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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 53

[Docket No. 01–126–2]

RIN 0579–AB37

Infectious Salmon Anemia; Payment of Indemnity

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Affirmation of interim rule as final rule.

SUMMARY: We are adopting as a final rule, without change, an interim rule that established regulations to provide for the payment of indemnity to producers in the State of Maine for fish destroyed due to infectious salmon anemia. We considered depopulation necessary to control infectious salmon anemia in Maine, and indemnification for depopulated fish necessary to gain producer support.

DATES: *Effective Date:* The interim rule became effective on April 5, 2002.

FOR FURTHER INFORMATION CONTACT: Ms. Jill Rolland, Fishery Biologist, Certification and Control Team, VS, APHIS, 4700 River Road Unit 46, Riverdale, MD 20737–1231; (301) 734–8069.

SUPPLEMENTARY INFORMATION:

Background

The regulations at 9 CFR part 53 (referred to below as the regulations) provide for the control and eradication of diseases including foot-and-mouth disease, rinderpest, contagious pleuropneumonia, exotic Newcastle disease, highly pathogenic avian influenza, and other communicable diseases of livestock or poultry that, in the opinion of the Secretary of Agriculture, constitute an emergency and threaten the livestock (farm-raised animals, including poultry and fish) of the United States. The regulations authorize payments based on the fair market value of the animals destroyed, as well as payments for their destruction and disposition. The regulations also authorize payments for materials that must be cleaned and disinfected or destroyed because of being contaminated by or exposed to disease.

In an interim rule effective April 5, 2002, and published in the **Federal Register** on April 10, 2002 (67 FR 17605–17611, Docket No. 01–126–1), we amended the regulations to provide for the payment of indemnity to producers in the State of Maine whose fish were destroyed due to infectious salmon anemia (ISA). The rule amended §§ 53.1, 53.2, 53.4, and 53.10 of the regulations by adding ISA to the list of diseases, providing for payments of up to 60 percent of the fair market value of the fish destroyed because of ISA, and by setting out criteria for qualifying for indemnity. We took that action to increase the effectiveness of our efforts to control ISA in Maine and prevent further outbreaks of the disease.

Comments on the interim rule were required to be received on or before June 10, 2002. We received two comments. The various issues raised in these comments are discussed below by topic.

Both commenters expressed disappointment in the Federal contribution to the farmers who depopulated fish because of ISA. Specifically, one commenter questioned how providing a 60 percent level of indemnification for ISA was determined when different percentages have applied to other programs. The other commenter stated that all farmers whose fish were depopulated after the Secretary of Agriculture's Declaration of Emergency on December 13, 2001, should be fully compensated. This commenter also stated that the interim rule did not make clear what level of compensation would be available to farmers for the costs of carcass disposal and facility cleaning and disinfection, and added that farmers should be fully reimbursed for these costs.

Federal compensation is not intended to reimburse producers for all disease-related losses. The Federal Government compensates producers for livestock or crops destroyed because they are affected by certain diseases and pests primarily to provide an incentive for the producers to participate in eradication programs. The ISA situation in Maine resulted in a Federal decision to pay compensation at a 60 percent level, rather than at the 50 percent level provided by the regulations in 9 CFR part 53 for most other animal diseases, in order to gain producer cooperation in depopulating affected fish. The Federal Government also paid 60 percent of the cost of carcass disposal, facility cleaning, and disinfection. The Federal share for depopulation and associated disposal, cleaning, and disinfection costs, was reduced to 40 percent in the second year of the ISA program.

One commenter asked what funds would be available for future eradication efforts once the current monies were used, and whether State, Federal, or Tribal fish rearing facilities in Maine would qualify for indemnity should ISA be found at one of those sites.

The ISA indemnity program described in the interim rule ended September 30, 2003. As of yet, no decision has been made about indemnification for future ISA outbreaks, including outbreaks in State, Federal, and Tribal fish rearing facilities in Maine.

One commenter stated that ISA is not a disease foreign to the United States and should therefore not be addressed in part 53. The commenter suggested that ISA be included with other animal diseases endemic to the United States and that we indemnify the salmon producers under the rules for those diseases.

We considered ISA a foreign animal disease because this is the first time that the disease has been diagnosed in the United States. The first case of ISA in the United States was confirmed in Maine on February 15, 2001, and the disease has not been diagnosed in other parts of the United States.

One commenter questioned why a claimant must have an accredited veterinarian perform certain activities in order to be eligible for indemnity. The commenter said that other aquatic animal health professionals accredited by the American Fisheries Society could perform the services needed.

To be eligible for Federal indemnity payments, we require that all claimants participate in the ISA control program administered by APHIS and the State of Maine. Participants in this program

must have ready access to an APHIS accredited veterinarian. APHIS relies on accredited veterinarians in many of its disease control programs. These veterinarians are accredited by APHIS after completing specialized training in Federal animal health laws, regulations, and rules; interstate movement requirements for animals; import and export requirements for animals; USDA animal disease and eradication programs; laboratory support in confirming disease diagnoses; ethical/professional responsibilities of an accredited veterinarian; and animal health procedures, issues, and information resources relevant to the State in which the veterinarian wishes to perform accredited duties. To be accredited, a veterinarian must also be able to perform a variety of specialized tasks, which include recognizing clinical signs of foreign animal diseases, planning a disease control strategy for a unit of livestock, and developing appropriate cleaning and disinfection plans to control the spread of communicable diseases of livestock. We believe that this knowledge and these competencies are essential to the success of our disease control and eradication programs. In addition, we believe that requiring an accredited veterinarian to perform specific activities in the cooperative ISA control program was particularly important because the ISA program was our first action to regulate the farm-raised fish industry.

One commenter questioned provisions in § 53.4 that allow salvageable fish depopulated because of ISA to be sold for rendering, processing, or other purposes. The commenter stated that these provisions are inconsistent with the requirements in § 53.4 for other species and diseases, which appear to be intended to remove animals posing risks to other animals as quickly as possible.

Allowing salvageable fish to be sold for rendering or processing does not delay their removal. Once a disease is detected, the farmer may determine if the infected fish have salvage value. However, fish will be removed from their pens within a specified time regardless of whether they will be sold for rendering and processing or whether they will be destroyed by other means.

Other indemnity programs have allowed producers to seek salvage value in the past. One such program was the low pathogenic avian influenza indemnity program. Under this program, nearly 976,000 meat birds were sent to controlled slaughter. Determining whether an animal may have salvage value is based on a number of factors, including the effect of the disease on the animal, whether or not the disease poses human health risks, and whether there is a risk of spreading the disease in transit or after processing. In the case of ISA, we determined that these risks did not apply and that it was appropriate to allow salmon farmers to be compensated for fish in this manner.

One commenter questioned why the eligibility requirements for receiving indemnity for fish destroyed because of ISA are more extensive than the requirements for receiving indemnity for destruction of animals because of other diseases covered by the regulations. The commenter cited retention of an accredited veterinarian and participation in the sea lice control program as examples. The commenter added that terrestrial farmers are not required to participate in disease control programs for endemic pests in order to receive compensation under the regulations.

We included these requirements after consultation with members of the State-Federal Joint Working Group on ISA, whose members believed the requirements we have established to be central issues in controlling the spread of ISA. With the knowledge that diseases spread in aquatic areas are more difficult to control than terrestrial diseases, we determined that such measures were necessary to ensure the disease was eradicated.

The commenter is correct in stating that terrestrial indemnification programs do not require that farmers participate in endemic pest control programs in order to receive indemnity payments under the regulations. However, the regulations do describe specific requirements for participation in some terrestrial animal disease indemnity programs. For example, 9 CFR part 54, subpart A—Scrapie Indemnification Program, describes a comprehensive disease control program that farmers must participate in to be eligible for indemnity payments. In the case of ISA, there is scientific evidence which suggests that sea lice contribute to the spread of ISA. For this reason, we determined that a sea lice control program was an integral part in controlling ISA. All vectors through which a disease can spread must be addressed in order to have an effective program.

Citing the Department's indemnification schedule in the "Infectious Salmon Anemia Programs Standards," v6.2, April 30, 2002, one commenter stated support for the general schedule but objected to broodfish being valued on the basis of meat value only. The commenter suggested that the value of these fish be calculated based on average fecundity (12,000 eggs per female) and the market price of salmon eggs ($.05 per egg), which the commenter stated would generate a value of $300 per broodfish.

We agree that broodfish should not be valued based on meat value. A valuation method for broodfish would be based on eggs, among other variables affecting these eggs, but no broodfish were depopulated in this program. We did not include a value specifically for broodfish in the schedule developed for the interim rule because one was not needed. If needed in the future, a standard would be developed for the valuation of broodfish.

Therefore, for the reasons given in the interim rule and in this document, we are adopting the interim rule as a final rule without change.

This action also affirms the information contained in the interim rule concerning Executive Orders 12372 and 12988.

Further, this action has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

Regulatory Flexibility Act

This rule affirms an interim rule that amended the regulations by establishing regulations to provide for the payment of indemnity to producers in the State of Maine for fish destroyed due to ISA.

In accordance with 5 U.S.C. 603, we performed an initial regulatory flexibility analysis for the interim rule, which was included in the interim rule and which invited submission of comments and data to assist in a comprehensive analysis of the economic effects of the interim rule on small entities. More specifically, we requested information on the number and kind of small entities that might incur benefits or costs from the implementation of the interim rule. No such information was submitted in the comments that we received.

The following final regulatory flexibility analysis addresses the economic effects of the interim rule on small entities as required by the Regulatory Flexibility Act (5 U.S.C. 604).

Program Description and Benefits

ISA is recognized to cause considerable economic losses. In 2002, the Secretary of Agriculture authorized the transfer from the Commodity Credit Corporation of $8.29 million as one part of a 2-year ISA indemnity and control program. The money was earmarked for indemnity costs, disposal, cleanup,

epidemiology, and surveillance. Under the interim rule, APHIS paid up to 60 percent of the fair market value of the fish destroyed.

At the time the interim rule was published, the farmed Atlantic salmon industry in Maine was estimated to be producing over 15,000 tons (or 30 million lbs.) of fish per year. In 2000, production value was estimated to have surpassed $100 million in Maine. Maine's farmed Atlantic salmon industry directly employed approximately 1,000 people, primarily in Washington and Hancock Counties, and it was estimated that an additional 2,500 people had jobs that directly depended on Maine's farmed Atlantic salmon industry. There were approximately 28 to 33 employees per every million pounds of product output. The amount of fish stock per farm varied; as of December 2003, there were 26 active pen sites and 45 permitted pen sites, and, on average, 350,000 fish per site.

Value Determination for Non-Marketable Animals

Under the interim rule, an appraiser determined the fair market value of fish to be destroyed. Value was based on age; as salmon mature, their value increases significantly. Initially, salmon smolts are raised in freshwater pens for approximately 14 or 15 months. On average, these smolts weigh about 0.25 lbs. and carry no market value. On or about May 1 of each year, operators move salmon into saltwater pens, where they grow at a rapid pace. Therefore, salmon that are 16 months old have actually only been in a saltwater pen for approximately 1 month. Salmon grow approximately 0.5 to 1 lb. each month, except during the coldest winter months. During that first winter (December to March), when salmon are between 21 to 24 months, their weight stagnates at approximately 3 lbs. This weight stagnation process occurs each year, and in the spring, salmon resume growing at their previous pace. Prior to the ISA program a producer typically strived to harvest fish when they were the ideal market age of 38 to 42 months old (about 24 to 28 months in a saltwater pen, or about the time they reach 10 to 14 lbs.). Following implementation of the ISA program, the ideal market age dropped to 30 to 38 months (about 16 to 22 months in the saltwater pen, or about 9 to 14 lbs.). The final indemnity schedule is available through the person listed under **FOR FURTHER INFORMATION CONTACT.**

Between December 2001 and September 2003, APHIS, with the cooperation of the State of Maine and affected producers, depopulated just over 1.66 million exposed or infected salmon in Maine. At the 60 percent rate provided for by the interim rule, we provided indemnity payments of about $4.5 million to salmon producers in fiscal year 2002. We spent an additional $1.1 million on facility cleaning and disinfection, disposal, and operating costs, bringing the total cost for the first year to $5.6 million. The remaining $2.6 million was rolled over for the program in fiscal year 2003. We provided about $84,000 in indemnity to producers at the 40 percent rate in the program's second year. The remainder of the $2.6 million went to costs associated with facility cleaning and disinfection, disposal, and operating costs for fiscal years 2003 and 2004. The following paragraph discusses how the indemnity payments were distributed over the 2-year program.

In fiscal year 2002, 1.61 million exposed or infected salmon from 8 sites were depopulated. Three sites contained about 718,000 10-month-old salmon. These sites received a little more than $2.33 million in indemnity. About 711,500 9-month-old salmon from 4 sites were depopulated. These four sites received around $2.16 million in indemnity. In fiscal year 2003, 23,391 14-month-old fish from one site were depopulated. The site received a total of $77,284 in indemnity.

Salvage Value—Value Determination for Marketable Animals

Under the interim rule, salmon producers had the option of selling stock for rendering or other processing. The prices offered for salmon sold for rendering or processing were based on a number of criteria, but primarily considered the weight of the salvageable portion of the fish. These prices are offered by the processors; the prices for fish sold for salvage were reported to APHIS. We subtract any salvage value gained at slaughter from the indemnity payment.

In fiscal year 2002, a salmon producer from one site in the Passamaquoddy Bay received at least 60 percent of the market value in salvage value for 131,295 14-month-old salmon. Thus, APHIS paid no indemnity for the fish harvested from that site. In fiscal year 2003, a salmon producer from one site received $80,139 in salvage value for 28,516 fish that were worth $86,917. In this case, APHIS paid the difference of $6,778 to the producer.

Cost Benefit Analysis

ISA put the entire farmed Atlantic salmon industry in Maine at risk. The benefits of keeping this $100 million dollar per year industry viable outweighed the cost of this program. Additionally, the interim rule provided salmon owners with a financial incentive to identify and destroy their ISA infected and/or exposed fish, thus arresting the spread of the disease and accelerating eradication efforts. Several benefits flowed from the interim rule. First, it reduced costs to the Maine salmon industry from animal mortality, costs from possible State regulatory actions, and trade restrictions on U.S. salmon product exports. Second, an aggressive program early on, while the number of known affected pens was reasonably small, obviated the need for higher future Federal costs to contain a more widespread outbreak. As a result of the ISA program, one-half of Maine's salmon industry (along the West Coast of Cobscook Bay) avoided exposure to ISA.

The interim rule also produced third-party trade benefits by demonstrating to trading partners the intent and ability of the United States to protect its animal industries, thus enhancing our ability to negotiate access to foreign markets. In addition, the interim rule encouraged salmon farmers in New Brunswick, Canada, to upgrade the province's program, thereby reducing the risk of future outbreaks in Maine.

The action taken in the interim rule can also be expected to reduce potential future eradication program costs. Canada has been battling ISA for several years; from 1998 to 2000, fish farmers in that country lost approximately $70 million (in U.S. dollars). Canada's Provincial and Federal Governments have contributed over $29.5 million (in U.S. dollars) to compensate salmon farmers. As a result of early intervention, based on a compensation program with enough financial incentive to encourage active participation among salmon farmers, Canada reduced the incidence of ISA from 18 infected sites in 1998 to 4 infected sites in 2001. However, this number jumped to 18 infected sites in 2003. This led to the destruction of 2.7 million fish with projected losses of more than $76 million (in U.S. dollars).

Options Considered

In assessing the need for the interim rule, we identified three alternatives. The first was to maintain the status quo, where State efforts are supported by Federal technical assistance but not by Federal compensation programs or interstate movement restrictions. We rejected this option because it did not fully address the risks associated with a more widespread ISA epidemic. While Maine has the authority to quarantine a

pen site once it is known to be infected with ISA, the State lacked the resources to conduct the comprehensive testing and traceback activities that were necessary to identify newly infected sites. States also lack authority to directly regulate interstate commerce in salmon. Finally, while State quarantines are an important tool, quarantining a pen site does not eliminate the risk, since people may accidentally or deliberately violate the quarantine. Making Federal indemnity funds available served as a powerful incentive for producers to participate in the ISA control program and for owners of infected sites to depopulate, which greatly reduced the risk of further spread of ISA.

The second option would have been to provide financial and technical assistance to Maine's farmed salmon industry for continuation and expansion of a variety of pen site management practices to reduce or eliminate ISA. Although this option may have been less costly than the option we chose, option three below, we did not select it because it did not allow us to advance the ISA control program as quickly or effectively as the chosen option. However, APHIS will continue to work with industry and the State of Maine to further develop ISA management practices to preserve the reduction in ISA levels that the indemnity program achieved.

The third option, to provide indemnity payments to depopulate ISA infected and/or exposed fish, was the one we chose. Depopulation of infected animals, which clears the way for a disinfection program, is currently the single most effective way to eliminate ISA. Under this alternative, producers gained partial compensation for ISA infected and or/exposed fish.

Potential Impact on Small Entities

The interim rule established a voluntary program that allowed salmon producers in Maine to be paid indemnity for fish destroyed because of ISA. Many producers, as well as a number of processors who render salmon into food and non-food byproducts, may be small businesses. To the extent that the interim rule contributed to the elimination of ISA in Maine, all salmon producers were expected to benefit over the long term. In the short term, the economic impact on producers was expected to vary.

The U.S. Small Business Administration (SBA) defines a small fin fish and/or fish hatchery operation as one that has per-farm gross receipts of less that $750,000. In 2000, there were 26 Atlantic salmon farms in the State of Maine. Collectively, they employed approximately 1,200 workers; also, another 2,500 jobs, primarily in processing, rendering, or transport directly depended on these operations. The gross receipts of the affected salmon producers is unknown. However, it is reasonable to assume that most exceeded the SBA small entity threshold because, collectively, these 26 farms produced gross receipts in excess of $100 million in 2000.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. 3501 *et seq.*), the information collection and recordkeeping requirements in the interim rule have been approved by the Office of Management and Budget (OMB). The assigned OMB control number is 0579–0192.

Government Paperwork Elimination Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. For information pertinent to GPEA compliance related to this rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

List of Subjects in 9 CFR Part 53

Animal diseases, Indemnity payments, Livestock, Poultry and poultry products.

PART 53—FOOT-AND-MOUTH DISEASE, PLEUROPNEUMONIA, RINDERPEST, AND CERTAIN OTHER COMMUNICABLE DISEASES OF LIVESTOCK OR POULTRY

■ Accordingly, we are adopting as a final rule, without change, the interim rule that amended 9 CFR part 53 and that was published at 67 FR 17605–17611 on April 10, 2002.

Authority: 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

Done in Washington, DC, this 23rd day of April 2004 .

Peter Fernandez,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 04–9598 Filed 4–27–04; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2004–NM–57–AD; Amendment 39–13590; AD 2004–09–01]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A300 B4–600, B4–600R, C4–605R Variant F, and F4–600R (Collectively Called A300–600) Series Airplanes; and Model A310 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to certain Airbus Model A300 B4–600, B4–600R, C4 605R Variant F, and F4–600R (collectively called A300–600) series airplanes; and Model A310 series airplanes. This action requires a one-time inspection for damage of the integrated drive generator electrical harness and pyramid arm, and repair if necessary. This action is necessary to prevent electrical arcing within the engine pylon, which could result in loss of the relevant alternating current (AC) bus bar, reduced structural integrity of the engine pylon, and consequent loss of control of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective May 13, 2004.

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

Comments for inclusion in the Rules Docket must be received on or before May 28, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2004–NM–57–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-iarcomment@faa.gov*. Comments sent via the Internet must contain "Docket No. 2004–NM–57–AD" in the subject line and need not be submitted in triplicate. Comments sent via fax or the Internet as attached electronic files must

be formatted in Microsoft Word 97 or 2000 or ASCII text.

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 FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Tony 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: The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, notified the FAA that an unsafe condition may exist on certain Airbus Model A300 B4–600, B4–600R, C4–605R Variant F, and F4–600R (collectively called A300–600) series airplanes; and Model A310 series airplanes. The DGAC advises that an operator found structural damage on the forward pyramid arm of an engine pylon during a scheduled maintenance check. Investigation revealed that the damage was caused by chafing of the integrated drive generator (IDG) electrical harness against the structure of the pyramid arm. This condition, if not corrected, could result in loss of the relevant alternating current (AC) bus bar, reduced structural integrity of the engine pylon, and consequent loss of control of the airplane.

Explanation of Relevant Service Information

Airbus has issued All Operators Telex (AOT) A300–54A6037, dated February 19, 2004 (for Model A300–600 series airplanes); and AOT A310–54A2038, dated February 19, 2004 (for Model A310 series airplanes). These AOTs describe procedures for inspecting for damage of the IDG harness and pyramid arm, and related investigative and corrective actions if necessary.

The inspection involves:

- Determining if the IDG electrical harness bracket on the pylon forward pyramid arm is attached, and if the retaining fasteners are in place and secured.
- Determining if there is contact between the IDG electrical harness and the pyramid arms.
- Determining if there is damage (chafing marks) on the pylon forward pyramid arms; and/or damage (chafing or fretting) to the IDG electrical harness, especially at the junction between the 4 convoluted conduits that protect each feeder cable, and at the large conduit that protects the 4 cables together.

