or responsibilities between EPA and the various levels of government. The proposed rule would not alter the States' or Territories' considerable discretion in implementing these water quality standards. Further, this proposed rule would not preclude the States and Territories from adopting water quality standards that meet the requirements of the CWA, either before or after promulgation of the final rule, thus eliminating the need for Federal standards. Thus, Executive Order 13132 does not apply to this proposed rule.

Although Executive Order 13132 does not apply to this rule, EPA did consult with representatives of the States and Territories subject to CWA section 303(i) in developing this rule. Prior to this proposed rulemaking action, EPA had numerous phone calls, meetings and exchanges of written correspondence with the States to discuss EPA's concerns with the States' bacteria criteria, compliance with the BEACH Act, and the Federal rulemaking process. In June 2000 EPA and the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) established a State/EPA Work Group on Water Quality Standards, composed of selected senior State and EPA managers, to provide input to EPA on water quality standards issues. The group has met approximately three times per year since then, beginning with a meeting in September 2000. At every meeting the group has discussed the scientific, programmatic, and policy aspects of bacteria criteria for both coastal and non-coastal recreation waters, and has provided useful input to EPA on these topics. Members of this group, together with other interested State participants, have also served as an ad-hoc work group since 2001 to assist EPA in developing draft detailed scientific and policy guidance (*Implementation Guidance for Ambient Water Quality Criteria for Bacteria*, May 2002 Draft, EPA–823–B–02–003) concerning adoption and implementation of EPA's recommended criteria for bacteria. EPA will continue to work with the States and Territories before finalizing these water quality standards. 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. There are four authorized Indian Tribes with coastal or Great Lakes waters; however, they have not yet adopted water quality standards, and therefore, have no designated coastal recreation waters within their jurisdiction. These tribes are therefore not subject to today's proposed rule. Thus, Executive Order 13175 does not apply to this rule.

EPA has contacted those Tribes identified as having coastal or Great Lakes waters to inform them of the potential future impact this proposal could have on Tribal waters. EPA specifically solicits additional comment on this proposed rule from tribal officials.

G. Executive Order 13045: Protection of Children From Environmental Health Risks 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.

This proposed rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. EPA estimates that compliance with the proposed rule will create a negligible increase in nationwide energy consumption for point source facilities discharging to coastal recreation waters in affected States. In Section VI, EPA presented its estimated incremental costs to permitted facilities as a result of the proposed rule. Some of these costs include energy use associated with increased maintenance of disinfection tanks. EPA estimates that the increased energy use from these activities would be about 140,000 kilowatt hours. Net production by electric power generation facilities in the United States in 2002 was 3,858,452 million kilowatt hours (Energy Information Administration, Department of Energy, *http://www.eia.doe.gov/neic/quickfacts/quickelectric.htm*). EPA estimates that the additional energy requirements of EPA's rule are insignificant (*i.e.*, 0.000004% of national energy generation).

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, 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, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

While ambient water quality criteria may be considered technical standards EPA is not aware of any voluntary consensus standards relating to bacteria criteria to protect human health. Furthermore, even if there were such voluntary consensus standards the BEACH Act specifically directs EPA to promulgate Federal standards based on its own bacteria criteria, published in accordance with CWA section 304(a), in cases where States fail to do so. Therefore, EPA is not considering the use of any voluntary consensus standards.

List of Subjects in 40 CFR Part 131

Environmental protection, Intergovernmental relations, Reporting and recordkeeping requirements, Water pollution control.

Dated: July 1, 2004.

Michael O. Leavitt,

Administrator.

For the reasons set out in the preamble, EPA proposes to amend 40 CFR part 131 as follows:

PART 131—WATER QUALITY STANDARDS

1. The authority citation for part 131 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

Subpart D—[Amended]

2. Section 131.41 is added to read as follows:

§ 131.41 Bacteriological criteria for those states not complying with Clean Water Act section 303(i)(1)(A).

(a) *Scope.* This section is a promulgation of the Clean Water Act section 304(a) criteria for bacteria for coastal recreation waters in specific States. It is not a general promulgation of the Clean Water Act section 304(a) criteria for bacteria. This section also contains a compliance schedule provision.

(b) *Definitions*—(1) *Coastal Recreation Waters* are the Great Lakes and marine coastal waters (including coastal estuaries) that are designated under section 303(c) of the Clean Water Act for use for swimming, bathing, surfing, or similar water contact activities. Coastal recreation waters do not include inland waters or waters upstream from the mouth of a river or stream having an unimpaired natural connection with the open sea.

(2) *Designated bathing beach waters* are those coastal recreation waters that, during the recreation season, are heavily-used and may have: A lifeguard, bathhouse facilities, or public parking for beach access. States may include any other waters in this category even if the waters do not meet these criteria.

(3) *Moderate use coastal recreation waters* are those coastal recreation waters that are not designated bathing beach waters but typically, during the recreation season, are used by at least half of the number of people as at typical designated bathing beach waters

within the State. States may also include light use or infrequent use coastal recreation waters in this category.

(4) *Light use coastal recreation waters* are those coastal recreation waters that are not designated bathing beach waters but typically, during the recreation season, are used by less than half of the number of people as at typical designated bathing beach waters within the State, but are more than infrequently used. States may also include infrequent use coastal recreation waters in this category.

(5) *Infrequent use coastal recreation waters* are those coastal recreation waters that are rarely or occasionally used.

(6) *New pathogen discharger* for the purposes of this rule means any building, structure, facility, or installation from which there is or may be a discharge of pathogens, the construction of which commenced on or after [THE EFFECTIVE DATE OF THE RULE].

(7) *Existing pathogen discharger* for the purposes of this rule means any discharger that is not a new pathogen discharger.

(c) *EPA's section 304(a) ambient water quality criteria for bacteria.*

(1) Fresh waters:

A Indicator	B Geometric mean	C Single sample maximum (per 100 ml)			
		C1 Designated bathing beach (75% confidence level)	C2 Moderate use coastal recreation waters (82% confidence level)	C3 Light use coastal recreation waters (90% confidence level)	C4 Infrequent use coastal recreation waters (95% confidence level)
E. coli	126/100 ml [a]	235 [b]	298 [b]	409 [b]	575 [b]

Footnotes to table in paragraph (c)(1):
[a] This value is for use with analytical methods 1106.1 or 1600 or any equivalent viable method.
[b] Calculated using the following: single sample maximum = geometric mean * 10 ^ (confidence level factor * log standard deviation), where the confidence level factor is: 75%: 0.68; 82%: 0.94; 90%: 1.28; 95%: 1.65. The log standard deviation from EPA's epidemiological studies is 0.4.

(2) Marine waters:

A Indicator	B Geometric mean	C Single sample maximum (per 100 ml)			
		C1 Designated bathing beach (75% confidence level)	C2 Moderate use coastal recreation waters (82% confidence level)	C3 Light use coastal recreation waters (90% confidence level)	C4 Infrequent use coastal recreation waters (95% confidence level)
Enterococci	35/100 ml [a]	104 [b]	158 [b]	276 [b]	501 [b]

Footnotes to table in paragraph (c)(2):
[a] This value is for use with analytical methods 1103.1, 1603, or 1604 or any equivalent viable method.
[b] Calculated using the following: single sample maximum = geometric mean * 10 ^ (confidence level factor * log standard deviation), where the confidence level factor is: 75%: 0.68; 82%: 0.94; 90%: 1.28; 95%: 1.65. The log standard deviation from EPA's epidemiological studies is 0.7.

(3) As an alternative to the single sample maximum in paragraph (c)(1) or (c)(2) of this section, States may use a site-specific log standard deviation to calculate a single sample maximum for individual coastal recreation waters, but must use at least 30 samples from a single recreation season to do so.