The related investigative and corrective actions depend on the results of the inspection and include the following:

- If there is no damage found, no further action is specified by the AOT.
- If the bracket on the pylon forward pyramid arm is not attached and/or the fasteners are not in place and secured, the corrective action is to repair the bracket and/or fasteners.
- If there is fretting at the convoluted conduits (with or without contact between the IDG electrical harness and the pyramid arms), the related investigative and corrective actions are to inspect the feeder cables for damage, repair the cables if necessary per the limits defined in the Airbus electrical standard practices manual, and apply self-adhesive protective tape to the IDG electrical harness at possible contact points.
- If there is any contact between the IDG electrical harness and the pyramid arms, without damage to the harness or the arms, and without fretting at the convoluted conduits, the related corrective action is to apply self-adhesive protective tape to the harness at possible contact points.
- If there is any damage to the pyramid arms found during any inspection, the AOTs recommend contacting Airbus before further flight for disposition of repairs.

The DGAC classified these AOTs as mandatory and issued French airworthiness directive F–2004–039, dated March 17, 2004, to ensure the continued airworthiness of these airplanes in France.

FAA's Conclusions

These airplane models are manufactured in France and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. The FAA has examined the findings of the DGAC, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, this AD is being issued to prevent loss of the relevant AC bus bar, reduced structural integrity of the engine pylon, and consequent loss of control of the airplane. This AD requires a one-time inspection for damage of the IDG electrical harness and pyramid arm, and repair if necessary. The actions are required to be accomplished in accordance with the AOTs described previously, except as discussed below.

Differences Among the French Airworthiness Directive, the AOTs, and This AD

The French airworthiness directive and the AOTs do not define the type of inspection for the IDG electrical harness and pyramid arm. This AD calls the inspection a "detailed inspection." Note 1 of this AD defines this inspection.

Although the French airworthiness directive and the AOTs specify to report inspection results to the manufacturer, this AD does not include such a requirement.

Where the French airworthiness directive and the AOTs specify to contact Airbus for disposition of repairs if there is any damage to the pyramid arms, this AD requires operators to repair per a method approved by either the FAA or the DGAC (or its delegated agent). In light of the type of repair that would be required to address the unsafe condition, and consistent with existing bilateral airworthiness agreements, we have determined that, for this AD, a repair approved by either the FAA or the DCAG would be acceptable for compliance with this AD.

Interim Action

We consider this AD interim action. If final action is identified later, we may consider further rulemaking then.

Determination of Rule's Effective Date

Since a situation exists that requires the immediate adoption of this regulation, it is found that notice and opportunity for prior public comment hereon are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the

Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES**. All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

Submit comments using the following format:

- Organize comments issue-by-issue. For example, discuss a request to change the compliance time and a request to change the service bulletin reference as two separate issues.
- For each issue, state what specific change to the AD is being requested.
- Include justification (*e.g.*, reasons or data) for each request.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this AD will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 2004–NM–57–AD." The postcard will be date stamped and returned to the commenter.

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.

The FAA has determined that this regulation is an emergency regulation that must be issued immediately to correct an unsafe condition in aircraft, and that it is not a "significant regulatory action" under Executive Order 12866. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket. A copy of it, if filed, 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:

2004–09–01 Airbus: Amendment 39–13590. Docket 2004–NM–57–AD.

Applicability: Model A300 B4–600, B4–600R, C4–605R Variant F, and F4–600R (collectively called A300–600) series airplanes; and Model A310 series airplanes; certificated in any category; equipped with GE CF6–80C2 engines.

Compliance: Required as indicated, unless accomplished previously.

To prevent loss of the relevant alternating current (AC) bus bar, reduced structural integrity of the engine pylon, and consequent loss of control of the airplane, accomplish the following:

All Operators Telex Reference

(a) The term "All Operators Telex," or "AOT," as used in this AD, means the following AOTs, as applicable:

(1) For Model A300 B4–600, B4–600R, C4 605R Variant F, and F4–600R (collectively called A300–600) series airplanes: Airbus AOT A300–54A6037, dated February 19, 2004; and

(2) For Model A310 series airplanes: Airbus AOT A310–54A2038, dated February 19, 2004.

Inspection

(b) At the applicable time in paragraph (b)(1) or (b)(2) of this AD, do a one-time detailed inspection for discrepancies of the integrated drive generator (IDG) harness, harness bracket, retaining fasteners, and pyramid arm, in accordance with the applicable AOT.

(1) For airplanes on which Airbus Modification 07591 has not been incorporated as of the effective date of this AD: Within 10 days after the effective date of this AD.

(2) For airplanes on which Airbus Modification 07591 has been incorporated as of the effective date of this AD: Within 600 flight hours after the effective date of this AD.

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 Further Action if No Discrepancies Are Found

(c) If there are no discrepancies found during the inspection required by paragraph (b) of this AD, no further action is required by this AD.

Related Investigative and Corrective Actions for Damaged Electrical Harness

(d) If any discrepancy in the IDG electrical harness, fretting at the convoluted conduits, or contact between the IDG electrical harness and the pyramid arms is found during the inspection required by paragraph (b) of this AD: Before further flight, do the applicable related investigative actions and corrective actions in accordance with the applicable AOT.

Corrective Action for Damaged Electrical Harness Bracket, Retaining Fasteners, or Pyramid Arm

(e) If any discrepancy in the electrical harness bracket, retaining fasteners, or pyramid arm is found during the inspection required by paragraph (b) of this AD: Before further flight, repair in accordance with a method approved by either the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, or the Direction Générale de l'Aviation Civile (DGAC) (or its delegated agent).

No Reporting Requirement

(f) Although the referenced AOTs describe procedures for submitting certain information to the manufacturer, this AD does not require those actions.

Alternative Methods of Compliance

(g) 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

(h) Unless otherwise specified in this AD, the actions shall be done in accordance with Airbus All Operators Telex (AOT) A300–54A6037, dated February 19, 2004; or A310–54A2038, dated February 19, 2004; 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 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 Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 2: The subject of this AD is addressed in French airworthiness directive F–2004–039, dated March 17, 2004.

Effective Date

(i) This amendment becomes effective on May 13, 2004.

Issued in Renton, Washington, on April 16, 2004.

Michael J. Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–9241 Filed 4–27–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NM–65–AD; Amendment 39–13594; AD 2004–09–05]

RIN 2120–AA64

Airworthiness Directives; Cessna Model 500, 501, 550, and 551 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD); applicable to certain Cessna Model 500, 501, 550, and 551 airplanes; that requires a one-time inspection of the brake stator disks to determine to what change level they have been modified (if any), and related investigative and corrective actions if necessary. This AD also requires that the existing markings on the piston housing of certain brake assemblies be eliminated. The actions specified by this AD are intended to prevent wheel lockups that may be caused by cracked or broken brake stator disks becoming jammed in the brake assembly and preventing rotation. Such jamming of the brake assembly may result in reduced directional control or braking performance during landing. This action is intended to address the identified unsafe condition.

DATES: Effective June 2, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of June 2, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from Cessna Aircraft Co., P.O. Box 7706, Wichita, Kansas 67277. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; at the FAA, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: David Hirt, Aerospace Engineer, Systems and Propulsion Branch, ACE–116W, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas 67209; telephone (316) 946–4156; fax (316) 946–4407.

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 Cessna Model 500, 501, 550, and 551 airplanes was published as a supplemental notice of proposed rulemaking (NPRM) in the **Federal Register** on November 12, 2003 (68 FR 64002). That action proposed to require a one-time inspection of the brake stator disks to determine to what change level they have been modified (if any), and follow-on actions if necessary. That action also proposed to require that the existing markings on the piston housing of certain brake assemblies be eliminated.

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 Withdraw NPRM

One commenter, the manufacturer of the subject brake assemblies, requests that the FAA withdraw the NPRM because the proposed AD is not timely and would place an unnecessary cost burden on operators. The commenter states that the average service life of the subject brake assemblies is 592 landings. With a utilization rate of 20 landings per month, the service life is approximately 30 months. Based on this information, and considering the date of issuance of the Goodrich service bulletins and the distribution of brake stator disks with change-level "B," the commenter estimates that the subject brake stator disks should have been retired from service by July 2002. The commenter states that the proposed AD will have a negative economic effect on subject operators by subjecting them to an inspection for a component change letter range that should have been removed from service more than 17 months ago.

We do not concur. The information supplied by the commenter does not address the fact that this unsafe condition may still be present on airplanes that are operated at a utilization rate that is lower than average, or defective brakes in spares stocks that may be installed on airplanes in the future. The commenter also does not address the possibility that certain operators may have chosen not to comply with the actions in the Goodrich service bulletins referenced in this AD. We find that it is necessary to proceed with this AD to ensure that all subject stator disks are inspected in a timely manner. No change to the AD is necessary in this regard.

Explanation of Additional Changes to Final Rule

Paragraphs (d) and (e) of the supplemental NPRM state, "If repetitive inspections are required by paragraph (c) of this AD, [replacement of the brake assembly with a new or serviceable brake assembly] terminates those inspections." We find that this statement may potentially cause confusion related to the inspection requirements specified in paragraph (f) of this AD. It was not our intent for the terminating action statement included in paragraphs (d) and (e) of this AD to terminate inspections that may be required by paragraph (f) of this AD. For clarification, we have revised paragraphs (d) and (e) of this final rule to state that, if repetitive inspections are required by paragraph (c) of this AD, repetitive inspections are terminated after all brake assemblies on the airplane contain only stator disks stamped with "CHG AI" or "CHG B" or a higher change letter. Related to this change, we have also revised paragraph (f) of this AD to clarify that the actions in paragraph (c) of this AD, which contains follow-on actions to paragraph (b) of this AD, must be accomplished when applicable.

Also, we have revised the Summary section of this final rule to change the term "follow-on actions" to "related investigative and corrective actions." We find that this wording better describes the actions that are required for any stator disk not stamped with "CHG AI" or "CHG B" or a higher change letter.

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 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 370 airplanes of the affected design in the worldwide fleet. We estimate that 259 airplanes of U.S. registry will be affected by this AD. It will take up to 1 work hour per airplane to accomplish the required inspection if the inspection were done at the time of a tire change and up to 4 work hours per airplane if the inspection were done at a different time, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of this AD on U.S. operators is estimated to be $16,835, or $65 per airplane, for inspections of the brake assembly done at the time of a tire change; or up to $67,340, or $260 per airplane, for inspections done at a different time.

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:

2004–09–05 Cessna Airplane Company: Amendment 39–13594. Docket 2000–NM–65–AD.

Applicability: Model 500 and 501 airplanes, serial numbers 0001 through 0689 inclusive, and Model 550 and 551 airplanes, serial numbers 0002 through 0733 inclusive; certificated in any category; equipped with BFGoodrich brake assembly part number (P/N) 2–1528–6 or 2–1530–4.

Compliance: Required as indicated, unless accomplished previously.

To prevent jamming of the wheel/tire assembly, which could result in a loss of directional control or braking performance upon landing, accomplish the following:

Inspection of Stator Disks for Change Letter

(a) Within 50 landings or 90 days after the effective date of this AD, whichever is first, inspect the stator disks on the brake assembly to determine if "CHG AI" or "CHG B" or a higher change letter is impression-stamped on each disk, in accordance with Goodrich Service Bulletin 2–1528–32–2 (for airplanes equipped with BFGoodrich brake assembly P/N 2–1528–6); or Goodrich Service Bulletin 2–1530–32–2 (for airplanes equipped with BFGoodrich brake assembly P/N 2–1530–4); both Revision 5; both dated February 19, 2003; as applicable. If both disks are stamped with "CHG AI" or "CHG B" or a higher change letter, no further action is required by this paragraph. A review of airplane maintenance records is acceptable in lieu of an inspection of the stator disks if the change letter of the stator disks can be positively determined from that review.

Inspection for Cracked or Broken Stator Disks

(b) For any stator disk not stamped with "CHG AI" or "CHG B" or a higher change letter: At the applicable compliance time specified in paragraph (b)(1) or (b)(2) of this AD, perform a detailed inspection for cracked or broken stator disks; in accordance with Goodrich Service Bulletin 2–1528–32–2 (for airplanes equipped with BFGoodrich brake assembly P/N 2–1528–6); or Goodrich Service Bulletin 2–1530–32–2 (for airplanes equipped with BFGoodrich brake assembly P/N 2–1530–4); both Revision 5; both dated February 19, 2003; as applicable.

(1) For airplanes that use thrust reversers: Inspect prior to the accumulation of 376 total landings on the brake assembly, or within 50 landings after the effective date of this AD, whichever is later.

(2) For airplanes that do not use thrust reversers: Inspect prior to the accumulation of 200 total landings on the brake assembly, or within 25 landings after the effective date of this AD, whichever is later.

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."

Follow-On Actions (No Cracked or Broken Stator Disk)

(c) If no cracked or broken stator disk is found, before further flight, reassemble the brake assembly and, if the piston housing is impression-stamped with the letters "SB," obliterate the existing markings on the piston housing by stamping "XX" over the letters "SB." If paragraph E.(3)(a) or E.(3)(b), as applicable, of Goodrich Service Bulletin 2–1528–32–2 (for airplanes equipped with BFGoodrich brake assembly P/N 2–1528–6); or Goodrich Service Bulletin 2–1530–32–2 (for airplanes equipped with BFGoodrich brake assembly P/N 2–1530–4); both Revision 5; both dated February 19, 2003; as applicable; specifies repetitive inspections, repeat the inspection required by paragraph (b) of this AD at intervals not to exceed those specified in the service bulletin, until paragraph (e) of this AD is accomplished.

Corrective Action (Cracked or Broken Stator Disk)

(d) If any cracked or broken stator disk is found, prior to further flight, replace the brake assembly with a new or serviceable brake assembly; in accordance with Goodrich Service Bulletin 2–1528–32–2 (for airplanes equipped with BFGoodrich brake assembly P/N 2–1528–6); or Goodrich Service Bulletin 2–1530–32–2 (for airplanes equipped with BFGoodrich brake assembly P/N 2–1530–4); both Revision 5; both dated February 19, 2003; as applicable. If repetitive inspections are required by paragraph (c) of this AD, replacement of all brake assemblies on the airplane with new or serviceable brake assemblies that contain only stator disks stamped with "CHG AI" or "CHG B" or a higher change letter terminates those inspections.

Replacement of Brake Assembly

(e) When the brake assembly has accumulated 700 total landings since its installation or within 50 landings on the airplane after the effective date of this AD, whichever is later, replace the brake assembly with a new or serviceable brake assembly; in accordance with Goodrich Service Bulletin 2–1528–32–2 (for airplanes equipped with BFGoodrich brake assembly P/N 2–1528–6); or Goodrich Service Bulletin 2–1530–32–2 (for airplanes equipped with BFGoodrich brake assembly P/N 2–1530–4); both Revision 5; both dated February 19, 2003; as applicable. If repetitive inspections are required by paragraph (c) of this AD, replacement of all brake assemblies on the airplane with new or serviceable brake assemblies that contain only stator disks stamped with "CHG AI" or "CHG B" or a higher change letter terminates those inspections.

Parts Installation

(f) As of the effective date of this AD, no person may install a BFGoodrich brake assembly on any airplane unless it has been inspected as specified in paragraph (f)(1) or (f)(2) of this AD, and found to be free of cracked or broken stator disks.

(1) For BFGoodrich brake assembly P/N 2–1528–6: Brake assembly must be inspected in accordance with paragraphs (a), (b), and (c) of this AD, as applicable, in accordance with the service information specified in those paragraphs or BFGoodrich Service Bulletin 2–1528–32–3, dated March 23, 2000.

(2) For BFGoodrich brake assembly P/N 2–1530–4: Brake assembly must be inspected in accordance with paragraphs (a), (b), and (c) of this AD, as applicable, in accordance with the service information specified in those paragraphs or BFGoodrich Service Bulletin 2–1530–32–3, dated March 23, 2000.

Alternative Methods of Compliance

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

Incorporation by Reference

(h) Unless otherwise specified in this AD, the actions shall be done in accordance with the applicable service bulletin listed in Table 1 of this AD.

TABLE 1.—SERVICE BULLETINS INCORPORATED BY REFERENCE

Service bulletin	Revision	Date
BFGoodrich Service Bulletin 2–1528–32–3	Original	March 23, 2000.
BFGoodrich Service Bulletin 2–1530–32–3	Original	March 23, 2000.
Goodrich Service Bulletin 2–1528–32–2	5	February 19, 2003.
Goodrich Service Bulletin 2–1530–32–2	5	February 19, 2003.

Goodrich Service Bulletin 2–1528–32–2, Revision 5, contains the following effective pages:

Page number	Revision level show on page	Date shown on page
1	5	February 19, 2003.
2, 6	4	February 7, 2003.
3	3	November 5, 2001.
4, 5	2	August 3, 2001.

Goodrich Service Bulletin 2–1530–32–2, Revision 5, contains the following effective pages:

Page number	Revision level shown on page	Date shown on page
1	5	February 19, 2003.
2, 6	4	February 7, 2003.
3	3	November 30, 2001.
4, 5	2	August 3, 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 Cessna Aircraft Co., P.O. Box 7706, Wichita, Kansas 67277. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; at the FAA, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Effective Date

(i) This amendment becomes effective on June 2, 2004.

Issued in Renton, Washington, on April 16, 2004.

Michael J. Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–9380 Filed 4–27–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–163–AD; Amendment 39–13595; AD 2004–09–06]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A319, A320, and A321 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to all Airbus Model A319, A320, and A321 series airplanes. That AD currently requires identification of the part number and serial number of the parking brake operated valve (PBOV); and, if necessary, inspection of the PBOV, including a functional check of the PBOV, and follow-on and corrective actions. That AD also provides for an optional terminating action for the requirements of that AD. This new action mandates the previously optional terminating action, which terminates the inspection requirements of the previous AD. The actions specified by this AD are intended to prevent leakage of hydraulic fluid from the PBOV, which could cause the loss of the parking brake accumulator, and render the alternate braking system and the parking/emergency braking system inoperative, as well as causing the loss of function of the yellow hydraulic system (which provides all or part of the hydraulics for the elevator, rudder, aileron, flaps, stabilizer, yaw damper, pitch and yaw feel systems and autopilot, and certain spoilers).

DATES: Effective June 2, 2004.

The incorporation by reference of Airbus Service Bulletin A320–32A1233, Revision 01, excluding Appendix 01, dated October 1, 2001, as listed in the regulations, is approved by the Director of the Federal Register as of June 2, 2004.

The incorporation by reference of Airbus Service Bulletin A320–32A1233, including Appendix 01, dated August 16, 2001, as listed in the regulations, was approved previously by the Director of the Federal Register as of May 8, 2002 (67 FR 19652, April 23, 2002).

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 Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

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 2002–08–13, amendment 39–12721 (67 FR 19652, April 23, 2002), which is applicable to all Airbus Model A319, A320, and A321 series airplanes, was published in the **Federal Register** on January 26, 2004 (69 FR 3535). The action proposed to continue to require identification of the part number and serial number of the parking brake operated valve (PBOV); and, if necessary, inspection of the PBOV, including a functional check of the PBOV, and follow-on and corrective actions. The action also proposed to mandate the optional terminating action, which would terminate the inspection requirements of the previous AD.

Comments

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

Request To Change Applicability

One commenter, the manufacturer, requests that the FAA change the applicability statement to designate the part number and serial numbers of the affected PBOV(s). The commenter states no rationale for its request.

We do not agree that the change requested by the commenter is necessary. The applicability of this AD ("All Model A319, A320, and A321 series airplanes, certificated in any category") is identical to that in AD 2002–08–13. This AD restates certain requirements of that AD, including the requirement to identify the part number and serial number of the PBOV to determine whether the PBOV is affected. Since this action is restated in this AD, it would be redundant to state the part number and serial numbers of the affected PBOV(s) in the applicability statement. Also, the requirement in paragraph (e) of this new AD specifies repair or replacement of PBOVs having the affected part number and serial numbers. We find no justification to alter the requirements of this AD. Therefore, we have not changed the final rule in this matter.

Changes Made to This Final Rule

Operators should note that Airbus Service Bulletin A320–32A1233, including Appendix 01, dated August 16, 2001, listed in paragraph (a) of this AD, was previously incorporated by reference in AD 2002–08–13, amendment 39–12721 (67 FR 19652, April 23, 2002). The citation for that service bulletin "included" Appendix 01, which consisted of an inspection report. According to the Office of the Federal Register's guidelines for materials previously incorporated by reference, we must restate the document citation exactly as it appeared in the original incorporation. However, it was not our intent to require accomplishment of that report.

Operators should note that we have added new paragraph (h) to this final rule (and reidentified subsequent paragraphs) to clarify that submission of the inspection report contained in Appendix 01 of the referenced service bulletins is not required.

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 with the change described previously. The FAA has 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 333 airplanes of U.S. registry that will be affected by this AD. The new requirements of this AD add no additional economic burden. The current costs for this AD are as follows:

The actions that are currently required by AD 2002–08–13, and that are also required by 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 actions on U.S. operators is estimated to be $43,290 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 removing amendment 39–12721 (67 FR 19652, April 23, 2002), and by adding a new airworthiness directive (AD), amendment 39–13595, to read as follows:

2004–09–06 Airbus: Amendment 39–13595, Docket 2002 NM–163–AD. Supersedes AD 2002–08–13, Amendment 39–12721.

Applicability: All Model A319, A320, and A321 series airplanes, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent leakage of hydraulic fluid from the parking brake operated valve (PBOV), which could cause the loss of the parking brake accumulator, and render the alternate braking system and the parking/emergency braking system inoperative, as well as causing the loss of function of the yellow hydraulic system (which provides all or part of the hydraulics for the elevator, rudder, aileron, flaps, stabilizer, yaw damper, pitch and yaw feel systems and autopilot, and certain spoilers); accomplish the following:

Restatement of Requirements of AD 2002–08–13

Inspection and Functional Check

(a) Within 7 days after May 8, 2002 (the effective date of AD 2002–08–13, amendment 39–12721), identify the part number and serial number of the PBOV to determine whether the PBOV is an affected part, as identified by Airbus Service Bulletin A320–32A1233, dated August 16, 2001; or Revision 01, dated October 1, 2001.

(1) If the PBOV is NOT an affected part: No further action is required by this paragraph.

(2) If the PBOV is an affected part: Except as required by paragraph (b) of this AD, prior to further flight, test the PBOV in accordance with the service bulletin; and thereafter perform follow-on and corrective actions (including repetitive tests and repair of the PBOV or replacement with a serviceable PBOV) at the time specified by and in accordance with the service bulletin, as applicable.

(b) If Airbus Service Bulletin A320–32A1233, dated August 16, 2001; or Revision 01, dated October 1, 2001; specifies to contact the manufacturer for corrective action: Prior to further flight, perform the corrective action 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).

Optional Terminating Action

(c) Replacement of the PBOV with a new, non-affected PBOV terminates the requirements of this AD. Affected PBOVs are identified in Airbus Service Bulletin A320–32A1233, dated August 16, 2001; or Revision 01, dated October 1, 2001.

Parts Installation

(d) As of May 8, 2002 (the effective date of AD 2002–08–13), no person may install an affected PBOV on any airplane, unless that PBOV is in compliance with all applicable requirements of this AD. Affected PBOVs are identified by Airbus Service Bulletin A320–32A1233, dated August 16, 2001; or Revision 01, dated October 1, 2001.

New Requirements of This AD

Repair or Replace

(e) Within 9 months after the effective date of this AD, repair or replace all the PBOVs identified during the inspection required by paragraph (a) of this AD as having part number A25315–1, and having a serial number between H2372 and H2989 inclusive, that are not identified with the letter "V" or "VF+E." Repair or replace the PBOVs in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–32A1233, Revision 01, dated October 1, 2001.

Note 1: The service bulletin refers to Messier-Bugatti Service Bulletin A25315–32–3215, Revision 1, dated November 26, 2001, as an additional source of service information for the PBOV repair or replacement.

Terminating Action

(f) Repair or replacement of the PBOV per paragraph (e) of this AD terminates the requirements of this AD.

Actions Done Per Previous Issue of Service Bulletin

(g) Repairs or replacements done before the effective date of this AD in accordance with Airbus Service Bulletin A320–32A1233, dated August 16, 2001, are considered acceptable for compliance with the applicable actions specified in this AD.

No Reporting Requirement

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

Alternative Methods of Compliance

(i)(1) In accordance with 14 CFR 39.19, the Manager, International Branch, ANM–116, is authorized to approve alternative methods of compliance for this AD.

(2) Alternative methods of compliance, approved previously per AD 2002–08–13, amendment 39–12721, are approved as alternative methods of compliance with this AD.

Incorporation by Reference

(j) Unless otherwise specified in this AD, the actions shall be done in accordance with Airbus Service Bulletin A320–32A1233, including Appendix 01, dated August 16, 2001; or Airbus Service Bulletin A320–32A1233, Revision 01, excluding Appendix 01, dated October 1, 2001; as applicable.

(1) The incorporation by reference of Airbus Service Bulletin A320–32A1233, Revision 01, excluding Appendix 01, dated October 1, 2001; 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 A320–32A1233, including Appendix 01, dated August 16, 2001; was approved previously by the Director of the Federal Register as of May 8, 2002 (67 FR 19652, April 23, 2002).

(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 Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 2: The subject of this AD is addressed in French airworthiness directive 2001–384(B) R1, dated March 20, 2002.

Effective Date

(k) This amendment becomes effective on June 2, 2004.

Issued in Renton, Washington, on April 16, 2004.

Michael J. Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–9379 Filed 4–27–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2004–NM–42–AD; Amendment 39–13593; AD 2004–09–04]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747 –400 and –400D Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Boeing Model 747–400 and 400D series airplanes. This action requires installation of tie bars on the rails of the center passenger service units (PSU) panel in Zone A. This action is necessary to prevent PSU panels from moving and falling from the PSU support rails during takeoff and landing, which could result in injury to passengers and could impede evacuation of the passengers in an emergency situation. This action is intended to address the identified unsafe condition.

DATES: Effective May 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 May 13, 2004.

Comments for inclusion in the Rules Docket must be received on or before June 28, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2004–NM–42–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-iarcomment@faa.gov*. Comments sent via fax or the Internet must contain "Docket No. 2004–NM–42–AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 for Windows or ASCII text.

The service information referenced in this AD may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Patrick Gillespie, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6429; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION: The FAA has received a report that, during manufacture, panel tie bars were not installed on the rails of the center passenger service units (PSU) panel in Zone A on certain Boeing Model 747–400 series airplanes. If the tie bars in Zone A are not installed, the PSU panels can move from their location on the PSU rails during flexure of the rails. When the PSU panel is on the top side of the PSU rail horizontal flange, it is possible for the PSU door to function incorrectly. Such incorrect functioning of the PSU door could result in the PSU panels falling into the passenger cabin. This condition, if not corrected, could result in PSU panels falling from the PSU support rails during takeoff or landing, which could result in injury to passengers and could impede evacuation of the passengers in an emergency situation.

Explanation of Relevant Service Information

The FAA has reviewed and approved Boeing Special Attention Service Bulletin (SASB), 747–25–3111, Revision 2, dated April 24, 2003. For certain airplanes specified as Group 1 airplanes in the SASB, procedures are described to remove the existing aluminum tie bars of the PSUs and to install new plastic PSU tie bars. For certain other airplanes specified as Group 2 airplanes in the SASB, procedures are described to install tie bars on the rails of the center PSU panel in Zone A. Installation of the tie bars for Group 2 airplanes is intended to adequately address the identified unsafe condition.

Related Rulemaking

On August 3, 1990, we issued AD 90–17–07, amendment 39–6695 (55 FR 33100) which is applicable to certain Boeing Model 747–400 series airplanes. That AD requires modification of the PSU support rails per Boeing Service Bulletin 747–25–2853, dated March 1, 1990.

Explanation of Requirements of the Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design that may be registered in the United States at some time in the future, this AD is being issued to prevent PSU panels from moving and falling from the PSU support rails during takeoff or landing, which could result in injury to passengers and could impede evacuation of the passengers in an emergency situation. This AD requires installation of tie bars on the rails of the center PSU panels. With the exception noted in the following "Differences Between the SASB and the AD" section, the actions are required to be accomplished in accordance with the SASB described previously.

Differences Between the SASB and the AD

Although the Boeing SASB describes replacing aluminum tie bars with new plastic ties bars for certain airplanes, this AD does not require such replacement. We consider that the replacement of the aluminum tie bars with new plastic PSU tie bars to be an optional action that is provided mainly for the operator's benefit or convenience, since the new plastic PSU tie bars weigh less than the aluminum tie bars. Further, replacing the aluminum tie bars with the plastic tie bars does not address the identified unsafe condition specified in this AD.

Additionally, the Boeing SASB does not suggest a particular compliance time. We have determined that a compliance time of "within 18 months after the effective date of this AD" will provide adequate time to perform the installation of the tie bars and yet will provide an acceptable level of safety.

Cost Impact

None of the Model 747–400 or 400D series airplanes affected by this action are on the U.S. Register. All airplanes included in the applicability of this rule currently are operated by non-U.S. operators under foreign registry; therefore, they are not directly affected by this AD action. However, the FAA considers that this rule is necessary to ensure that the unsafe condition is addressed in the event that any of these subject airplanes are imported and placed on the U.S. Register in the future.

Should an affected airplane be imported and placed on the U.S. Register in the future, it would require approximately 1 work hour to accomplish the required actions, at an average labor rate of $65 per work hour.

Required parts will be furnished at no cost to operators. Based on these figures, the cost impact of this AD would be $65 per airplane.

Determination of Rule's Effective Date

Since this AD action does not affect any airplane that is currently on the U.S. Register, it has no adverse economic impact and imposes no additional burden on any person. Therefore, prior notice and public procedures hereon are unnecessary and the amendment may be made effective in less than 30 days after publication in the **Federal Register**.

Comments Invited

Although this action is in the form of a final rule and was not preceded by notice and opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES**. All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

Submit comments using the following format:

- Organize comments issue-by-issue. For example, discuss a request to change the compliance time and a request to change the service bulletin reference as two separate issues.
- For each issue, state what specific change to the AD is being requested.
- Include justification (*e.g.*, reasons or data) for each request.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this AD will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 2004–NM–42–AD." The postcard will be date stamped and returned to the commenter.

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:

2004–09–04 Boeing: Amendment 39–13593. Docket 2004–NM–42–AD.

Applicability: Model 747–400 and –400D series airplanes, identified as Group 2 airplanes in Boeing Special Attention Service Bulletin 747–25–3111, Revision 2, dated April 24, 2003; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent passenger service unit (PSU) panels from moving and falling from the PSU support rails during takeoff or landing, which could result in injury to passengers and could impede evacuation of the passengers in an emergency situation; accomplish the following:

Installation of Tie Bars

(a) Within 18 months after the effective date of this AD, install tie bars in Zone A on the rails of the center PSU panels, per the Accomplishment Instructions of Boeing Special Attention Service Bulletin 747–25–3111, Revision 2, dated April 24, 2003.

Alternative Methods of Compliance

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

Incorporation by Reference

(c) The actions shall be done in accordance with Boeing Special Attention Service Bulletin 747–25–3111, Revision 2, dated April 24, 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, P.O. Box 3707, Seattle, Washington 98124–2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Effective Date

(d) This amendment becomes effective on May 13, 2004.

Issued in Renton, Washington, on April 16, 2004.

Michael J. Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–9378 Filed 4–27–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–CE–63–AD; Amendment 39–13592; AD 2004–09–03]

RIN 2120–AA64

Airworthiness Directives; HPH s. r. o. Models Glasflügel 304CZ, 304CZ–17, and 304C Sailplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA adopts a new airworthiness directive (AD) for certain HPH s. r. o. (HPH) Models Glasflügel 304CZ, 304CZ–17, and 304C sailplanes. This AD requires you to inspect to determine the airbrake handle attachment rivet material. This AD also

requires you to replace any non-steel rivet with a steel rivet. This AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for the Czech Republic. We are issuing this AD to prevent the airbrake handle from becoming loose, which could result in failure of the airbrake control. This failure could lead to loss of control of the sailplane.

DATES: This AD becomes effective on June 11, 2004.

As of June 11, 2004, the Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulation.

ADDRESSES: You may get the service information identified in this AD from HPH spol.s r.o., Cáslavská 126, P.O. Box 112, CZ284 01 Kutná Hora, Czech Republic; telephone: 011–42–327 513441; e-mail: *hph@hph.cz.*

You may view the AD docket at FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2003–CE–63–AD, 901 Locust, Room 506, Kansas City, Missouri 64106. Office hours are 8 a.m. to 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Greg Davison, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4130; facsimile: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Discussion

What events have caused this AD? The Civil Aviation Authority (CAA), which is the airworthiness authority for the Czech Republic, recently notified FAA that an unsafe condition may exist on certain HPH Models Glasflügel 304CZ, 304CZ–17, and 304C sailplanes. The CAA reports that excessive free play in the airbrake handle was found during a pre-flight check on a Glasflügel 304CZ sailplane.

A non-steel (duralumin) rivet connecting the airbrake handle to the pushrod had become loose.

What is the potential impact if FAA took no action? If not corrected, a loose airbrake handle could result in failure of airbrake control. This failure could lead to loss of control of the sailplane.

Has FAA taken any action to this point? We issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain HPH Models Glasflügel 304CZ, 304CZ–17, and 304C sailplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on February 4, 2004 (69 FR 5302). The NPRM proposed to require you to inspect to determine the airbrake handle attachment rivet material and replace any non-steel rivet with a steel rivet.

Comments

Was the public invited to comment? We provided the public the opportunity to participate in developing this AD. We received no comments on the proposal or on the determination of the cost to the public.

Conclusion

What is FAA's final determination on this issue? We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed except for minor editorial corrections. We have determined that these minor corrections:

—Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and

—Do not add any additional burden upon the public than was already proposed in the NPRM.

Changes to 14 CFR Part 39—Effect on the AD

How does the revision to 14 CFR part 39 affect this AD? On July 10, 2002, the FAA published a new version of 14 CFR part 39 (67 FR 47997, July 22, 2002), which governs the 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.

Costs of Compliance

How many sailplanes does this AD impact? We estimate that this AD affects 12 sailplanes in the U.S. registry.

What is the cost impact of this AD on owners/operators of the affected sailplanes? We estimate the following costs to accomplish the inspection:

Labor Cost	Parts Cost	Total Cost Per Sailplane	Total Cost on U.S. Operators
1 workhour × $65 per hour = $65	Not applicable	$65	$65 × 12 = $780.

We estimate the following costs to accomplish any necessary replacements that will be required based on the results of this inspection. We have no way of determining the number of sailplanes that may need this replacement:

Labor Cost	Parts Cost	Total Cost Per Sailplane Airbrake Handle
1 workhour × $65 per hour = $65	$10 for each rivet. 3 rivets on each airbrake handle.	$65 + $30 (to replace all 3 rivets) = $95.

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. 2003–CE–63–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. FAA amends § 39.13 by adding a new AD to read as follows:

2004–09–03 HPH s. r. o.: Amendment 39–13592; Docket No. 2003–CE–63–AD.

When Does This AD Become Effective?

(a) This AD becomes effective on June 11, 2004.

What Other ADs Are Affected by This Action?

(b) None.

What Sailplanes Are Affected by This AD?

(c) This AD affects Models Glasflügel 304CZ, 304CZ–17, and 304C sailplanes, serial numbers 1 through 60–17, that are certificated in any category.

What Is the Unsafe Condition Presented in This AD?

(d) This AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for the Czech Republic. The actions specified in this AD are intended to prevent the airbrake handle from becoming loose, which could result in failure of the airbrake control. This failure could lead to loss of control of the sailplane.

What Must I do To Address This Problem?

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

Actions	Compliance	Procedures
(1) Inspect to determine the airbrake handle attachment rivet material.	Within the next 25 hours time-in-service (TIS) after June 11, 2004 (the effective date of this AD).	Follow HPH spol.s r.o. Mandatory Bulletin No.: G304CZ–05 a) G304CZ17–05 a), dated March 26, 2003.
(2) Replace any non-steel attachment rivet with a steel rivet.	Before further flight after the inspection required in paragraph (e)(1) of this AD.	Follow HPH spol.s r.o. Mandatory Bulletin No.: G304CZ–05 a) G304CZ17–05 a), dated March 26, 2003.

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, Standards Office, Small Airplane Directorate, FAA. For information on any already approved alternative methods of compliance, contact Greg Davison, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4130; facsimile: (816) 329–4090.

Does This AD Incorporate Any Material by Reference?

(g) You must do the actions required by this AD following the instructions in HPH spol.s r.o. Mandatory Bulletin No.: G304CZ–05 a) G304CZ17–05 a), dated March 26, 2003. 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 HPH spol.s r.o., Cáslavská 126, P.O. Box 112, CZ284 01 Kutná Hora, Czech Republic; telephone: 011–42–327 513441; e-mail: *hph@hph.cz*. You may review copies at FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Is There Other Information That Relates to This Subject?

(h) Czech Republic AD Number CAA–AD–040/2003, dated May 6, 2003, also addresses the subject of this AD.

Issued in Kansas City, Missouri, on April 19, 2004.

Dorenda D. Baker,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–9377 Filed 4–27–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD09–03–287]

RIN 1625–AA11

Regulated Navigation Area; USCG Station Port Huron, Port Huron, MI, Lake Huron

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is establishing a regulated navigation area (RNA) around the entrance to the moorings for Station Port Huron. These regulations are necessary to manage vessel traffic and ensure the operability of Coast Guard vessels departing Station Port Huron. These regulations are intended to restrict vessels from fishing, mooring and anchoring in a portion of Lake Huron in the vicinity of The United States Coast Guard (USCG) Station Port Huron.

DATES: This rule is effective May 28, 2004.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket CGD09–03–287 and are available for inspection or copying at Commander, Marine Safety Compliance Operations Branch (mco), Ninth Coast Guard District, 1240 E. Ninth Street, Cleveland, Ohio 44199–2060, between 9 a.m. and 2 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander Jim McLaughlin, Chief, Marine Safety Compliance Operations Branch, Ninth Coast Guard District Marine Safety Division, at (216) 902–6045.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On January 15, 2004, we published a notice of proposed rulemaking (NPRM) entitled Regulated Navigation Area; USCG Station Port Huron, Port Huron, Michigan, Lake Huron in the **Federal Register** (69 FR 2318). We received 9 letters commenting on the proposed rule. No public meeting was requested, and none was held.

Background and Purpose

A large number of recreational fishermen typically fish right off the entrance to the Station Port Huron Moorings. As such, it is typical for fishing line to cross the path of any station vessels exiting the harbor, especially in time-critical emergency situations. On multiple occasions in

past years, vessels from Station Port Huron were removed from operations due to fishing line becoming lodged in and ruining the shaft bearing. Replacement of this shaft bearing requires removal of the entire shaft from the vessel.

As a result, Station Port Huron's vessels were unavailable for search and rescue response during the most active portion of the year, the summer boating season. Having vessels out of service on a regular basis has resulted in a life-threatening situation. Station Port Huron has not been able to rely on having all of its underway assets available on a 24-hour basis, severely affecting time critical mission response.

In addition, due to security concerns it is necessary to prohibit vessels from anchoring or mooring within the RNA. On several occasions, vessels have been discovered inside Station Port Huron's boat basin or anchored so close to the Station's property that crewmembers trespassed upon Federal Property upon disembarking the vessel. This routine invasion of the boat basin and Government property is a clear threat to the security and safety of the station and its crew.

Station Port Huron is situated on the southern end of Lake Huron at the mouth of the St. Clair River. As such, it is a heavily traveled area both for commercial and recreational vessels. Station Port Huron's area of responsibility continues south approximately 13 miles down the St. Clair River and approximately 10 miles north to Port Sanilac, Michigan. Due to the wide geographic area coupled with the extent of vessel traffic, it is critical that all Station vessels be operable at all times and that response times not be hindered.

Discussion of Comments and Changes

One commenter indicated that vessels should be allowed to enter Station Port Huron's boat basin. In order to ensure that Coast Guard vessels may exit the basin as quickly as possible with no unnecessary obstructions at all times, no vessels are allowed to enter the basin. In addition, due to the requirement to be able to respond as quickly as possible, vessels in the basin place both themselves and Coast Guard members in danger by being in the basin.

Three commenters indicated the Coast Guard should place a device on the shaft to cut off any fishing line. This comment was explored by members of Station Port Huron and it was determined that the device is available for the larger 41 UTB foot boat, however there is no device available for the smaller 25 foot RBHS and 24 foot UTL–T boats. In addition, while the device works well for synthetic fishing line, the device is not effective on the portion of steel used as leaders at the end of fishing line that the USCG boats have been encountering.

Five commenters stated that the size of the zone was too big. The size of the zone is as small as possible to still be effective in preventing adverse impacts on boat operations. The zone size was selected based on currents, and the possibility of fishing lines drifting in from outside the zone. The current zone size guarantees Station Port Huron boats can depart and enter the basin at any time of day, in any weather condition without concern of entanglement.

No changes are being made to this regulation in response to these comments.

Regulatory Evaluation

This rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of the Order. The Office of Management and Budget has not reviewed it under that Order. It is not significant under the regulatory policies and procedures of the Department of Homeland Security.

We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary.

This determination is based on the relative small size of the zone and the limited class of vessels restricted from this area, *i.e.* fishing, mooring or anchoring vessels. In addition, vessels may engage in these activities provided the vessel operator receives prior approval from the Captain of the Port Detroit.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule has a significant impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (*see* **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule so that they can better evaluate its effects and participate in the rulemaking process. If the rule affects your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Commander (mco), Ninth Coast Guard District (*see* **ADDRESSES.**)

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

We have analyzed this rule under Executive Order 13132 and have determined that this rule does not have implications for federalism under that Order.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

The Coast Guard has analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety

Risks. This rule is not an economically significant rule and does not concern an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

The Coast Guard has analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Environment

We have considered the environmental impact of this rule and concluded that, under figure 2–1, paragraph 32(g) of Commandant Instruction M16475.1C, this rule is categorically excluded from further environmental documentation. A written categorical exclusion determination is available in the docket for inspection or copying where indicated under **ADDRESSES.**

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1

■ 2. Add § 165.920 to read as follows:

§ 165.920 Regulated Navigation Area: USCG Station Port Huron, Port Huron, MI, Lake Huron.

(a) *Location.* All waters of Lake Huron encompassed by the following: starting at the northwest corner at 43°00.4′ N, 082°25.327′ W; then east to 43°00.4′ N, 082°25.23.8′ W; then south to 43°00.3′ N, 082°25.238′ W; then west to 43°00.3′ N, 082°25.327′ W; then following the shoreline north back to the point of origin (NAD 83).

(b) *Special regulations.* No vessel may fish, anchor, or moor within the RNA without obtaining the approval of the Captain of the Port (COTP) Detroit. Vessels need not request permission from COTP Detroit if only transiting through the RNA. COTP Detroit can be reached by telephone at (313) 568–9580, or by writing to: MSO Detroit, 110 Mt. Elliot Ave., Detroit MI 48207–4380.

Dated: April 21, 2004.

Ronald F. Silva,

Rear Admiral, U.S. Coast Guard, Commander, Ninth Coast Guard District.