(d) *Applicability.* (1) The criteria in paragraph (c) of this section apply to the coastal recreation waters of the States identified in paragraph (e) of this section and apply concurrently with any ambient recreational water criteria adopted by the State, except for those coastal recreation waters where State regulations contain criteria approved by EPA as meeting the requirements of Clean Water Act section 303(i), in which case the State's criteria for those coastal recreation waters will apply and not the criteria in paragraph (c) of this section.

(2) The criteria established in this section are subject to the State's general rules of applicability in the same way and to the same extent as are other Federally-adopted and State-adopted numeric criteria when applied to the same use classifications.

(e) *Applicability to specific jurisdictions.* (1) The criteria in paragraph (c)(1) of this section apply to fresh coastal recreation waters of the following States: Illinois, Minnesota, New York, Ohio, Pennsylvania, Wisconsin.

(2) The criteria in paragraph (c)(2) of this section apply to marine coastal recreation waters of the following States: Alaska, California (except for coastal recreation waters within the jurisdiction of Regional Board 4), Delaware (except for waters with human sources of fecal contamination), Florida, Georgia, Hawaii (except for non-estuarine coastal recreation waters within 300 meters of the shoreline), Louisiana, Maine (except for SB and SC waters with human sources of fecal contamination), Maryland, Massachusetts, Mississippi, New York, North Carolina, Oregon, Puerto Rico (except for waters classified by Puerto Rico as intensely used for primary contact recreation and for those waters included in 40 CFR 131.40), Rhode Island, South Carolina, United States Virgin Islands, Washington.

(3) The criteria in column C of paragraph (c)(2) of this section apply to marine coastal recreation waters of the following States: Commonwealth of the Northern Mariana Islands, Hawaii (for non-estuarine coastal recreation waters within 300 meters of shore).

(f) *Schedules of compliance.* (1) Subsection (f) applies to any State that does not have a regulation in effect for Clean Water Act purposes that authorizes compliance schedules subject to this paragraph, except for [LIST OF STATES AND TERRITORIES

THAT TELL EPA IN WRITING THAT THEY DO NOT WANT TO ALLOW A SCHEDULE OF COMPLIANCE]. All dischargers shall promptly comply with any new or more restrictive water quality-based effluent limitations based on the water quality criteria set forth in this section.

(2) When a permit issued on or after [THE EFFECTIVE DATE OF THE RULE] to a new pathogen discharger as defined in paragraph (b) of this section contains water quality-based effluent limitations based on water quality criteria set forth in paragraph (c) of this section, the permittee shall comply with such water quality-based effluent limitations upon the commencement of the discharge.

(3) Where an existing pathogen discharger reasonably believes that it will be infeasible to comply immediately with a new or more restrictive water quality-based effluent limitations based on the water quality criteria set forth in this section, the discharger may request approval from the permit issuing authority for a schedule of compliance.

(4) A compliance schedule for an existing pathogen discharger shall require compliance with water quality-based effluent limitations based on water quality criteria set forth in paragraph (b) of this section as soon as possible, taking into account the dischargers' ability to achieve compliance with such water quality-based effluent limitations.

(5) If the schedule of compliance for an existing pathogen discharger exceeds one year from the date of permit issuance, reissuance or modification, the schedule shall set forth interim requirements and dates for their achievement. The period between dates of completion for each requirement may not exceed one year. If the time necessary for completion of any requirement is more than one year and the requirement is not readily divisible into stages for completion, the permit shall require, at a minimum, specified dates for annual submission of progress reports on the status of interim requirements.

(6) In no event shall the permit issuing authority approve a schedule of compliance for an existing pathogen discharge which exceeds five years from the date of permit issuance, reissuance, or modification, whichever is sooner.