[FR Doc. 04–9623 Filed 4–27–04; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[AZ 063–0048; FRL–7638–2]

Revisions to the Arizona State Implementation Plan, Pinal County Air Quality Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing full approval and limited approval/ limited disapproval of revisions to the Pinal County Air Quality Control District (PCAQCD or District) portion of the Arizona State Implementation Plan (SIP) concerning visible emissions standards, limits on open burning, and carbon monoxide (CO) emissions from industrial processes. For the visible emissions standards and the open burning limits, EPA is finalizing a full approval of portions of those provisions and finalizing a simultaneous limited approval and limited disapproval for other portions. For CO emissions from industrial processes, EPA is finalizing a limited approval and limited disapproval. Under authority of the Clean Air Act as amended in 1990 (CAA or the Act), this action simultaneously approves local rules that regulate these emission sources and directs Arizona to correct rule deficiencies.

EFFECTIVE DATE: This rule is effective on May 28, 2004.

ADDRESSES: You can inspect a copy of the administrative record for this action at EPA's Region IX office during normal business hours. You can inspect copies of the submitted rule revisions by appointment at the following locations:

Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105.

Air and Radiation Docket and Information Center (6102T), U.S. Environmental Protection Agency, Room B–102, 1301 Constitution Avenue, NW., Washington, DC 20460.

Arizona Department of Environmental Quality, 1110 West Washington Street, Phoenix, AZ 85007.

Pinal County Air Quality Control District, Building F, 31 North Pinal Street (P. O. Box 987), Florence, AZ 85232.

FOR FURTHER INFORMATION CONTACT: Al Petersen, Rulemaking Office (AIR–4), U.S. Environmental Protection Agency, Region IX; (415) 947–4118, *petersen.alfred@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us" and "our" refer to EPA.

I. Proposed Action

On June 18, 2001 (66 FR 32783), EPA proposed a limited approval and limited disapproval of the rules in Table 1 that were submitted for incorporation into the Arizona SIP.

TABLE 1.—SUBMITTED RULES

Local agency	Rule No.	Rule title	Adopted or amended or codified	Submitted
PCAQCD	2–8–300	Performance Standards [Visible Emissions]	06/29/93 adopted	11/27/95
PCAQCD	3–8–700	General Provisions [Open Burning]	02/22/95 amended	11/27/95
PCAQCD	5–24–1040	Carbon Monoxide Emissions—Industrial Processes	02/22/95 codified	11/27/95

We proposed a limited approval because we determined that these rules improve the SIP and are largely consistent with the relevant CAA requirements. We simultaneously proposed a limited disapproval because some rule provisions conflict with one or more requirements of section 110 and/or part D of title I of the CAA.

On June 18, 2001 (66 FR 32783), we also proposed a full approval of the rules in Table 2 that were submitted for incorporation into the Arizona SIP.

TABLE 2.—SUBMITTED RULES

Local agency	Rule No.	Rule title	Adopted or amended	Submitted
PCAQCD	2–8–280	General [Visible Emissions]	06/29/93 adopted	11/27/95
PCAQCD	2–8–290	Definitions [Visible Emissions]	06/29/93 adopted	11/27/95
PCAQCD	2–8–310	Exemptions [Visible Emissions]	06/29/93 adopted	11/27/95
PCAQCD	2–8–320	Monitoring and Records [Visible Emissions]	06/29/93 adopted	11/27/95
PCAQCD	3–8–710	Permit Provisions and Administration [Open Burning].	02/22/95 amended	11/27/95

Our proposed action contains more information on the rules and our evaluation.

II. Public Comments and EPA Responses

EPA's proposed action provided a 30-day public comment period. During this period, we received comments from the following parties:

Chuck Shipley, Arizona Mining Association (AMA); letter dated July 18, 2001, and received July 19, 2001.

Scott Davis, Pinnacle West Capital Corporation (PWCC); letter dated July 17, 2001, and received July 19, 2001.

Don Gabrielson, PCAQCD; letter dated July 18, 2001, and received July 18, 2001.

The comments and our responses are summarized below.

Comment I: AMA challenges EPA's analysis of whether the District's visible emissions standard satisfies the requirements for reasonably available control measures including reasonably available control technology (RACM/RACT). AMA asserts that EPA is not determining a RACM/RACT 20% opacity standard consistent with EPA's *PM–10 Guideline Document*, EPA–452/R093–008. Specifically, AMA argues that RACM/RACT must not be a blanket, nationwide determination, and EPA or PCAQCD must evaluate available control measures for reasonableness, considering the technological feasibility and the cost of control in the applicable area. AMA also asserts that the establishment of a national standard by guideline without full and fair national public notice and comment is unlawful.

Response: EPA is not promulgating a national RACM/RACT opacity standard by today's action. However, we believe that the widespread application of the 20% opacity standard, or its equivalent No. 1 Ringlemann, across the country is generally achievable and control equipment is reasonably available unless a State or local authority demonstrates otherwise given particular local circumstances. Table 3 lists some of the States and local agencies with a 20% opacity standard, or its equivalent of No. 1 Ringlemann, in their SIP rules.

TABLE 3.—STATE OR DISTRICT OPACITY EMISSION STANDARDS

State	Local agency	Per cent opacity	Ringlemann No. opacity	SIP rule No.
Michigan		20		R336.1301
New Mexico		20		20–2–61
Texas		20		111.111
Washington		20		173–400–040
California	Bay Area AQMD	20	1	Reg 6
California	Imperial County APCD		1	401
California	Mojave Desert AQMD		1	401
California	Sacramento Metropolitan AQMD		1	401
California	San Diego APCD		1	50
California	San Joaquin Valley Unified APCD		1	4101
California	South Coast AQMD		1	401

Based on the significant information before the Agency showing that a more stringent opacity standard is generally considered RACM/RACT and lacking a demonstration from the District to rebut this significant information, it is reasonable for EPA to conclude the 40% opacity limit of Rule 2–8–300 fails to fulfill RACM/RACT. *See National Steel Corp.* v. *Gorsuch*, 700 F.2d 314, 323 (6th Cir. 1983) ("Where a state fails to supply the information necessary for a proper [RACT] evaluation by the EPA, the EPA must be free to use its own acquired knowledge."). After this final disapproval action, PCAQCD will have the opportunity to perform any appropriate RACM/RACT demonstration in a revised submittal of Rule 2–8–300. In performing this demonstration, the District should consider the widespread adoption of the 20% opacity standard, as well as any unique local factors that the District identifies.

While AMA's comments focus on the level of control to meet RACM/RACT, it is important to note that Rule 2–8–300 must in fact meet the more stringent requirements of best available control measures including best available control technology (BACM/BACT), because PCAQCD regulates a serious PM–10 nonattainment area. CAA section 189(b)(1)(B). BACM/BACT should not be less stringent than the 20% opacity standard shown to be in widespread use. 59 FR 41998, 42011 (Aug. 16, 1994) ("General Preamble Addendum") ("BACM is intended to be a more stringent standard than RACM."). While specific processes are

undoubtedly capable of meeting a more stringent opacity standard than 20% by implementing BACM/BACT, the visible emissions rule is generic and applies to sources from many types of processes located in different areas. Some of the sources covered by this generic rule might have difficulty meeting a more stringent standard than 20% opacity. As a result, the District may be able to demonstrate that a generic 20% opacity standard is appropriate for the purposes of Rule 2–8–300 to meet the CAA requirements for both RACM/RACT and BACM/BACT.

Comment II: AMA argues that, notwithstanding the broad application of 20% opacity standards as RACM/RACT, each area must be able to determine RACM/RACT based on the area's unique aspects. AMA concludes, that since EPA previously approved the 40% opacity standard for PCAQCD, the District had no reason to re-justify the standard. AMA implies that EPA should continue to rely on the justification for the original approval.

Response: EPA agrees that RACM/RACT is to be determined by each area taking into consideration unique local factors. That analysis, however, has not been conducted by the District here. At the time of the original approval of the 40% opacity visible emissions limit, the District did not include areas classified as nonattainment. As a result, the requirements for RACM/RACT and BACM/BACT did not apply. Any previous rationale for approval of the 40% opacity standard would no longer serve as an adequate basis for approval of the standard. Through this limited disapproval, we are directing the District to reconsider the level of the visible emission limit and demonstrate that it satisfies RACM/RACT and BACM/BACT.

Comment III: AMA states that PCAQCD is not authorized to impose a 20% opacity standard. PCAQCD is prohibited by Arizona law from adopting a rule that is more stringent than an Arizona Department of Environmental Quality (ADEQ) rule unless PCAQCD makes a specific finding that a more stringent rule is necessary to meet a local condition or Federal law. PCAQCD has not made such a finding.

Response: This final notice directs Arizona to correct deficiencies in local rules in order to comply with the Federal CAA. This could necessitate changes to State law. There is no need to respond to the specific details of this comment because State law cannot interfere with compliance with Federal law. As AMA notes, PCAQCD may need to make a finding that a more stringent standard is necessary to meet Federal law.

We also note that EPA has recently disapproved a similar generic opacity standard adopted by ADEQ (R18–2–702). *See* 67 FR 59456 (September 23, 2002). EPA directed ADEQ to revise the opacity standard to satisfy RACM/RACT. On October 26, 2003, ADEQ finalized changes to Rule R18–2–702 that established a statewide general opacity standard of 20%. Accordingly, even under commenter's interpretation of State law, the revised ADEQ rule may no longer preclude a more stringent PCAQCD visible emissions rule under State law.

Comment IV: AMA asserts that EPA fails to consider the following PCAQCD nonattainment provisions:

- Any source, except *de minimis* sources, must obtain a permit to operate. See Rule 3–1–040.
- A new or modified major source must implement the lowest achievable emission rate (LAER), which is more stringent than BACM/BACT. *See* Rule 3–3–220.
- Any source located in the PM–10 nonattainment area is required to meet the more stringent standards found in chapter 5 of the PCAQCD Regulations.
- Rule 2–8–300 is found in chapter 2 of the PCAQCD Regulations, and is not applicable to sources in nonattainment areas.

AMA implies that these provisions obviate the need for more stringent visible emission standards to meet nonattainment requirements.

Response: EPA has reviewed the District's rules and continues to conclude that, even taken as a whole, these rules do not ensure that significant sources of PM–10 in the nonattainment portions of the District will be subject to the required level of control (*i.e.*, RACM/RACT or BACM/BACT).

- The permitting requirements of Rule 3–1–040 do not include specific controls that ensure RACM/RACT or BACM/BACT is fulfilled. Instead, the permitting requirements specify that the permit contain enforceable emission limitations and standards that assure compliance with applicable requirements. See PCAQCD Rule 3–1–081. Unless the underlying applicable requirements, such as Rule 2–8–300, meet RACM/RACT or BACM/BACT, the permitting provisions are not adequate to ensure RACM/RACT or BACM/BACT will be imposed on sources as required.
- The LAER requirements of Rule 3–3–220, as AMA acknowledges, only apply to new or modified major sources. RACM/RACT is required for existing as well as new or modified sources and is not limited to major stationary sources. *See* 57 FR 13498, 13541 (April 16, 1992) ("General Preamble"). In addition, BACM/BACT is required for all significant sources of emissions in nonattainment areas including existing sources and new sources that might not be considered "major" under the District's rules. *See* 59 FR 42012.
- The source-specific performance standards in Chapter 5 may also fail to ensure RACM/RACT or BACM/BACT will be required for emission sources in the nonattainment portions of the District. Several of these standards contain no specific PM–10 standards and several rules include the same 40% opacity standards that we are finding do not meet the requirements of either RACM/RACT or BACM/BACT.
- Finally, there is no provision in PCAQCD rules that limits the applicability of Rule 2–8–300 or other rules in Chapter 2 to attainment areas. In its current form, Rule 2–8–300 applies to both attainment areas and nonattainment areas of PCAQCD. Thus EPA must review Rule 2–8–300 with respect to CAA requirements for nonattainment areas.

Comment V: AMA notes that EPA previously proposed to disapprove a similar opacity standard promulgated by ADEQ in 65 FR 79037 (December 18, 2000). AMA requests that EPA consider the Arizona SIP as a whole before making its proposals. In particular, AMA requests that EPA examine Arizona's nonattainment plans before using concerns about nonattainment areas as a pretext for proposals to disapprove a regulation governing attainment areas.

Response: Since AMA submitted its comments, EPA has finalized its disapproval of ADEQ's opacity standards. *See* 67 FR 59456 (September 23, 2002). That action, while consistent with the action being taken here, does not have any direct impact on the evaluation of the District's visible emission rule. PCAQCD is generally outside of the area regulated by ADEQ rules and attainment plans. Therefore, decisions on ADEQ attainment plans do not relieve the District from the need to ensure that Rule 2–8–300 meets the CAA requirements for SIP approval.

Rule 2–8–300 regulates all of PCAQCD, which includes both attainment areas and nonattainment areas. As a result, Rule 2–8–300 must meet RACM/RACT or BACM/BACT requirements for nonattainment areas. EPA does not have a mechanism to approve the rule only as it applies in the attainment area and disapprove it as it applies in the nonattainment area.

Comment VI: AMA asserts that EPA lacks a legal basis for the proposed limited disapproval of PCAQCD Rules 2–8–300, 3–8–700, and 5–24–1040 and relies exclusively on guidance documents. AMA requests that EPA cite to and rely upon statutes and rules subjected to notice and public comment in identifying alleged deficiencies in proposed SIP revisions.

Response: EPA has issued a limited disapproval of PCAQCD Rules 2–8–300, 3–8–700, and 5–24–1040 because the rules do not meet all applicable requirements of the CAA. SIP rules must be enforceable (*see* section 110(a) of the CAA), must require RACM/RACT or BACM/BACT for sources in nonattainment areas (*see* section 189), must not interfere with applicable requirements including requirements concerning attainment (*see* section 110(1)), and must not relax existing requirements in effect prior to enactment of the 1990 CAA amendments (*see* section 193). These provisions of the CAA provide the statutory basis for EPA's conclusion that PCAQCD Rules 2–8–300, 3–8–700, and 5–24–1040 are legally deficient.

EPA acknowledges that guidance and policy documents are not a legal basis for EPA's actions. However, guidance and policy documents are generally careful analyses and interpretations of the CAA. Such guidance and policy documents are valuable in assuring fairness and consistency in evaluating submitted SIP rules. The proposed actions that result from an evaluation with the assistance of guidance and policy documents are always noticed in the **Federal Register** for public review and comment.

Comment VII: AMA asserts that EPA makes unsubstantiated claims in justifying disapproval of the PCAQCD rules. For example, PCAQCD proposes to include orchard heaters in the list of exemptions from open burning requirements in Rule 3–8–700. EPA states that this may be a SIP relaxation and the exemption should be removed "because there are no orchard heaters in PCAQCD." AMA asserts that EPA offers no basis for this statement. AMA cites no other specific instances where EPA made and allegedly unsubstantiated claim justifying its SIP disapproval.

Response: With respect to the one specific example noted by AMA, AMA misunderstands the recommendation made by EPA. First, EPA concluded as a legal matter that the addition by PCAQCD of a new exemption from Rule 3–8–700 for orchard heaters amounts to a SIP relaxation, which, unless justified by PCAQCD, is not consistent with section 110(1) of the CAA. PCAQCD stated (telephone conversation with Don Gabrielson on July 21, 2000) that there are no orchard heaters in PCAQCD. Therefore, we recommended that, rather than attempting to demonstrate that the new exemption does not violate CAA section 110(1), the District should simply remove this exemption from the rule. Whether the District's statement regarding the absence of orchard heaters is true or not does not alter the basic legal conclusion that the exemption cannot stand without a demonstration of compliance with CAA section 110(1).

Should the District choose to retain the orchard heater exemption, PCAQCD could comply with section 110(1) by showing that its decision would not interfere with any applicable requirements of the CAA, including attainment and reasonably further progress requirements. In making such a demonstration, claims regarding the presence or absence of orchard heaters would require factual support.

Comment VIII: PWCC believes that LAER instead of BACT should be required in serious nonattainment areas.

Response: PWCC's comments confuse the requirements for new source review (NSR) (*e.g.*, CAA section 173) with the more general requirements governing existing sources in nonattainment areas (*e.g.*, CAA section 189(b)(1)(B)). PWCC is correct that the CAA provisions governing NSR require BACT in attainment areas and LAER in nonattainment areas. Section 189, however, specifies the level of control required for existing sources in PM–10 nonattainment areas. SIP provisions covering moderate PM–10 nonattainment areas must assure implementation of RACM/RACT to those existing sources in the nonattainment area that are reasonable to control. *See* CAA section 172(c)(1) and 189(a)(1)(C); *see also* 57 FR 13541. EPA interprets section 189(b)(1)(B) as requiring BACM (including BACT) for all (except *de minimis*) stationary PM–10 sources in serious PM–10 nonattainment areas. See 59 FR 42012. For a discussion on the relationship between BACM as required under 189 and BACT as required by the CAA provisions for prevention of significant deterioration, *see* the General Preamble Addendum, 59 FR at 42008–42011.

Comment IX: PWCC concurs with EPA's determination that sources located in the serious PM–10 nonattainment area within PCAQCD should probably be subject to a 20% opacity standard. However, PWCC argues that the 20% opacity standard is inappropriate for the sources located within the moderate PM–10 area. PWCC refers to comments it submitted by letter of February 15, 2001, regarding the 20% opacity standard proposed in 65 FR 79037 (December 18, 2000) for ADEQ Rule R18–2–702. In those comments, PWCC argued that, at a minimum, EPA should approve the rule for all areas in the State, except the small PM–10 nonattainment areas. Likewise, AMC and PCAQCD question the validity of EPA's determination that the 20% opacity standard applies to sources located outside of the serious PM–10 nonattainment area.

Response: As we explained in our Response to Comment I, EPA believes that PCAQCD's 40% opacity standard does not fulfill the requirements for RACM/RACT and that a 20% opacity standard is achievable with reasonably available control equipment. Accordingly, it is reasonable to expect the District to adopt a 20% opacity standard to fulfill RACM/RACT in moderate PM–10 nonattainment areas.

Furthermore, Rule 2–8–300 applies in all of PCAQCD. EPA does not have a mechanism to approve the rule as it applies in the moderate nonattainment areas and disapprove it in the serious nonattainment areas. Accordingly, EPA must ensure that Rule 2–8–300 fulfills RACM/RACT and BACM/BACT requirements in the District's moderate PM–10 nonattainment area and serious PM–10 nonattainment area, respectively.

Comment X: PWCC contends that the 20% opacity standard should not be imposed throughout PCAQCD because the majority of sources are in attainment areas or in unclassified areas. PWCC recommends that EPA approve Rule 2–8–300 for all areas in the District that are in attainment or unclassified and direct PCAQCD to determine RACM/RACT (or BACM/BACT) for those areas that are in nonattainment and develop a new rule or rules, if necessary.

Response: EPA agrees that only portions of PCAQCD are nonattainment areas for PM–10. However, because Rule 2–8–300 applies to sources in the nonattainment portions of the District, the rule must meet the relevant requirements of CAA sections 110 and 188–190 for nonattainment areas. For the reasons discussed above, Rule 2–8–300 does not comply with the requirements of section 189 and therefore cannot be fully approved.

EPA declines to follow PWCC's recommendation that the rule be approved as it applies in the attainment portions of the District. The rule was not presented to EPA in a form that would allow EPA to approve a separable piece of the rule that applies only in attainment areas. Thus, EPA has no mechanism to approve the rule in the

attainment portion of the District while disapproving it in the nonattainment portions. This final notice directs Arizona to correct the rule deficiencies. Arizona has the opportunity to direct PCAQCD to take appropriate action to ensure sources in the nonattainment portions of the District are subject to RACM/RACT or BACM/BACT as required.

Comment XI: PCAQCD asserts that BACM/BACT should be determined on a case-by-case basis since the nature and extent of a nonattainment problem may vary within the area and from one area to another. The District claims that such an analysis must be conducted in the context of the *Apache Junction Portion of the Metropolitan Phoenix PM–10 Serious State Implementation Plan* (August 1999) (Apache Junction Plan). The Apache Junction Plan identifies construction activity and stationary sources as the only relevant categories of PM–10.

The District points out that significant stationary sources within the Apache Junction Plan area must obtain operating permits pursuant to PCAQCD Rule 3–1–040 and that and that under Ariz. Rev. Stat. section 49–480.F.5, the District may include any other conditions that are necessary to ensure compliance with the Clean Air Act in operating permits issued to these sources. The District argues that the operating permit requirement in conjunction with the general requirements of Ariz. Rev. Stat. section 49–480.F.5 obviates the need for a more stringent opacity standard within the Apache Junction Plan area.

Response: EPA agrees that BACM/BACT is to be determined on a case-by-case basis. See 59 FR 42014. However, Rule 2–8–300, as the District concedes, does not include any analysis demonstrating that the generic visible emissions rule satisfies BACM/BACT and/or RACM/RACT requirements. EPA understands that no such analysis was conducted because at the time the District submitted the rule, the District did not include nonattainment areas. Now that portions of the District have been redesignated to nonattainment, however, the District must prepare the necessary analysis to support SIP approval of the rule as it applies to the nonattainment portions of the District. Without contrary specific data on technological feasibility and the cost of control in the applicable geographical area, we cannot conclude based on the information before us that an opacity standard less stringent than 20% fulfills RACM/RACT and BACM/BACT.

The District's reliance on the general language of Ariz. Rev. Stat. § 49–480.F.5 is also misplaced. In our General Preamble we explain that procedures for determining compliance with a rule must be "sufficiently specific and nonsubjective so that two independent entities applying the procedures would obtain the same result." *See* 57 FR 13568 (April 16, 1992). A SIP must also include "clear, unambiguous, and measurable requirements" for ensuring that sources are in compliance with control measures. *Id.* The State of Arizona's general commitment to require permit emission limits as necessary to assure compliance with applicable requirements, including requirements of the CAA, is not meaningful if the standards adopted into the SIP do not themselves satisfy RACM/RACT or BACM/BACT as appropriate. Accordingly, EPA cannot conclude that PCAQCD's general commitment to assure compliance with the CAA represents the application of RACM/RACT or BACM/BACT.

Comment XII: The District argues that a 20% opacity standard cannot be implemented for the construction industry because the monitoring requirements contained in PCAQCD Rule 2–8–320 should not be applied to construction sources. The District contends that attempts to measure construction dust opacity using EPA Reference Method 9, as Rule 2–8–320 requires, are futile because Method 9 cannot be practicably applied to mobile sources. Rather, the District suggests that "implementation of far more detailed control requirements" for construction sources, such as those imposed by Maricopa County, would be consistent with EPA guidance calling for a case-by-case analysis of what measures should be characterized as BACM.

Response: EPA agrees that a more detailed control strategy for construction site dust may satisfy RACM/RACT or BACM/BACT requirements for PM–10 nonattainment areas located within PCAQCD. However, until PCAQCD submits such a detailed control strategy, EPA cannot approve the District's SIP on that basis. We note that contrary to the District's own claim regarding implementability, PCAQCD Rule 4–3–090, which has not been approved in the SIP, requires construction activities generally to meet a 20% opacity limit using the same Method 9. This rule combined with other provisions setting standards for all specific significant sources of PM–10 in the nonattainment areas, could replace the need for a generic visible emission standard for construction sources in the nonattainment areas.

Upon resubmittal of the visible emissions rule, the District may demonstrate that all sources significantly contributing to nonattainment are subject to RACM/RACT or BACM/BACT as appropriate.

Comment XIII: PCAQCD relates that the 40% opacity standard was originally adopted as a "general SIP" rule or "attainment area" rule. Subsequent action by EPA designated the Phoenix Planning Area, which includes the Apache Junction area of PCAQCD, as a serious PM–10 nonattainment area. *See* 61 FR 21372 (May 10, 1996). PCAQCD acknowledges that a further "curative" SIP submittal must be made for nonattainment areas. Such a "curative" SIP submittal exists as the Apache Junction Plan. PCAQCD objects to EPA's treatment of Rule 2–8–300 as a nonattainment plan provision. PCAQCD submits that it is wholly improper for the EPA to refrain from taking action on the pending "curative" Apache Junction Plan, while at the same time citing purported inadequacies in that "curative" SIP submittal as a basis for disapproving a separate and distinct "general SIP" submittal. PCAQCD also argues that EPA is effectively acting on the Apache Junction Plan without public notice and comment.

Response: As discussed above, nothing in PCAQCD's rules suggests that Rule 2–8–300 applies only to a specific area within PCAQCD. Because the rule applies to all of PCAQCD, the rule must satisfy the most stringent requirements, that apply to nonattainment areas within the District, including BACM/BACT for the Apache Junction serious PM–10 nonattainment area of PCAQCD. CAA section 189(b)(1)(B). EPA has no mechanism for approving the rule to apply only to attainment areas within PCAQCD. Our proposed action on rules independent of the Apache Junction Plan is appropriate because we believe that several of these rules plainly fail to meet CAA requirements, and that we can make this determination without evaluating the Apache Junction Plan.

III. EPA Action

No comments were submitted to change our assessment of the other rules as described in our proposed action. Therefore, as authorized in section 110(k)(3) and 301(a) of the CAA, EPA is finalizing a limited approval of submitted PCAQCD Rule 2–8–300. This action incorporates the submitted rule into the Arizona SIP, including those provisions identified as deficient. As authorized under section 110(k)(3), EPA is simultaneously finalizing a limited disapproval of the rule. As a result, sanctions will be imposed for PCAQCD

Rule 2–8–300 unless EPA approves subsequent SIP revisions that correct the rule deficiencies within 18 months of the effective date of this action. These sanctions will be imposed under section 179 of the CAA as described in 40 CFR 52.31. In addition, EPA must promulgate a Federal implementation plan (FIP) under section 110(c) unless we approve subsequent SIP revisions that correct the rule deficiencies within 24 months. Note that the submitted rule has been adopted by the local agency, and EPA's final limited disapproval does not prevent the local agency from enforcing it.

EPA is also finalizing a limited approval of submitted PCAQCD Rules 3–8–700 and 5–24–1040. As authorized under section 110(k)(3), EPA is simultaneously finalizing a limited disapproval of the rules. This action incorporates the submitted rules into the Arizona SIP, including those provisions identified as deficient. No sanctions will be imposed for Rule 3–8–700, because the source category has insignificant (*de minimis*) PM–10 emissions to make an effect on attainment. No sanctions will be imposed for Rule 5–24–1040, because the area is attainment for CO.

EPA is also finalizing full approval of submitted PCAQCD Rules 2–8–280, 2–8–290, 2–8–310, 2–8–320, and 3–8–710 for incorporation into the Arizona SIP.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled "Regulatory Planning and Review."

B. Paperwork Reduction Act

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.*)

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements 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 not-for-profit enterprises, and small governmental jurisdictions.

This rule will not have a significant impact on a substantial number of small entities because SIP approvals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.* v. *U.S. EPA*, 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

D. Unfunded Mandates Reform Act

Under sections 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). 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." Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule 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, because it 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. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13175, 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." This final rule does not have tribal implications, as specified in Executive Order 13175. 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. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

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 rule is not subject to Executive Order 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use "voluntary consensus standards" (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. section 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. section 804(2). This rule will be effective May 28, 2004.

K. Petitions for Judicial Review

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 June 28, 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, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: March 8, 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 D—Arizona

■ 2. Section 52.120 is amended by adding paragraphs (c)(84)(i)(I), (84)(i)(J), and (84)(i)(K) to read as follows:

§ 52.120 Identification of plan.

* * * * *

(c) * * *

(84) * * *

(i) * * *

(I) Rules 2–8–280, 2–8–290, 2–8–300, 2–8–310, and 2–8–320, adopted on June 29, 1993.

(J) Rules 3–8–700 and 3–8–710, amended on February 22, 1995.

(K) Rule 5–24–1040, codified on February 22, 1995.

* * * * *

[FR Doc. 04–9558 Filed 4–27–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R04–0AR–2003–FL–0001–200414(w); FRL–7654–5]

Approval and Promulgation of Implementation Plans: Florida; Broward County Aviation Department Variance; Withdrawal of Direct Final Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: Due to an adverse comment, EPA is withdrawing the direct final rule to approve revisions to State Implementation Plan submitted by the State of Florida for the purpose of a department order granting a variance from Rule 62–252.400 to the Broward County Aviation Department. In the direct final rule published on April 6, 2004, (69 FR 17929), we stated that if we received adverse comment by May 6, 2004, the rule would be withdrawn and not take effect. EPA subsequently received an adverse comment. EPA will address the comment received in a subsequent final action based upon the proposed action also published on April 6, 2004, (69 FR 18006). EPA will not institute a second comment period on this action.

EFFECTIVE DATE: The Direct final rule is withdrawn as of April 28, 2004.

FOR FURTHER INFORMATION CONTACT: Sean Lakeman, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9043. Mr. Lakeman can also be reached via electronic mail at *lakeman.sean@epa.gov*.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: April 20, 2004.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 04–9581 Filed 4–27–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[WV064–6033a; FRL–7652–6]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Revision to the State Implementation Plan Addressing Sulfur Dioxide in Marshall County

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve a revision to the West Virginia State Implementation Plan (SIP). The revision consists of a Consent Order for PPG Industries, Inc., which will continue to achieve and maintain the national ambient air quality standards (NAAQS) for sulfur dioxide (SO_2) in Marshall County, West Virginia. EPA is approving this revision to incorporate the Consent Order into the federally approved SIP in accordance with the requirements of the Clean Air Act.

DATES: This rule is effective on June 28, 2004 without further notice, unless EPA receives adverse written comment by May 28, 2004. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by WV064–6033 by one of the following methods:

A. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *E-mail: morris,makeba@epa.gov*

C. *Mail:* Makeba Morris, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. WV064–6033. EPA's policy is that all comments received will be included in the public docket without change, 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 regulations.gov or e-mail. The federal regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through 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.

Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; the Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, 1301 Constitution Avenue, NW, Room B108, Washington, DC 20460; and West Virginia Department of Environmental Protection, Division of Air Quality, 7012 MacCorkle Avenue, SE., Charleston, West Virginia 25304–2943.

FOR FURTHER INFORMATION CONTACT: Ellen Wentworth, (215) 814–2034, or Denis Lohman, (215) 814–2192, or by e-mail at *wentworth.ellen@epa.gov* or *lohman.denny@epa.gov*

SUPPLEMENTARY INFORMATION:

I. Background

On August 2, 2000 (65 FR 47339), EPA approved and promulgated a revision to the West Virginia SIP addressing SO_2 in Marshall County, West Virginia. This SIP revision consisted of Consent Orders prescribing new SO_2 emission limits and operating practices for three facilities in Marshall County, West Virginia. The facilities were PPG Industries (CO–SIP–2000–1), Bayer Corporation (CO–SIP–2000–2), and Columbian Chemicals Company (CO–SIP–2000–3). The changes to the emission limits were approved into the West Virginia SIP and are federally enforceable. These changes in emission rates were necessary as a result of these sources being modeled as "nearby background sources" in the preliminary modeling of the Kammer power plant in Marshall County. The preliminary modeling indicated that these sources, at their existing allowable emission rates, were substantial contributors to modeled predicted violations of the NAAQS for SO_2. The West Virginia Department of Environmental Protection (WVDEP) initiated action to complete a refined modeling analysis and determine appropriate emission limits for these sources and others in and near to Marshall County. With the emission limits and work practice requirements being approved for these three facilities, and the existing SIP-approved emission rates for the other sources modeled, the refined modeling results predict worst-case concentrations for the 3-hour, 24-hour, and annual averaging periods of 1294 micrograms per cubic meter of air ($\mu g/m^3$) for the secondary 3-hour, 352 $\mu g/m^3$ for the primary 24-hour standard, and 62 $\mu g/m^3$ for the primary annual standard, respectively. Approval of the August 2, 2000 SIP revision, incorporating the provisions of CO–SIP–2000–1, (65 FR 47339) ensured that all ambient concentrations were below the applicable SO_2 NAAQS of 1300 $\mu g/m^3$, 365 $\mu g/m^3$, and 80 $\mu g/m^3$, respectively. For more detailed information on the modeling for the SIP revision of August 2, 2000, please see the technical support document (TSD) prepared for that rulemaking.

In September 2001, PPG requested an extension of the compliance date (June 1, 2002) contained in CO–SIP–2000–1 for raising the height of three (3) emissions points. These emission points included Process # 036, the Sulfur Recovery Unit; Process # 016, the CS_2 Flare; and Process # 004, the Inorganics Flare. The request for an extension of the compliance date for these emission points was incorporated into a Consent Order, CO–SIP–C–2001–35A (2000), which amended CO–SIP–2000–1, and provided for an extension until September 1, 2003 for raising the heights of Process # 004, the Inorganics Flare; Process # 036, the CS_2 Sulfur Recovery Unit; and Process # 016, the CS_2 Flare to heights of sixty-five (65) meters above grade. All other provisions and requirements of CO–SIP–2000–1 remained in effect. This Consent Order was approved by the WVDEP on

November 21, 2001. A SIP revision was drafted and a public hearing was held on June 13, 2002. However, before the WVDEP submitted this revised Consent Order to EPA as a formal SIP revision, PPG notified the WVDEP that due to a process change at the facility, certain stack extensions would no longer be necessary to in order to demonstrate modeled attainment of the SO_2 NAAQS.

In September 2002, PPG Industries requested the approval of a plan for demonstrating attainment of the NAAQS for SO_2 whereby the height of Process # 004, the Inorganics Flare, would remain at its existing height with an allowable emission rate of 91.3 lbs/hr of SO_2 , Process # 036, the CS_2 Sulfur Recovery Unit, would remain at its existing height and would have an allowable emission rate of 300 lbs/hr of SO_2, and Process # 016, the CS_2 Flare would remain at its existing height and would have an allowable emission rate of 6.0 lbs/hr. Previously, the emission rate of the CS_2 Flare used for modeling had been 1011.6 lbs/hr SO_2. This plan was able to demonstrate attainment of the NAAQS for SO_2 because of a process change made in the CS_2 Department during the second quarter of 2002, whereby emissions of SO_2 that were originally sent to the CS_2 Flare (with an emission rate of 1011.6 lbs/hr) would now be recovered in the CS_2 Sulfur Recovery Unit.

The WVDEP advised PPG Industries that acceptable modeling, (using the same model input files used in the original attainment demonstration approved by EPA as a SIP revisions in August, 2000), incorporating the changes noted in the plan request of September 2002, would have to be submitted to the WVDEP for review. In December 2002, PPG submitted an air dispersion modeling demonstration to WVDEP with the proposed requested changes. The WVDEP reviewed PPG's submittal, and found that with the requested changes to the Consent Order, the modeling continued to demonstrate attainment of all of the NAAQS for SO_2.

II. Summary of SIP Revision

On November 17, 2003, the WVDEP submitted a formal revision to its SIP to EPA. The SIP revision consists of a Consent Order CO–SIP–2003–27, for prescribing SO_2 emission limits and operating practices for PPG Industries, Inc., located in Marshall County, West Virginia. This SIP revision provides for the attainment of the three (3) hour, twenty-four (24) hour and annual SO_2 NAAQS in, and around Marshall County, West Virginia. The purpose of this revision is to approve and incorporate CO–SIP–2003–27, entered into between the WVDEP and PPG Industries, Inc., located in Marshall County, West Virginia into the SIP.

A. Description of the Consent Order for PPG

Listed below are the essential compliance provisions of CO–SIP–2003–27. The Consent Order also contains generic provisions requiring compliance with 45CSR10, as well as good air pollution control practices.

CO–SIP–2003–27—PPG Industries, Inc.

Effective July 29, 2003

a. Emissions of SO_2 from Process #004, the Inorganics Flare, shall not exceed 91.3 lbs SO_2 /hour as averaged over a three-hour period.

b. Process #014, the CS_2 Vaporizer A, Process #015, the CS_2 Vaporizer B, Process #018, the Molten Salt Furnace, and Process #019, Chlorine Recovery shall be fired only with natural gas.

c. Emissions of SO_2 from Process #016, the CS_2 Flare, shall not exceed 6.0lbs/hr when averaged over a three-hour period. Emissions during the start-up and shutdown of the CS_2 production unit will not be sent to Process #016, the CS_2 Flare. The operating department will direct these emissions during start-ups and shutdowns to the CS_2 Sulfur Recovery Unit via piping and valves and the CS_2 Sulfur Recovery Unit will be operated during this period of time in compliance with the emission limitation specified in paragraph (e) below.

d. Emissions of sulfur dioxide from Process #017, the Raw Brine Flare, shall not exceed 11.65 lbs. SO_2 /hour as averaged over a three-hour period.

e. Emissions of SO_2 from Process #036, the CS_2 Sulfur Recovery Unit, shall not exceed 300 lbs. SO_2/hour as averaged over a three-hour period.

Gases exhausted from Process #004, the Inorganics Flare, Process #036, the CS_2 Sulfur Recovery Unit, and Process #016, the CS_2 Flare, shall be exhausted from stacks having heights of thirty and four tenths (30.4) meters above grade, and all exhaust gases from Process #017, the Raw Brine Flare, shall be exhausted from a stack having a height of forty (40) meters above grade. Any modifications to the stacks in existence on the date of this CO or replacement of those stacks shall comply with the provisions of 45 CSR20 "Good Engineering Practice as Applicable to Stack Heights."

The modeling demonstration for this SIP revision request is derived from the demonstration for the Marshall County SIP revision approved on August 2, 2000 (65 FR 47339). The Marshall County demonstration used the CALPUFF [1] dispersion model and included source specifications for the PPG Industries facility. This request is to modify the approved demonstration by changing the configuration of the PPG Industries facility. The PPG contribution to the original demonstration was removed and replaced with modified contributions from the new source specifications. The modified results also demonstrate attainment of the NAAQS for SO_2.

B. Maximum Predicted SO_2 Impacts From the Modified Compliance Demonstration

Period	Model prediction	NAAQS
3-Hour	1271	1300
24-Hour	353	365
Annual	73	80

The modeling demonstration adequately shows that the NAAQS for SO_2 are attained in the Marshall County area of West Virginia.

III. Final Action

EPA is approving a revision to the West Virginia SIP submitted by the WVDEP on November 17, 2003. The revision consists of a Consent Order, CO–SIP–2003–27, for PPG Industries, Inc., located in Marshall County, West Virginia. The SIP revision is supported by a modeled demonstration that the NAAQS for SO_2 in Marshall County shall continue to be attained and maintained.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comment [as appropriate, insert language explaining why we anticipate no adverse comment]. However, in the "Proposed Rules" section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on June 28, 2004 without further notice unless EPA receives adverse comment by May 28, 2004. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a

[1] At the time, CALPUFF was not listed as a preferred model in 40 CFR part 51 Appendix W (Guideline on Air Quality Models). West Virginia obtained permission from EPA to use CALPUFF for the demonstration. Subsequently, on April 15, 2003 (68 FR 18440) Appendix W was revised to include CALPUFF as a preferred model.

second comment period on this action. Any parties interested in commenting must do so at this time.

IV. Statutory and Executive Order Reviews

A. General Requirements

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 (Public Law 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.*).

B. Submission to Congress and the Comptroller General

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. Section 804 exempts from section 801 the following types of rules: (1) Rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding today's action under section 801 because this is a rule of particular applicability establishing source-specific requirements for PPG Industries, Inc., in Marshall County, West Virginia.

C. Petitions for Judicial Review

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 June 28, 2004. Filing a petition for reconsideration by the Administrator of this final rule approving a Consent Order for PPG Industries, Inc., in Marshall County, West Virginia 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, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: April 13, 2004.

Richard J. Kampf,

Acting Regional Administrator, Region III.

■ 40 CFR part 52 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 XX—West Virginia

■ 2. Section 52.2520 is amended by adding paragraph(c)(58) to read as follows:

§ 52.2520 Identification of plan.

* * * * *

(c) * * *

(58) Revision to the West Virginia Regulations to achieve and maintain the sulfur dioxide national ambient air quality standards (NAAQS) in Marshall County consisting of Consent Order, CO–SIP–C–2003–27 for PPG Industries, Inc., submitted on November 17, 2003, by the West Virginia Department of Environmental Protection:

(i) Incorporation by reference.

(A) Letter of November 17, 2003, from the West Virginia Department of Environmental Protection transmitting a revision to the State Implementation Plan (SIP) to achieve and maintain the NAAQS for sulfur dioxide in Marshall County, West Virginia.

(B) Consent Order, CO–SIP–C–2003–27, entered into by and between the West Virginia Department of Environmental Protection, Division of Air Quality, and PPG Industries, Inc., on July 29, 2003. The consent order was effective on July 29, 2003.

(ii) Additional Material.—Remainder of the State submittal pertaining to the revision listed in paragraph (c)(58)(i) of this section.

[FR Doc. 04–9580 Filed 4–27–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 153, 168, and 180

[OPP–2003–0368; FRL–7335–4]

Pesticides; Tolerance Exemptions for Active and Inert Ingredients for Use in Antimicrobial Formulations (Food-Contact Surface Sanitizing Solutions)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is adding a new section to part 180 to list the pesticide chemicals that are exempt from the requirement of a tolerance when used in food-contact surface sanitizing solutions. This list of exempt pesticide chemicals is duplicated from the Food and Drug Administration's (FDA) regulations in 21 CFR 178.1010. For some of these chemical substances, EPA's list will use naming conventions differing from those used by FDA. Additionally, EPA is redesignating/reorganizing § 180.1001. This section of CFR will be split into five separate sections with no changes in text or content.

DATES: This final rule is effective on April 28, 2004.

ADDRESSES: EPA has established a docket for this action under Docket ID number OPP–2003–0368 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, 1921 Jefferson Davis Hwy., Arlington, VA., Monday through Friday, excluding legal holidays. The Docket telephone number is (703) 305-5805.

FOR FURTHER INFORMATION CONTACT: Kathryn Boyle, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 305–6304; fax number: (703) 305–0599; e-mail address: boyle.kathryn@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

You may be potentially affected by this action if you formulate or market pesticide products. Potentially affected categories and entities may include, but are not limited to:

- Food manufacturing (NAICS 311)
- Antimicrobial pesticides (NAICS 32561)

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.**

B. How Can I Access Copies Of this Document and Other Related Information?

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/*.

II. What is the Agency's Authority for Taking this Action?

This final rule is issued under the Federal Food, Drug and Cosmetic Act (FFDCA) section 408, 21 U.S.C. 346a, as amended by the Food Quality Protection Act (FQPA) (Public Law 104–170), and the Antimicrobial Regulation Technical Correction Act (ARTCA) (Public Law 105–324).

Section 408 of FFDCA authorizes the establishment of tolerances, exemptions from the requirement of a tolerance, modifications in tolerances, and revocation of tolerances for residues of pesticide chemicals in or on raw agricultural commodities and processed foods. Owing to the FQPA and ARTCA amendments to FFDCA, certain chemical substances originally regulated by FDA under FFDCA section 409 as food-contact surface sanitizing solutions are now subject to EPA's authority under FFDCA section 408. Section 408(j)(2) of FFDCA provides that all regulations issued by FDA under FFDCA section 409 that stated conditions for safe use of substances that are now, post-FQPA, considered pesticide chemical residues in or on processed food or that otherwise stated the conditions under which such pesticide chemicals could be safely used, shall be deemed to be regulations issued under FFDCA section 408.