(7) If a schedule of compliance exceeds the term of a permit, interim permit limits effective during the permit shall be included in the permit and addressed in the permit's fact sheet or statement of basis. The administrative record for the permit shall reflect final permit limits and final compliance dates. Final compliance dates for final permit limits, which do not occur during the term of the permit, must occur within five years from the date of issuance, reissuance or modification of the permit which initiates the compliance schedule.

[FR Doc. 04–15614 Filed 7–8–04; 8:45 am]
BILLING CODE 6560–50–P

Federal Register

Friday,
July 9, 2004

Part VI

The President

Executive Order 13344—Amending Executive Order 13261 on the Order of Succession in the Environmental Protection Agency

Federal Register
Vol. 69, No. 131
Friday, July 9, 2004

Presidential Documents

Title 3—

The President

Executive Order 13344 of July 7, 2004

Amending Executive Order 13261 on the Order of Succession in the Environmental Protection Agency

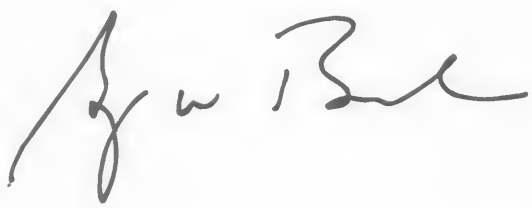
By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Vacancies Reform Act of 1998, 5 U.S.C. 3345, *et seq.*, it is hereby ordered that Executive Order 13261 of March 19, 2002, is amended as follows:

Section 1. In section 2, subsections (a), (b), and (c) are deleted and replaced with the following new subsections (a), (b), and (c):

(a) Assistant Administrator, Office of Solid Waste;

(b) Assistant Administrator for Toxic Substances;

(c) Assistant Administrator (Air and Radiation).



THE WHITE HOUSE,
July 7, 2004.

[FR Doc. 04–15787
Filed 7–8–04; 9:42 am]
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To designate the United States courthouse and post office building located at 93 Atocha Street in Ponce, Puerto Rico, as the "Luis A. Ferre United States Courthouse and Post Office Building". (July 7, 2004; 118 Stat. 819)

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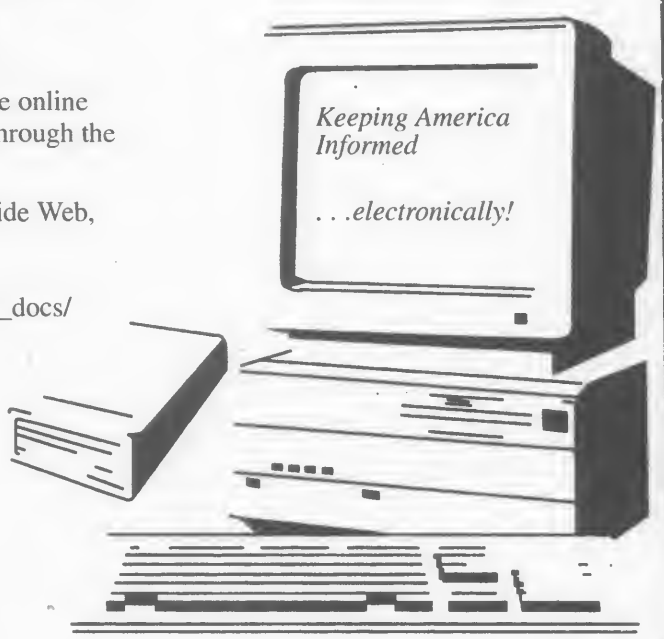