These pesticide chemical regulations are now subject to modification or revocation at EPA's initiative under FFDCA section 408(e). Today's rule duplicates the substance of FDA's food additive regulations for those chemical substances found in 21 CFR 178.1010 which are now pesticide chemicals, by codifying tolerance exemptions in a format consistent with EPA's authority under section 408 in a new section, 40 CFR 180.940.

Because some solutions described in 21 CFR 178.1010 may still have uses as food additives, FDA is leaving 21 CFR 178.1010 in effect. EPA's rulemaking activity has no effect on any of the FDA-regulated FFDCA section 409 food additive regulations in 21 CFR 178.1010.

III. Impact on Tolerance Reassessment

This rule shifts existing tolerance exemptions from 21 CFR 178.1010 to 40 CFR 180.940. These are duplicated from existing, valid FFDCA section 408 regulations. FDA promulgated the food additive regulations in 21 CFR 178.1010 under the authority of FFDCA section 409 prior to the enactment of FQPA. Those portions of 21 CFR 178.1010 that pertain to chemical substances that are pesticide chemicals post-FQPA and remain as such post-ARTCA were converted by FFDCA section 408(j)(2) into FFDCA section 408 tolerance exemptions. Thus, EPA's duplication of these tolerance exemptions is not "establishing, modifying, or revoking a tolerance" under FFDCA section 408(b). EPA is not, therefore, required to conduct a full reassessment of these tolerance exemptions at this time. However, because the tolerance exemptions duplicated from 21 CFR 178.1010 into 40 CFR 180.940 were in effect prior to the enactment of FQPA, they are subject to the tolerance reassessment deadline of August 2, 2006.

IV. Background

In the **Federal Register** of December 3, 2002 (67 FR 71847) (FRL–6824–2), the Agency published a direct final rule to establish 40 CFR 180.940. Comments were received. In the December 3, 2002 FR final rule, EPA had announced that it would withdraw the direct final rule if it received adverse comment, and proceed with proposed rule as provided by section 553 of the Administrative

Procedure Act, 5 U.S.C. 553. Because some of the comments were of a nature that would warrant a response if made on a proposed rule, they were adverse comments that required withdrawal of the direct final rule. EPA withdrew the direct final rule on March 24, 2003 (68 FR 14165)(FRL–7299–4).

In the **Federal Register** of June 25, 2003 (68 FR 37778) (FRL–7302–2), the Agency issued its proposal to establish 40 CFR 180.940. The comments received as a result of the December 3, 2002, direct final rule were addressed in that proposed rule.

Six comments were received in response to the June 25th proposed rule. There was also a late comment to the direct final rule.

One commenter requested to increase the concentrations of certain chemical ingredients. At this time, EPA is not proposing to change the upper concentration limits as specified by FDA in 21 CFR 178.1010. The purpose of this final rule action is to duplicate FDA's previous clearances in a format consistent with EPA's authority under section 408. To increase the concentration limitations from those specified by FDA, requires the performance of a risk assessment. At this time EPA is merely duplicating the listing of chemicals in 21 CFR 178.1010 to 40 CFR 180.940, albeit in a different format. EPA is required under section 408(q)(1)(C) to complete tolerance reassessment for all pesticide chemicals by 2006, and will consider the commenter's suggestion during tolerance reassessment.

The same commenter requested that all GRAS ingredients listed under 21 CFR part 184 be included in 180.940. Another commenter requested that all chemical substances designated as GRAS in 21 CFR part 582 be included in 40 CFR 180.940 under a catch-all provision. The Agency understands that 21 CFR 178.1010 allows the inclusion of GRAS chemical substances and chemical substances "permitted by prior sanction or approval," that are not expressly identified in 21 CFR 178.1010. It is for this reason that the Agency asked registrants of food-contact surface sanitizing solutions to specifically identify all other ingredients that they believe should be included in 40 CFR 180.940. At a later date, EPA intends to publish its proposal to revise 40 CFR 180.940 by adding chemical substances that were not specified by name in 21 CFR 178.1010 but that are included in a registered food-contact surface sanitizing solution. Today's final rule only considers the chemical substances that were specified by name in 21 CFR 178.1010.

One commenter expressed concern that documenting all of FDA's informal clearances could prove to be difficult. They stated that the existence of a registration should be sufficient proof. The Agency agrees. In fact, several registrants of various food-contact surface sanitizing solutions have already supplied the Agency with a list of chemical substances that were not included in the proposed 40 CFR 180.940, but are part of a registered pesticide product. The claims for inclusion of these chemical substances were documented only by reference to an EPA Registration Number. Where EPA's files clearly demonstrate both that the registered pesticide was subject to section 409 and contained the chemical substance before enactment of the FQPA, EPA will include the chemical substance in the upcoming proposal to revise 40 CFR 180.940. So although identifying a registered pesticide as containing a particular chemical substance may be sufficient to support inclusion in 40 CFR 180.940, registrants can maximize the likelihood of inclusion by providing documentation of FDA's prior sanction or approval.

Two commenters requested confirmation on whether or not chemical substances that are included in an existing, registered food-contact surface sanitizing solution, but are not included by name in 21 CFR 178.1010, are considered under this final rule to be FDA-approved substances. Today's final rule does not address such chemical substances. In the preambles to both the direct final rule and the proposed rule, EPA asked registrants of food-contact surface sanitizing solutions to identify to EPA any chemical substances that they claim have been cleared by FDA for use in sanitizing solutions but not expressly identified in 21 CFR 178.1010. As previously stated, at some time in the near future, EPA intends to publish its proposal to revise 40 CFR 180.940 to add chemical substances that were not specified by name in 21 CFR 178.1010. In order to preserve the use of registered food-contact surface sanitizing solutions whose ingredients were cleared by FDA before FQPA's enactment, EPA will treat all of the component chemicals (whether or not they are specifically identified in 21 CFR 178.1010) of registered food-contact surface sanitizing solutions as exempt from the requirement of a tolerance until EPA has completed its review of the registrants' claims with respect to pesticide chemicals not specifically identified in 21 CFR 178.1010.

The same two commenters also stated that EPA should not distinguish between the three categories of food-contact surface sanitizing solutions. They believe that these categories have not been rigidly applied. Today's final rule addresses only those use patterns as specifically described in 21 CFR 178.1010. If a registrant supplies information to the Agency to demonstrate that FDA cleared a solution for uses broader than described in § 178.1010, then EPA can include these changes in its upcoming proposal to revise 40 CFR 180.940. However, today's regulation merely duplicates the substance of the existing FDA regulation.

The late comment (to the direct final rule) requested that all of the quaternary sanitizer solutions currently listed under 21 CFR 178.1010 be approved by EPA for end use at a concentration not to exceed 400 ppm of the active quaternary compound. The rationale for such a change included a statement that FDA had intended to make such a change and a discussion of the concerns of public health officials who advocate for solutions with demonstrated efficacy over a wide range of concentrations. Such a range would provide the user "a reasonable margin of error" while preparing safe and effective sanitizing solutions.

In a similar manner, another commenter indicated its belief that the proposed language for the quaternary ammonium compounds was inconsistent with the existing FDA regulations. According to the commenter FDA had established a total limit of 400 ppm for the quaternary ammonium compounds, while EPA's approach could possibly allow up to 750 ppm. EPA discussed this issue with FDA, and concluded that the comments have merit, not only for the quaternary ammonium compounds, but also for other chemicals that were expressed as total or solution limits. This would include the halogens (chloride-, bromide-, and iodide-producing chemicals) and napthalene sulfonate derivatives. Since the concentration limits for the above chemicals are specified in 21 CFR 178.1010 as total or solution limits, this change has been carried forward to 40 CFR 180.940.

One of the commenters submitted a letter from FDA which seemed to indicate that FDA had raised the maximum at-use concentration of certain chemicals from 200 ppm to 220 ppm. This comment was also discussed with FDA who indicated that while they had "no objection" to 220 ppm as the at-use concentration, they intended that the tolerance for residues in or on food should remain at 200 ppm. FDA would continue to have no objection to use

levels as high as 220 as indicated through field testing.

While not in response to a comment, the Agency is making several changes to the list of chemical substances proposed in the June 25th proposed rule. Several of the chemical substances (citric acid, dextrin, magnesium oxide, sodium bicarbonate, starch and octadecanoic acid, calcium salt) have been recently classified as List 4A minimal risk inert ingredients (see the listings of inert ingredients at *http://www.epa.gov/opprd001/inerts/lists.html).* Tolerance exemptions for certain of these List 4A substances (citric acid, dextrins, and starch (as a food commodity)) have already been established in 40 CFR 180.950, the section of CFR that holds "Tolerance Exemptions for Minimal Risk Active and Inert Ingredients." Because chemical substances with a tolerance exemption identified in 40 CFR 180.950 may be used in any pesticide product, including antimicrobial products, without limitation, having tolerance exemptions in both 40 CFR 180.940 and 180.950 would be redundant. Therefore, duplicative entries for citric acid, dextrin, and starch are not created today in 40 CFR 180.940. Additionally, because the Agency intends that all List 4A substances eventually will be transferred to 40 CFR 180.950 without limitations, the Agency is removing the concentration use limitations for sodium bicarbonate, magnesium oxide and octadecanoic acid, calcium salt.

Based on the reasons set forth in the preamble to the proposed rule, and considering the comments received by the Agency in response to the direct final and proposed rules, EPA is creating a new section 40 CFR 180.940.

Redesignation of 40 CFR 180.1001

In the July 1, 2002 edition of title 40 CFR parts 150 to 189, § 180.1001 occupies pages 508 to 537, a large amount of information for one section of CFR. Today's action shifts and splits 40 CFR 180.1001 with no changes to the text or content. See Table 1 for a redesignation of the paragraphs and the new sections.

TABLE 1.—REDESIGNATION OF 40 CFR 180.1001

Former CFR Designation	New CFR Designation
180.1001(a)	40 CFR 180.900
180.1001(b)	40 CFR 180.905
180.1001(c)	40 CFR 180.910
180.1001(d)	40 CFR 180.920
180.1001(e)	40 CFR 180.930

All references to 40 CFR 180.1001 in other sections of 40 CFR are also being changed to reflect the shift. Additionally two FDA regulations cite to 180.1001: 21 CFR 182.99 and 582.99. FDA is aware that this shift of 40 CFR 180.1001 is occurring.

V. Objections and Hearing Requests

Under section 408(g) of the FFDCA, as amended by the FQPA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. Although the procedures in those regulations require some modification to reflect the amendments made to the FFDCA by the FQPA of 1996, EPA will continue to use those procedures, with appropriate adjustments, until the necessary modifications can be made. The new section 408(g) provides essentially the same process for persons to "object" to a regulation for an exemption from the requirement of a tolerance issued by EPA under new section 408(d), as was provided in the old FFDCA sections 408 and 409. However, the period for filing objections is now 60 days, rather than 30 days.

A. What Do I Need to Do to File an Objection or Request a Hearing?

You must file your objection or request a hearing on this regulation in accordance with the instructions provided in this unit and in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number OPP–2003–0368 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before June 28, 2004.

1. *Filing the request.* Your objection must specify the specific provisions in the regulation that you object to, and the grounds for the objections (40 CFR 178.25). If a hearing is requested, the objections must include a statement of the factual issues(s) on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the objector (40 CFR 178.27). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

Mail your written request to: Office of the Hearing Clerk (1900C), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. You may also deliver your request to the Office of the Hearing Clerk in Rm.104, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. The Office of the Hearing Clerk is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Office of the Hearing Clerk is (703) 603–0061.

2. *Tolerance fee payment.* If you file an objection or request a hearing, you must also pay the fee prescribed by 40 CFR 180.33(i) or request a waiver of that fee pursuant to 40 CFR 180.33(m). You must mail the fee to: EPA Headquarters Accounting Operations Branch, Office of Pesticide Programs, P.O. Box 360277M, Pittsburgh, PA 15251. Please identify the fee submission by labeling it "Tolerance Petition Fees."

EPA is authorized to waive any fee requirement "when in the judgement of the Administrator such a waiver or refund is equitable and not contrary to the purpose of this subsection." For additional information regarding the waiver of these fees, you may contact James Tompkins by phone at (703) 305–5697, by e-mail at *tompkins.jim@epa.gov,* or by mailing a request for information to Mr. Tompkins at Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

If you would like to request a waiver of the tolerance objection fees, you must mail your request for such a waiver to: James Hollins, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

3. *Copies for the Docket.* In addition to filing an objection or hearing request with the Hearing Clerk as described in Unit V.A., you should also send a copy of your request to the PIRIB for its inclusion in the official record that is described in **ADDRESSES**. Mail your copies, identified by docket ID number OPP–2003–0368, to: Public Information

and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. In person or by courier, bring a copy to the location of the PIRIB described in **ADDRESSES**. You may also send an electronic copy of your request via e-mail to: *opp-docket@epa.gov*. Please use an ASCII file format and avoid the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 6.1/8.0 or ASCII file format. Do not include any CBI in your electronic copy. You may also submit an electronic copy of your request at many Federal Depository Libraries.

B. When Will the Agency Grant a Request for a Hearing?

A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is a genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

VI. Statutory and Executive Order Reviews

This final rule reorganizes the existing exemptions in 40 CFR 180.1001, shifting them from one section to another within the same part. The Agency is acting on its own initiative under FFDCA section 408(e) in shifting these existing tolerance exemptions to a new section of part 180. This has no substantive effect, and is not expected to have any adverse impact, or otherwise impose any new requirements.

This final rule also establishes a new section, 40 CFR 180.940, "Tolerance Exemptions for Active and Inert Ingredients for Use in Antimicrobial Formulations (Food-Contact Surface Sanitizing Solutions)." As discussed in Unit II., this new section merely duplicates that portion of the existing FDA regulation 21 CFR 178.1010 that applies to chemical substances that are now subject to EPA's authority under FFDCA section 408.

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 rule has been exempted from review under Executive Order 12866 due to its lack of significance, this rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001). This final 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).

Under section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agency hereby certifies that the proposed action to reorganize 40 CFR 180.1001 will not have significant negative economic impact on a substantial number of small entities. Creation of a new section and the reorganization of 40 CFR 180.1001 does not have a substantive effect and hence causes no impact. 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 final 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 FFDCA section 408(n)(4). For these same reasons, the Agency has determined that this 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 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 rule.

VII. Congressional Review Act

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 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**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Parts 153, 168, and 180

Environmental protection, Administrative practice and procedure, Advertising, Agricultual commodities,

Exports, Labeling, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 21, 2004.

James Jones,

Director, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 153—[AMENDED]

■ 1. The authority citation for part 153 continues to read as follows:

Authority: 15 U.S.C. 136 *et seq.*

■ 2. Sections 153.155 is amended by revising paragraph (c)(1) to read as follows:

§ 153.155 Seed treatment products.

* * * * *

(c) * * *

(1) Sections 180.910, 180.920, and 180.950 if an exemption from the requirement of a tolerance has been established.

* * * * *

PART 168—[AMENDED]

■ 3. The authority citation for part 168 continues to read as follows:

Authority: 15 U.S.C. 136 *et seq.*

■ 4. Section 168.65 is amended by revising the first sentence of paragraph (b)(1)(iii)(A)(*2*)(*i*), and by revising paragraph (b)(1)(iii)(A)(*2*)(*ii*) to read as follows:

§ 168.65 Pesticide export label and labeling requirements.

* * * * *

(b) * * *

(1) * * *

(iii) * * *

(A) * * *

(*2*) * * *

(*i*) The change in color must result only from the addition of a dye included on the list of the chemicals exempted from the requirement of a tolerance at 40 CFR 180.910, 180.920, 180.930, and 180.950, and the dye must not be a List 1 inert. * * *

(*ii*) The change in fragrance must result only from the addition of a chemical included on the list of the chemicals exempted from the requirement of a tolerance at 40 CFR 180.910, 180.920, 180.930, and 180.950, and the chemical must not be a List 1 inert.

* * * * *

■ 5. Section 168.75 is amended by revising the second and fifth sentences of paragraph (b)(4)(iii) to read as follows:

§ 168.75 Procedures for exporting unregistered pesticide-purchase acknowledgment statements.

* * * * *

(b) * * *

(4) * * *

(iii) * * * The change in color must result only from the addition of a dye included on the list of the chemicals exempted from the requirement of a tolerance at 40 CFR 180.910, 180.920, 180.930, and 180.950, and the dye must not be a List 1 inert. * * * The change in fragrance must result only from the addition of a chemical included on the list of the chemicals exempted from the requirement of a tolerance at 40 CFR 180.910, 180.920, 180.930, and 180.950, and the chemical must not be a List 1 inert. * * *

* * * * *

PART 180—[AMENDED]

■ 6. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 7. Section 180.900 is added to subpart D to read as follows:

§ 180.900 Exemptions from the requirement of a tolerance.

An exemption from a tolerance shall be granted when it appears that the total quantity of the pesticide chemical in or on all raw agricultural commodities for which it is useful under conditions of use currently prevailing or proposed will involve no hazard to the public health.

■ 8. Section 180.905 is added to subpart D to read as follows:

§ 180.905 Pesticide chemicals; exemptions from the requirement of a tolerance.

(a) When applied to growing crops, in accordance with good agricultural practice, the following pesticide chemicals are exempt from the requirement of a tolerance:

(1) [Reserved]

(2) *N*-Octylbicyclo(2,2,1)-5-heptene-2,3-dicarboximide.

(3) Petroleum oils.

(4) Piperonyl butoxide.

(5) [Reserved]

(6) Pyrethrum and pyrethrins.

(7) Rotenone or derris or cube roots.

(8) Sabadilla.

(b) These pesticides are not exempted from the requirement of a tolerance when applied to a crop at the time of or after harvest.

■ 9. Section 180.910 is added to subpart D to read as follows:

§ 180.910 Inert ingredients used pre- and post-harvest; exemptions from the requirement of a tolerance.

Residues of the following materials are exempted from the requirement of a tolerance when used in accordance with good agricultural practice as inert (or occasionally active) ingredients in pesticide formulations applied to growing crops or to raw agricultural commodities after harvest:

Inert ingredients	Limits	Uses
Acetic acid		Catalyst
Acetic anhydride		Solvent, cosolvent
Acetone		Do.
Alkanoic and alkenoic acids, mono- and diesters of α-hydro-ω-hydroxypoly (oxyethylene) with molecular weight (in amu) range of 200 to 6,000.		Emulsifiers
Alkyl (C_8-C_{24}) benzenesulfonic acid and its ammonium, calcium, magnesium, potassium, sodium, and zinc salts.		Surfactants, related adjuvants of surfactants
α-Alkyl (C_9-C_{18}-ω-hydroxypoly(oxyethylene) with poly(oxyethylene) content of 2-30 moles.		Solvent, cosolvent, surfactant, and related adjuvants of surfactants
α-(*p*-Alkylphenyl)-ω-hydroxypoly(oxyethylene) produced by the condensation of 1 mole of alkylphenol (alkyl is a mixture of propylene tetramer and pentamer isomers and averages C_{13}) with 6 moles of ethylene oxide.		Surfactants, related adjuvants of surfactants

Inert ingredients	Limits	Uses
α-Alkyl (C_6-C_{14})-ω-hydroxypoly(oxypropylene) block copolymer with polyoxyethylene; polyoxypropylene content is 1-3 moles; polyoxyethylene content is 4-12 moles; average molecular weight (in amu) is approximately 635.		Do.
α-alkyl (C_{12}-C_{15})-ω-hydroxypoly (oxypropylene) poly (oxyethylene) copolymers (where the poly (oxypropylene) content is 3–60 moles and the poly (oxyethylene) content is 5–80 moles).	Not more than 20% of pesticide formulations	Surfactant
Alkyl (C_8-C_{18}) sulfate and its ammonium, calcium, isopropylamine, magnesium, potassium, sodium, and zinc salts.		Surfactants.
Aluminum hydroxide		Diluent, carrier
Aluminum oxide		Diluent
Aluminum stearate		Surfactant
Ammonium bicarbonate		Surfactant, suspending agent, dispersing agent
Ammonium carbamate		Synergist in aluminum phosphide formulations
Ammonium chloride		Intensifier when used with ammonium nitrate as a dessicant or defoliant. Fire suppressant in aluminum phosphide and magnesium phosphide formulations
Ammonium hydroxide		Solvent, cosolvent, neutralizer, solubilizing agent
Ammonium stearate		Surfactant
Ammonium sulfate		Solid diluent, carrier
Ammonium thiosulfate		Intensifier when used with ammonium nitrate as desiccant or defoliant
Amyl acetate		Solvent, cosolvent, attractant
Ascorbic acid (CAS Reg. No. 50–81–7)		Stabilizer, preservative
Ascorbyl palmitate		Preservative
Attapulgite-type clay		Solid diluent, carrier, thickener
Bacillus thuringiensis fermentation solids and/or solubles.		Diluent, carrier
Beeswax		Coating agent
Bentonite		Solid diluent, carrier
Benzoic acid		Preservative for formulation
Butane		Propellant
n-Butanol (CAS Reg. No. 71–36–3)		Solvent, cosolvent
Butylated hydroxyanisole		Antioxidant
Butylated hydroxytoluene		Do.
α-(*p-tert*-Butylphenyl)-ω-hydroxypoly (oxyethylene) mixture of dihydrogen phosphate and monohydrogen phosphate esters and the corresponding ammonium calcium, magnesium, monoethanolamine, potassium, sodium, and zinc salts of the phosphate esters; the poly(oxyethylene) content averages 4-12 moles.		Surfactants related adjuvants of surfactants
Calcareous shale		Solid diluent carrier
Calcite		Do.
Calcium carbonate		Do.
Calcium chloride		Stabilizer
Calcium phosphate		Solid diluent, carrier
Calcium hydroxide		Do.
Calcium hypochlorite		Sanitizing and bleaching agent
Calcium oxide		Solid diluent, carrier
Calcium salt of partially dimerized rosin, conforming to 21 CFR 172.210.		Coating agent
Calcium silicate		Solid diluent, carrier
Calcium stearate		Do.
Carnauba wax		Coating agent
Carrageenan, conforming to 21 CFR 172.620	Minimum molecular weight (in amu): 100,000.	Thickener
Casein	Expires May 24, 2005.	Surfactant, emulsifier, wetting agent
Cetyl alcohol (CAS Reg. No. 36653–82–4)	Not more than 5.0% of pesticide formulation.	Evaporation retardant
Charcoal, activated	Meets specifications in the Food Chemical Codex.	Carrier
Coconut shells		Solid diluent and carrier
Cod liver oil		Solvent, cosolvent
Coumarone—indene resin, conforming to 21 CFR 172.215.	For use on citrus only	Component of coating agent
Croscarmellose sodium (CAS Reg. No. 74811–65–7)		Disintegrant, solid diluent, carrier, and thickener
Diacetyl tartaric acid esters of mono- and diglycerides of edible fatty acids.		Emulsifier

Inert ingredients	Limits	Uses
Dialkyl (C_8-C_{18}) dimethyl ammonium chloride	Not more than 0.2% in silica, hydrated silica.	Flocculating agent in the manufacture of silica, hydrated silica for use as a solid diluent, carrier
Diatomite (diatomaceous earth)		Solid diluent carrier
Dichlorodifluoromethane		Propellant
Dichlorotetrafluoroethane		Do.
Diethylene glycol abietate		Surfactants, related adjuvants of surfactants
1,1-Difluoroethane (CAS Reg. No. 75–37–6)	For aerosol pesticide formulations used for insect control in food- and feed-handling establishments and animals.	Aerosol propellant
1,2-Dihydro-6-ethoxy-2,2,4-trimethylquinolene	Not more than 0.02% of pesticide formulation.	Antioxidant
3,6-Dimethyl-4-octyn-3,6-diol	Not more than 2.5% of pesticide formulation.	Surfactants, related adjuvants of surfactants
α-(*o,p*-Dinonylphenyl)-ω-hydroxypoly (oxyethylene) mixture of dihydrogen phosphate and monohydrogen phosphate esters and the corresponding ammonium, calcium, magnesium, monoethanolamine, potassium, sodium, and zinc salts of the phosphate esters; the nonyl group is a propylene trimer isomer and the poly(oxyethylene) content averages 4-14 moles.		Surfactants, related adjuvants of surfactants
α-(*o,p*-Dinonylphenyl)-ω-hydroxypoly (oxyethylene) produced by condensation of 1 mole of dinonylphenol (nonyl group is a propylene trimer isomer) with an average of 4-14 or 140-160 moles of ethylene oxide.		Do.
Dipropylene glycol		Solvent, cosolvent
Disodium phosphate		Anticaking agent, conditioning agent
Disodium zinc ethylenediaminetetraacetate dihydride		Sequestrant
Dodecylbenzenesulfonic acid, amine salts		Release rate regulator in pheromone formulation
α-(*p*-Dodecylphenyl)-ω-hydroxypoly (oxyethylene) produced by the condensation of 1 mole of dodecylphenol (dodecyl group is a propylene tetramer isomer) with an average of 4-14 or 30-70 moles of ethylene oxide; if a blend of products is used, the average number of moles of ethylene oxide reacted to produce any product that is a component of the blend shall be in the range of 4-14 or 30-70.		Surfactants, related, adjuvants of surfactants
Dolomite		Solid diluent, carrier
Epoxidized linseed oil		Surfactants, related adjuvants of surfactants
Epoxidized soybean oil		Do.
Ethoxylated lignosulfonic acid, sodium salt		Surfactant
Ethyl acetate		Solvent, cosolvent
Ethyl alcohol		Do.
Ethyl esters of fatty acids derived from edible fats and oils.		Solvent, cosolvent
Ethylene methylphenylglycidate		Synthetic flavoring
Ethylene oxide adducts of 2,4,7,9-tetramethyl-5-decynediol, the ethylene oxide content averages 3.5, 10, or 30 moles.		Surfactants, related adjuvants of surfactants
Ethylenediaminetetraacetic acid	3% of pesticide formulation	Sequestrant
Ethylenediaminetetraacetic acid, tetrasodium salt	5% of pesticide formulation	Sequestrant
2-Ethyl-1-hexanol	Not more than 2.5% of pesticide formulation.	Solvent, adjuvant of surfactants
Fatty acids, conforming to 21 CFR 172.860		Binder, defoaming agent, lubricant
FD&C Blue No. 1	Not more than 0.2% of pesticide formulation.	Dye
FD&C Red No. 40 (CAS Reg. No. 25956–17–6) conforming to 21 CFR 74.340.	Not to exceed 0.002% by weight of pesticide formulation.	Dye, coloring agent
Ferric sulfate		Solid diluent, carrier
Fish meal	Expires May 24, 2005.	Solid diluent, carrier
Furcelleran		Thickener
Glycerides, edible fats and oils derived from plants and animals, reaction products with sucrose (CAS Reg. Nos. 100403–38–1, 100403–41–6, 100403–39–2, 100403–40–5).		Emulsifier, dispersing agent
Glycerol		Thickener
Glycerol mono-, di-, and triacetate		Solvent, cosolvent
Glyceryl monostearate		Emulsifier
Granite		Do.
Graphite		Solid diluent, carrier

Inert ingredients	Limits	Uses
Gum arabic (acacia)		Surfactant, suspending agent, dispersing agent
Gypsum		Solid diluent, carrier
Hexamethylenetetramine	For use in citrus washing solutions only at not more than 1%.	Preservative
n-Hexyl alcohol (CAS Reg. No. 111–27–3)		Solvent, cosolvent
Humic acid, sodium salt (CAS Reg. No. 68131–04–4)		Adjuvant, UV protectant.
Hydrochloric acid		Solvent, neutralizer
Hydroxyethylidine diphosphonic acid (HEDP) (CAS Reg. No. 2809–21–4).	For use in antimicrobial pesticide formulations at not more than 1 percent.	Stabilizer, chelator
Iron oxide		Solid diluent, carrier
Isopropyl alcohol		Solvent, cosolvent, stabilizer, inhibitor
Isopropyl myristate, CAS Reg. No. 110–27–0		Solvent
Kaolinite-type clay		Solid diluent, carrier
Lactic acid		Solvent
Lauryl alcohol		Surfactant
α-Lauryl-ω-hydroxypoly(oxyethylene), average molecular weight (in amu) of 600.		Emulsifier
α-Lauryl-ω-hydroxypoly(oxyethylene) sulfate, sodium salt; the poly(oxyethylene) content is 3-4 moles.		Surfactants, related adjuvants of surfactants
Lignosulfonate, ammonium, calcium, magnesium, potassium, sodium, and zinc salts.		Surfactants, related adjuvants of surfactants
d-Limonene (CAS Reg. No. 5989–27–5)		Solvent, fragrance
Magnesium carbonate		Anticaking agent, conditioning agent
Magnesium chloride		Safener
Magnesium lime		Solid diluent, carrier
Magnesium oxide		Do.
Magnesium silicate		Do.
Magnesium stearate		Surfactant
Magnesium sulfate		Solid diluent, carrier, safener
Manganous oxide		Solid diluent, carrier
Methyl alcohol		Solvent
Methyl *n*-amyl ketone (CAS Reg. No. 110–43–0)		Solvent, cosolvent
Methylated silicones		Antifoaming agent
Methyl esters of fatty acids derived from edible fats and oils.		Solvent, cosolvent
Methyl esters of higher fatty acids conforming to 21 CFR 573.640.		Antidusting agent, surfactant
Methyl ester of rosin, partially hydrogenated (as defined in 21 CFR 172.615).		Surfactants, related adjuvants of surfactants
Methyl isobutyl ketone		Solvent
Mica		Solid diluent, carrier
Mineral oil, U.S.P., or conforming to 21 CFR 172.878 or 178.3620(a) (CAS Reg. No. 8012–95–1).		Diluent, carrier, and solvent
Modified polyester resin derived from ethylene glycol, fumaric acid, and rosin.	For use on citrus only	Resinous coating
Monoammonium phosphate	No more than 3.75% by weight in formulation.	Postharvest fumigation in formulation with aluminum phosphide
Mono- and diglycerides of C_8-C_{18} fatty acids		Surfactants, related adjuvants of surfactants
Montmorillonite-type clay		Solid diluent, carrier
Montmorillonite-type clay treated with polytetrafluoroethylene (PTFE; CAS Reg. No. 9002–84–0).	PTFE content not greater than 0.5% (w/w) of clay.	Carrier
Nonyl, decyl, and undecyl glycoside mixture with a mixture of nonyl, decyl, and undecyl oligosaccharides and related reaction products (primarily decanol and undecanol) produced as an aqueous-based liquid (50 to 65% solids) from the reaction of primary alcohols (containing 15 to 20% secondary alcohol isomers) in a ratio of 20% C_9, 40% C_{10}, and 40% C_{11} with carbohydrates (average glucose to alkyl chain ratio 1.3 to 1.8).		Surfactant.
α-(*p*-Nonylphenyl)-ω-hydroxypoly(oxyethylene) mixture of dihydrogen phosphate and monohydrogen phosphate esters and the corresponding ammonium, calcium, magnesium, monoethanolamine, potassium, sodium, and zinc salts of the phosphate esters; the nonyl group is a propylene trimer isomer and the poly(oxyethylene) content averages 4-14 moles or 30 moles.		Surfactants, related adjuvants of surfactants

Inert ingredients	Limits	Uses
α-(*p*-Nonylphenyl)-ω-hydroxypoly(oxyethylene) produced by the condensation of 1 mole of nonylphenol (nonyl group is a propylene trimer isomer) with an average of 4-14 or 30-90 moles of ethylene oxide; if a blend of products is used, the average number of moles of ethylene oxide reacted to produce any product that is a component of the blend shall be in the range of 4-14 or 30-90.		Do.
α-(*p*-Nonylphenyl)-ω-hydroxypoly(oxyethylene) sulfate, ammonium, calcium, magnesium, potassium, sodium, and zinc salts; the nonyl group is a propylene trimer isomer and the poly(oxyethylene) content averages 4 moles.		Do.
Octyl and decyl glucosides mixture with a mixture of octyl and decyloligosaccharides and related reaction products (primarily *n*- decanol) produced as an aqueous-based liquid (68-72% solids) from the reaction of straight chain alcohols (C_8(45%), C_{10} (55%)) with anhydrous glucose.		Do.
Oleic acid		Diluent
Oleic acid diester of α-hydro-ω-hydroxypoly (oxyethylene); the poly(oxyethylene) having average molecular weight (in amu) 400.		Surfactants, related adjuvants of surfactants
α-Oleoyl-ω-hydroxypoly(oxyethylene), average molecular weight (in amu) of 600.		Emulsifier
Oleyl alcohol (CAS Reg. No. 143–28–2	15%	Cosolvent
Oxalic acid	No more oxalic acid should be used than is necessary to chelate calcium and in no case should more than 2 lb oxalic acid per acre be used.	Calcium chelating hard water inhibitor
Oxidized pine lignin, sodium salt, (CAS Reg. No. 68201–23–0).	Maximum of 2% of formulation	Surfactant, related adjuvant of surfactant
Palmitic acid		Diluent
Pentaerythritol ester of maleic anhydride modified wood rosin.		Plasticizer
Pentaerythritol ester of modified resin		Do.
Pentaerythritol stearates mixture (CAS Reg. No. 85116–93–4) which include pentaerythritol monostearate (CAS Reg. No. 78–23–9), pentaerythritol distearate (CAS Reg. No. 13081–97–5), pentaerythritol tristearate (CAS Reg. No. 28188–24–1) and pentaerythritol tetrastearate (CAS Reg. No. 115–83–3).	No more than 25 ppm in pesticide formulations.	Emulsifier
Petrolatum, conforming to 21 CFR 172.880		Coating agent
Petroleum hydrocarbons, light odorless conforming to 21 CFR 172.884.		Solvent, diluent.
Petroleum hydrocarbons, synthetic isoparaffinic, conforming to 21 CFR 172.882.		Do.
Petroleum naphtha, conforming to 21 CFR 172.250(d)		Component of coating agent
Petroleum wax, conforming to 21 CFR 172.886(d)		Coating agent
Phosphoric acid		Buffer
Phosphorus oxychloride		Catalyst
Pine lignin		Adsorbent
B-Pinene polymers		Surfactants, related adjuvants of surfactants
Polyethylene, conforming to 21 CFR 177.1520(c)		Binder, carrier, and coating agent
Polyethylene glycol[α-hydro-ω-hydroxypoly(oxyethylene)]; mean molecular weight (in amu) 194 to 9,500 conforms to 21 CFR 178.3750.		Surfactants, related adjuvants of surfactants
Polyglycerol esters of fatty acids conforming to 21 CFR 172.854.		Surfactants, related adjuvants of surfactants
Polyglyceryl phthalate ester of coconut oil fatty acids		Do.
Poly(methylene-*p*-*tert*-butylphenoxy)-poly(oxyethylene) ethanol; the poly(oxyethylene) content averages 4-12 moles.		Coating agent
Poly(methylene-*p*-nonylphenoxy)poly (oxyethylene) ethanol; the poly(oxyethylene) content averages 4-12 moles.		Coating agent

Inert ingredients	Limits	Uses
Poly(oxy-1,2-ethanediyl), α-(carboxymethyl)-ω-(nonylphenoxy) produced by the condensation of 1 mole of nonylphenol (nonyl group is a propylene trimer isomer) with an average of 4-14 or 30-90 moles of ethylene oxide. The molecular weight (in amu) ranges are 454-894 and 1598-4238.		Surfactant
Polyoxyethylene (20) sorbitan monostearate		Surfactants, related adjuvants of surfactants
[Poly[oxy(methyl-1,2-ethanediyl)], α-[2-bis(2-hydroxyethyl)amino]propyl]-ω-hydroxy,-ether with α-hydro-ω-hydroxypoly(oxy-1,2-ethanediyl) (1:2), mono-C_{12-16} alkyl ethers, (CAS Reg. No. 176022–82–5).	Not to exceed 15% in the formulated product; only for use with glyphosate.	Surfactant
Polysorbate 65, conforming to 21 CFR 172.838		Emulsifier
Potassium aluminum silicate		Solid diluent, carrier
Potassium hydroxide		Neutralizer
Potassium phosphate		Buffer
Potassium sulfate		Solid diluent
Propane		Propellant
n-Propanol		Solvent, cosolvent
2-Propenoic acid, 2-methyl-, polymer with ethyl 2-propenoate and methyl 2-methyl-2-propenoate, ammonium salt (CAS Registration No. 55989–05–4), minimum number average molecular weight (in amu), 18,900.		Encapsulating agent, dispensers, resins, fibers and beads
Propionic acid		Catalyst
Propylene glycol		Solvent, cosolvent.
Propylene glycol alginate (as defined in 21 CFR 172.858).		Defoaming agent
Propyl gallate		Antioxidant
Propyl *p*-hydroxybenzoate		Preservative for formulations
Pyrophyllite		Solid diluent, carrier
Rhizobium inoculants (e.g. *Sinorhizobium, Bradyrhizobium & Rhizobium*).		All leguminous food commodities
Rosin, partially dimerized (as defined in 21 CFR 172.615).		Surfactants, related adjuvants of surfactants
Rosin, partially hydrogenated (as defined in 21 CFR 172.615).		Do.
Rosin, wood		Do.
Salts of fatty acids, conforming to 21 CFR 172.863		Binder, emulsifier, anticaking agent
Sand		Solid diluent, carrier
Secondary alkyl (C_{11}-C_{15}) poly(oxyethylene) acetate, sodium salt; the ethylene oxide content averages 5 moles.		Surfactant
Shellac, bleached; refined, food grade, arsenic and rosin-free.		Coating agent
Soap (sodium or potassium salts of fatty acids)		Surfactant, emulsifier, wetting agent
Soapstone		Solid diluent
Sodium acid pyrophosphate		Surfactant, suspending agent, dispersing agent, buffer
Sodium α-olefinsulfonate (sodium C_{14}-C_{16}) (Olefin sulfonate).		Surfactants, related adjuvants of surfactants
Sodium aluminum silicate		Solid diluent, carrier
Sodium benzoate		Anticaking agent
Sodium bicarbonate		Neutralizer
Sodium diisobutylnaphthalenesulfonate		Surfactants, related adjuvants of surfactants
Sodium dioctylsulfosuccinate		Do.
Sodium dodecylphenoxybenzenedisulfonate		Do.
Sodium hexametaphosphate		Surfactant, emulsifier, wetting agent, suspending agent, dispersing agent, buffer
Sodium hydroxide		Neutralizer
Sodium isopropylisohexylnaphthalenesulfonate		Surfactants, related adjuvants of surfactants
Sodium *N*-lauroyl-*N*-methyltaurine		Do.
Sodium lauryl glyceryl ether sulfonate		Do.
Sodium metasilicate		Surfactants, emulsifiers, wetting agents, dispersing agents, buffer
Sodium monoalkyl and dialkyl (C_8-C_{16}) phenoxybenzenedisulfonate mixtures containing not less than 70% of the monoalkylated product.		Surfactants, related adjuvants of surfactants
Sodium mono- and dimethyl naphthalenesulfonates, molecular weight (in amu) 245-260.		Do.
Sodium mono-, di-, and tributyl naphthalenesulfonates		Do.
Sodium mono-, di-, and triisopropyl naphthalenesulfonate.		Do.
Sodium *N*-oleoyl-*N*-methyltaurine		Do.
Sodium oleyl sulfate		Do.

Inert ingredients	Limits	Uses
Sodium *N*-palmitoyl-*N*-methyltaurine		Do.
Sodium propionate		Preservative for formulation
Sodium salt of sulfated oleic acid		Surfactants, related adjuvants of surfactants
Sodium silicate		Surfactant, emulsifier, wetting agent, stabilizer, inhibitor
Sodium starch glycolate (CAS Reg. No. 9063–38–1)	Granular and tableted products only; not to exceed 8% of the formulated product.	Disintegrant
Sodium sulfate		Solid diluent, carrier
Sodium sulfite		Stabilizer
Sodium thiosulfate anhydrous (CAS Reg. No.7772–98–7 or sodium thiosulfate pentahydrate,CAS Reg. No. 10102–17–7).	Not to exceed 6% of the formulated product.	Dechlorinator, reducing agent
Sodium tripolyphosphate		Buffer, surfactant, suspending agent, dispersing agent, anticaking agent, conditioning agent
Sorbitan fatty acid esters (fatty acids limited to C_{12}, C_{14}, C_{16}, and C_{18} containing minor amounts of associated fatty acids) and their derivatives; the poly(oxyethylene) content averages 5-20 moles.		Surfactants, related adjuvants or surfactants.
Sorbic acid (and potassium salt)		Preservative for formulations
Sorbitol		Antidusting agent
Soy protein, isolated	Expires May 24, 2005	Adhesive
Soybean flour	Expires May 24, 2005.	Surfactant
Soybean oil-derived fatty acids		Solvent, cosolvent
Sperm oil conforming to 21 CFR 172.210		Coating agent
Stearic acid		Diluent
α-Stearoyl-ω-hydroxypoly(oxyethylene), average molecular weight (in amu) of 600.		Emulsifier
α-Stearoyl-ω-hydroxypoly(oxyethylene); the poly(oxyethylene) content averages either 8, 9, or 40 moles; if a blend of products is used, the average number of moles ethylene oxide reacted to produce any product that is a component of the blend shall be either 8, 9, or 40.		Surfactants, related adjuvants of surfactants
Sucrose octaacetate		Adhesive
Sulfuric acid (CAS Reg. No. 7664–93–9) that meets the Food Chemicals Codex specifications.	0.1% of pesticide formulation	pH control agent
Sulfurous acid		Preservative
Synthetic paraffin and its succinic derivatives conforming to 21 CFR 172.275.		Carrier, binder, and carrying agent
Synthetic petroleum wax, conforming to 21 CFR 172.888.		Binder, carrier, and coating agent
Talc		Solid diluent, carriers
Tall oil; fatty acids not less than 58%, rosin acids not more than 44%, unsaponifiables not more than 8%.		Surfactants, related adjuvants of surfactants
Tartrazine		Dye
1,1,1,2-Tetrafluoroethane, (CAS Reg. No. 811–97–2)		Aerosol propellant
Tetrahydrofurfuryl alcohol		Solvent cosolvent
α-[*p*-(1,1,3,3-Tetramethylbutyl)phenyl]-ω-hydroxypoly(oxyethylene) produced by the condensation of 1 mole of *p*-(1,1,3,3-tetramethylbutyl)phenol with a range of 1-14 or 30-70 moles of ethylene oxide: if a blend of products is used, the average range number of moles of ethylene oxide reacted to produce any product that is a component of the blend shall be in the range of 1-14 or 30-70.		Surfactants, related adjuvants of surfactants
α-[*p*-(1,1,3,3-Tetramethylbutyl) phenyl]-ω-hydroxypoly(oxyethylene) produced by the condensation of 1 mole of *p*-(1,1,3,3-tetramethylbutyl) phenol with an average of 4-14 or 30-70 moles of ethylene oxide; if a blend of products is used, the average number of moles of ethylene oxide reacted to produce any product that is a component of the blend shall be in the range of 4-14 or 30-70.		Do.
2,4,7,9-Tetramethyl-5-decyn-4, 7-diol	Not more than 2.5% of pesticide formulation.	Surfactants, related adjuvants of surfactants
Tetrasodium pyrophosphate		Anticaking agent, conditioning agent
Tricalcium phosphate		Surfactant, suspending agent, dispersing agent, anticaking agent, conditioning agent
1,1,1-Trichloroethane		Solvent, cosolvent
Trichlorofluoromethane		Propellant
Tridecylpoly(oxyethylene) acetate, sodium salt; where the ethylene oxide content averages 6-7 moles.		Surfactants, related adjuvants of surfactants

Inert ingredients	Limits	Uses
Trisodium phosphate		Surfactant, emulsifier, wetting agent
Vermiculite		Solid diluent, carrier.
Walnut shells		Leaching inhibitor, binder for water-dispersible aggregates, sticker and suspension stabilizer
Wheat, including flour, bran, and starch	Expires May 24, 2005.	Solid diluent carrier, attractant
Wheat bran		Do.
Wintergreen oil		Attractant
Wood flour	Derived from wood free of chemical preservatives.	Solid diluent and carrier
Xanthan gum-modified, produced by the reaction of xanthan gum and glyoxal (maximum 0.3% by weight).	Not more than 0.5% of pesticide formulation.	Surfactant
Xylene meeting the specifications listed in 21 CFR 172.884(b)(4).	In pesticide formulations for grain storage only.	Solvent, cosolvent
Zeolite (hydrated alkali aluminum silicate)		Solid diluent, carrier
Zinc oxide		Coating agent
Zinc sulfate (basic and monohydrate)		Do.
Zinc sulfate (basic and monohydrate)		Solid diluent, carrier

■ 10. Section 180.920 is added to subpart D to read as follows:

§ 180.920 Inert ingredients used pre-harvest; exemptions from the requirement of a tolerance.