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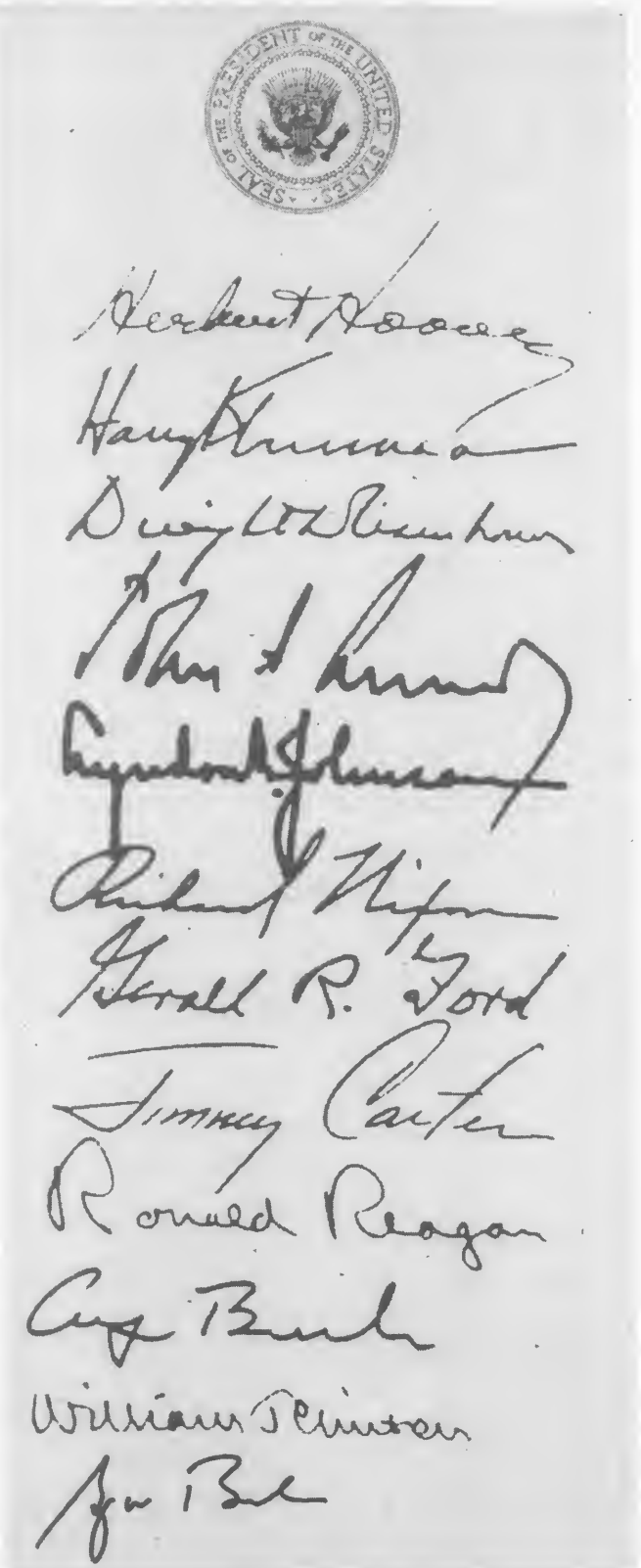

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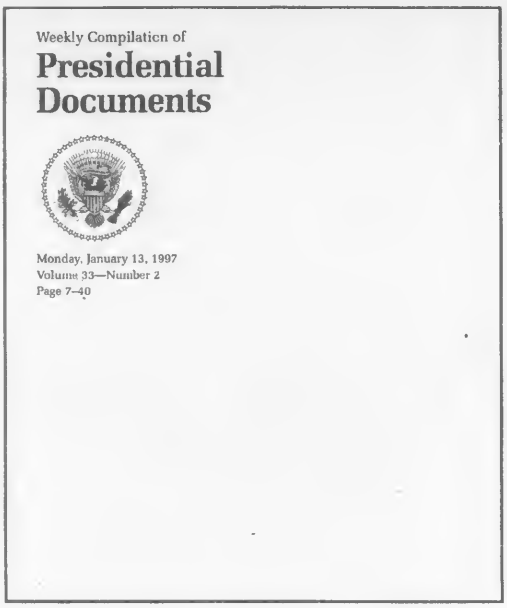

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