The following materials are exempted from the requirement of a tolerance when used in accordance with good agricultural practice as inert (or occasionally active) ingredients in pesticide formulations applied to growing crops only:

Inert ingredients	Limits	Uses
Acetonitrile	Not more than 0.5% of pesticide formulation.	Solvent for blended emulsifiers in all pesticides used before crop emerges from soil and in herbicides before or after crop emerges
Acetophenone		Attractant
Adenosine (CAS Reg. No. 58–61–7)	Maximum of 0.5% of formulation.	Synergist
Alder bark		Seed germination stimulator
α-Alkyl (C_{12}-C_{18})-ω-hydroxypoly(oxyethylene) copolymers with poly(oxypropylene); polyoxyethylene content averages 3-12 moles and polyoxypropylene content 2-9 moles.		Surfactants, related adjuvants of surfactants
α-Alkyl (C_{10}-C_{16})-ω-hydroxypoly(oxyethylene) mixture of dihydrogen phosphate and monohydrogen phosphate esters and the corresponding ammonium, calcium, magnesium, monoethanolamine, potassium, sodium, and zinc salts of the phosphate esters; the poly(oxyethylene) content averages 3-20 moles.		Surfactants, related adjuvants of surfactants
α-Alkyl (C_{12}-C_{15})-ω-hydroxypoly(oxyethylene) sulfosuccinate, isopropylamine and *N*-hydroxyethyl isopropylamine salts of; the poly(oxyethylene) content averages 3-12 moles.	Not more than 0.2% in the final solution.	Emulsifiers in pesticide concentrates applied with liquid fertilizer solutions before crop emerges from soil or not later than 4 weeks after planting
α-Alkyl(C_{10}-C_{12})-ω-hydroxpoly(oxyethylene) poly(oxypropylene) copolymer; poly(oxyethylene) content is 11-15 moles; poly(oxyproplene) content is 1-3 moles.		Surfactants, related adjuvants of surfactants.
α-Alkyl(C_{12}-C_{18})-ω-hydroxypoly(oxyethylene/ oxypropylene) hetero polymer in which the oxyethylene content averages 13-17 moles and the oxypropylene content averages 2-6 moles.		Do.
α-Alkyl (C_{10}-C_{16})-ω-hydroxypoly (oxyethylene)poly(oxypropylene) mixture of di- and monohydrogen phosphate esters and the corresponding ammonium, calcium, magnesium, monoethanolamine, potassium, sodium, and zinc salts of the phosphate esters; the combined poly(oxyethylene) poly(oxypropylene) content averages 3-20 moles.		Do.
α-Alkyl (C_{12}-C_{18})-ω-hydroxypoly(oxyethylene/ oxypropylene) hetero polymer in which the oxyethylene content is 8-12 moles and the oxypropylene content is 3-7 moles.		Do.

Inert ingredients	Limits	Uses
α-Alkyl (C_{12}-C_{15})-ω-hydroxypoly(oxyethylene/oxypropylene) hetero polymer in which the oxyethylene content is 8-13 moles and the oxypropylene content is 7-30 moles.		Solvent, cosolvent, surfactant, and related adjuvants of surfactants
α-Alkyl (C_{21}-C_{71})-ω-hydroxypoly (oxyethylene) in which the poly(oxyethylene) content is 2 to 91 moles and molecular weight range from 390 to 5,000.	Not to exceed 10%	Wetting agent or granule coating
n-Alkyl(C_8-C_{18})amine acetate		Surfactants, related adjuvants of surfactants
Almond, bitter		Attractant
Aluminum 2-ethylhexanoate	Not more than 0.25% of pesticide formulation.	Gelling agent
Aluminum sulfate		Safener adjuvant
Amine salts of alkyl(C_8-C_{24}) benzenesulfonic acid (butylamine, dimethylaminopropylamine, mono- and diisopropylamine, mono-, di-, and triethanolamine).		Surfactants, related adjuvants of surfactants
N-(Aminoethyl) ethanolamine salt of dodecylbenzenesulfonic acid.	For use only in liquid emulsifiable herbicide concentrates.	Do.
Ammonium nitrate (CAS Reg. No. 6484–52–2)		Adjuvant/ intensifier for herbicides
Ammonium polyphosphate (CAS Reg. No. 68333–79–9).		Sequestrant, buffer, or surfactant
Ammonium thiocyanate		Adjuvant/intensifier for defoliation of, and weed control in/on cotton and soybeans
Animal waste material (produced by the thermophilic digestion of cattle and poultry manure).	*E. coli* and *Salmonella* free; heavy metal content not to exceed the following: Material/Concentration (ppm): As/12.5; Cd/12.0; Cu/14.0; Pb/17.0; Hg/0.1; Se/0.2.	Carrier
Barium sulfate		Carrier
1,2-Benzisothiazolin-3-one	Not more than 0.1% of formulation. Not more than 0.02 lb to be applied per acre.	Preservative/stabilizer
N,N-Bis[α-ethyl-ω-hydroxypoly(oxyethylene) alkylamine; the poly(oxyethylene) content averages 3 moles; the alkyl groups (C_{14}-C_{18}) are derived from tallow, or from soybean or cottonseed oil acids.		Surfactants for preemergence use with herbicides on sugarcane only
N,N-Bis(2-hydroxyethyl)alkylamine, where the alkyl groups (C_8-C_{18}) are derived from coconut, cottonseed, soya, or tallow acids.		Surfactants, related adjuvants of surfactants
N,N-Bis 2-(ω-hydroxypolyoxyethylene) ethyl) alkylamine; the reaction product of 1 mole *N,N*-bis(2-hydroxyethyl)alkylamine and 3-60 moles of ethylene oxide, where the alkyl group (C_8-C_{18}) is derived from coconut, cottonseed, soya, or tallow acids.		Do.
N,N-Bis-2-(ω-hydroxypolyoxyethylene/polyoxypropylene) ethyl alkylamine; the reaction product of 1 mole of *N,N*-bis(2-hydroxyethyl alkylamine) and 3-60 moles of ethylene oxide and propylene oxide, where the alkyl group (C_8-C_{18}) is derived from coconut, cottonseed, soya, or tallow acids.		Surfactant, related adjuvants of surfactants
Boric acid		Sequestrant
Buffalo gourd root powder (*Cucurbita foetidissima* root powder); or, Zucchini juice (*Cucurbita pepo* juice) or Hawkesbury melon *Citrullus lanatus*..	No more than 2.5 lbs/acre/season (3.4 gm/acre/season of Cucurbitacin).	Gustatory stimulant
Butoxytriethylene glycol phosphate		Surfactants for arsenical herbicide formulations only
1,3-Butylene glycol dimethyacrylate	Not more than 0.1% of pesticide formulation.	Stabilizer
Butyl stearate		Defoamer
γ-Butyrolactone		Solvent
C.I. Pigment Blue #15 (CAS Reg. No. 147–14–8; containing no more than 50 ppm polychlorinated biphenyls (PCBs))..	For seed treament use only	Dye, coloring agent
C.I. Pigment Green #7 (CAS Reg. No. 1328–53–6; containing no more than 50 ppm polychlorinated biphenyls (PCBs)).	For seed treatment use only	Dye, coloring agent
C.I. Pigment Violet #23 (CAS Reg. No. 6358–30–1; containing no more than 20 ppb of polychlorinated dibenzo-*p*-dioxins and/or polychlorinated dibenzofurans).	For seed treatment use only	Dye, coloring agent

Inert ingredients	Limits	Uses
Calcium and sodium salts of certain sulfonated petroleum fractions (mahogany soaps); calcium salt molecular weight (in amu) 790-1,020, sodium salt molecular weight (in amu) 400-500.		Surfactants, related adjuvants of surfactants
Camphor (CAS Reg. No. 76–22–2)	Not more than 5% weight to weight (w/w) of pesticide formulations.	Deodorant, melting point adjustment
Carous chloride	10 ppm in formulation	Tagging agent
Carrageenan, conforming to 21 CFR 172.260	Not more than 0.15% of pesticide formulation.	Thickener and stabilizer for pesticide formulations applied to seeds before planting
Chlorobenzene	Contains not more than 1% impurities. Not for use after edible parts of plant begin to form. Do not graze livestock in treated areas within 48 hours after application.	Solvent, cosolvent
5-Chloro-2-methyl-4-isothiazolin-3-one (in combination with 2-methyl-4-isothiazolin-3-one).	Not more than 0.0022% (22.5 ppm) in the formulation; 0.00022% (or 2.25 ppm) in the final solution applied to growing crops.	Preservative
Condensation product of orthophenylphenol with 5 moles of ethylene oxide.		Stabilizer.
Copper naphthenate	Not more than 2.5% of formulation; application limited to before edible portions of plants begin to form.	Mercaptan scavenger in technical pesticide
Copper salts of neodecanoic acid and 2-ethylhexanoic acid.	Not more than 1% of formulation; application limited to before edible portions of plants begin to form.	Do.
Cyclohexane		Solvent, cosolvent
Cyclohexanol		Do.
Cyclohexanone		Do.
Cysteine (CAS Reg. No. 52–90–4)	Maximum of 0.5% of formulation.	Synergist
D&C Green No. 6		Dye
D&C Red No. 17, technical grade		Dye
D&C Red No. 33 (CAS Reg. No. 3567–66–6); meeting the specifications listed in 21 CFR 74.1333.		Dye
D&C Violet No. 2, technical grade	Not more than 0.005% of pesticide formulation.	Dye
n-Decyl alcohol		Do.
Diacetone alcohol		Deactivator, solvent for formulations used before crop emerges from soil
Diallyl phthalate	Not more than 0.1% of pesticide formulation.	Stabilizer
Diammonium phosphate (CAS Reg. No. 7783–28–0)		Buffer, surfactant
α-(Di-*sec*-butyl)phenylpoly(oxypropylene) block polymer with poly(oxyethylene); the poly(oxypropylene) content averages 4 moles, the poly(oxyethylene) content averages 5 to 12 moles, the molecular.		Surfactants, related adjuvants of surfactants
Diethanolamine		Stabilizer, inhibitor for formulations used before crop emerges from soil
Diethylene glycol		Deactivator, adjuvant for formulations used before crop emerges from soil
Diethylene glycol and diethylene glycol monobutyl, monoethyl, and monomethyl ethers.		Deactivator for formulations used before crop emerges from soil, stabilizer
3,6-Dimethyl-4-octyn-3,6-diol	In pesticide formulations, for soil prior to planting or to plants before edible parts form.	Surfactants, related adjuvants of surfactants
Dimethyl sulfoxide		Solvent or cosolvent for formulations used before crop emerges from soil or prior to formation of edible parts of food plants
Dipotassium hydrogen phosphate		Buffering agent
Dipropylene glycol dibenzoate	For seed treatment use only	Solvent, cosolvent
Dipropylene glycol monomethyl ether		Stabilizer
Disodium 4-isodecyl sulfosuccinate		Surfactants related adjuvants of surfactants.
Dodecylphenol		Coupling agent in emulsifier

Inert ingredients	Limits	Uses
α-Dodecylphenol-ω-hydroxypoly(oxyethylene/ oxypropylene) hetero polymer where ethylene oxide content is 11-13 moles and oxypropylene content is 14-16 moles, molecular weight (in amu) averages 600 to 965.		Surfactants, related adjuvants of surfactants
Douglas-fir bark, ground		Solid diluent, carrier
Dysprosium chloride	10 ppm in formulation	Tagging agent
Ethylene glycol		Antifreeze, deactivator for all pesticides used before crop emerges from soil and in herbicides before or after crop emerges
Ethylene glycol monobutyl ether		
Ethylene glycol monomethyl ether		Solvent for formulations used before crop emerges from soil
2-Ethylhexanol		Cosolvent, defoamer, solvent for all pesticides used before crop emerges from soil and in herbicides before or after crop emerges
Ethyl methacrylate		Surfactants, related adjuvants of surfactants
Europic chloride	10 ppm in formulation	Tagging agent
FD&C Red No. 40 (CAS Reg. No. 25956–17–6)	For seed treatment use only. Not to exceed 2% by weight of the pesticide formulation.	Dye, coloring agent
Ferric chloride		Not greater than 2% of suspending, dispersing agent, pesticide formulation
Fluoroapatite		Solid diluent, carrier
Folic acid (CAS Reg. No. 59–30–3)	Maximum of 0.5% of formulation.	Synergist
Furfural byproduct (a granular steam-acid sterilized, lignocellulosic residuum in the extraction of furfural from corn cobs, sugarcane bagasse, cottonseed hulls, oat hulls, and rice hulls).		Solid diluent, carrier
Gluconic acid (and sodium salt)		Sequestrant
l-Glutamic acid ($C_5 H_9 NO_4$≥ CAS Reg. No. 56–86–0)	Seet treatment use only	Plant nutrient
Glutamine (CAS Reg. No. 56–85–9)	Maximum of 0.5% of formulation.	Synergist
Glycerol—propylene oxide polymer (CAS Reg. No. 25791-96-2).		Component in water-soluble film
Glyceryl triacetate		Stabilizer
Glyceryl tris-12-hydroxystearate		Flow control agent
Graphite		Treatment aid for seeds
Hexamethylenetetramine		Stabilizer for carriers in solid pesticide formulations
2-Hydroxy-4-*n*-octoxybenzophenone (CAS Reg. No. 1843–05–6).	Not more than 0.2 pt of pesticide formulation.	Light stabilizer
Hydroxypropyl guar gum		Thickener
Isoamyl acetate	Not more than 0.5% of pesticide formulation.	Odor-masking agent
Isobomyl acetate		Solvent
Isobutyl alcohol		Do.
Isobutylene-butene copolymers	For soil application only	Binder
Isooctadecanol	Not more than 2% of pesticide formulation.	Defoaming agent
Isophorone (CAS Reg. No. 78–59–1)		Solvent, cosolvent
Isopropylbenzene		Solvent, cosolvent
Isopropylbenzenesulfonic acid and its ammonium, calcium, magnesium, potassium, sodium, and zinc salts.		Surfactants and related adjuvants of surfactants
Lanthanum chloride	10 ppm in formulation	Tagging agent.
(3-Lauramidopropyl) trimethylammonium methyl sulfate.	Not more than 2.6% in the formulation. Not to be applied within 7 days of harvest.	Antistatic agent
Linoleic diethanolamide (CAS Reg. No. 56863–02–6)		Surfactant
Magnesium nitrate (in combination with 2-methyl-4-isothiazolin-3-one and 5-chloro-2-methyl-4-isothiazolin-3-one).	None	Preservation
Maleic acid and maleic anhydride	For pesticide formulations applied to apples with a minimum preharvest interval of 21 days.	Stabilizer
Manganese carbonate		Plant nutrient
Mesityl oxide	Not for use after edible parts of plant begin to form. Do not graze livestock in treated areas within 48 hours after application.	Solvent, cosolvent

Inert ingredients	Limits	Uses
Methionine (CAS Reg. No. 59–51–8)	Maximum of 0.5% of formulation.	Synergist
Methyl alcohol		Do.
Methyl bis(2-hydroxyethyl)alkyl ammonium chloride, where the carbon chain (C_8-C_{18}) is derived from coconut, cottonseed, soya, or tallow acids.		Surfactant
α,α′-[Methylenebis]-4-(1,1,3,3-tetramethylbutyl)-*o*-phenylene bis[ω-hydroxypoly(oxyethylene)] having 6-7.5 moles of ethylene oxide per hydroxyl group.		Solvent, cosolvent, surfactant, and related adjuvants of surfactants
Methylene blue		Dye for formulations used on cotton
Methyl ethyl ketone		Surfactant
Methyl *p*- hydroxybenzoate		Preservative for formulations
Methyl isoamyl ketone		Solvent, cosolvent
Methyl isobutyl ketone		Do.
2-Methyl-4-isothiazolin-3-one (in combination with 5-chloro-2-methyl-4-isothiazolin-3-one).	Not more than 0.0022% (22.5 ppm) in the formulation; 0.00022% (or 2.25 ppm) in the final solution applied to growing crops.	Preservative
Methyl methacrylate		Surfactants, related adjuvants of surfactants
Methylnaphthalenesulfonic acid—formaldehyde condensate, sodium salt.		Dispersant
Methyl oleate		Surfactant
2-Methyl-2,4-pentanediol		Solvent for formulations used before crop emerges from soil
Methyl poly(oxyethylene) alkyl ammonium chloride, where the poly(oxyethylene) content is 3-15 moles and the alkyl group (C_8-C_{18}) is derived from coconut, cottonseed, soya, or tallow acids.		Surfactant
N-Methylpyrrolidone (CAS Reg. No. 872-504)		Solvent, cosolvent
Methyl violet 2B		Dye
Mixed phytosterols (consisting of campesterol, sitosterol and stigmasterol, with minor amounts of associated plant sterols) derived from edible vegetable oils.		Surfactant.
Mono- and bis-(1*H*, 1*H*, 2*H*, 2*H*-perfluoroalkyl) phosphates where the alkyl group is even numbered and in the C_6-C_{12} range.	Not more than 0.5% of pesticide formulation.	Defoaming agent
Mono- and dialkyl (C_8-C_{18}) methylated ammonium chloride compounds, where the alkyl group(s) (C_8-C_{18}) are derived from coconut, cottonseed, soya, tallow, or hogfat fatty acids.		Surfactants, related adjuvants of surfactants
Morpholine salt of dodecylbenzenesulfonic acid		Do.
Naphthalenesulfonic acid-formaldehyde condensate, ammonium and sodium salts.		Do.
Nicotinamide (CAS Reg. No. 98–92–0)	Maximum of 0.5% of formulation.	Synergist
α-(*p*-Nonylphenyl)-ω-hydroxypoly(oxyethylene); produced by the condensation of 1 mole of nonylphenol (nonyl group is a propylene trimer isomer) with an average of 4-14 or 30-100 moles of ethylene oxide; if a blend of products is used, the average number of moles of ethylene oxide reacted to produce any product that is a component of the blend shall be in the range 4-14 or 30-100.		Surfactant
X-(*p*- Nonylphenyl)-ω-hydroxy-poly(oxyethylene) sulfosuccinate isopropylamine and *N*-hydroxyethyl isopropylamine salts of: the poly(oxyethylene) content averages r moles.	Not more than 0.2% in the final solution.	Emulsifiers in pesticide concentrates applied with liquid fertilizer solutions before crop emerges from soil or not later than 4 weeks after planting
n- Octyl alcohol		Solvent, cosolvent
α-Oleoyl-ω-(oleoyloxy) poly(oxyethylene) derived from α-hydro-ω-hydroxypoly(oxyethylene) (molecular weight 600 amu).		Component of defoamers
Oxo-decyl acetate (CAS reg. No. 108419–33–6)		Solvent
Oxo-heptyl acetate (CAS Reg. No. 90438–79–2)		Solvent
Oxo-hexyl acetate (CAS Reg. No. 88230–35–7)		Solvent
Oxo-nonyl acetate (CAS Reg. No. 108419–34–7)		Solvent
Oxo-octyl acetate (CAS Reg. No. 108419–32–5)		Solvent
Oxo-tridecyl acetate (CAS Reg. No. 108419–35–8)		Solvent
Paraformaldehyde	Not more than 2% of pesticide formulation.	Preservative for formulation
Partial sodium salt of *N*- lauryl-α-iminodipropionic acid	Not more than 1% of pesticide formulation.	Surfactants, related adjuvants of surfactants
Phenol		Solvent, cosolvent

Inert ingredients	Limits	Uses
Phenolic resins	Soil applications	Binding agent
Phenolsulfonic acid—formaldehyde—urea condensate and its sodium salt.	Applied to growing plants only	Dispersant surfactant
(Phthalocyaninato (2)) copper; (C.I. pigment blue No. 15).	When used as a colorant in low-density plastic films.	Coloring agent, pigment
Pigment red 48	For seed treatment use only	Dye
α-Pinene	Not more than 2% of formulation by weight.	Stabilizer
Poly(methylene-*p*- nonylphenoxy)poly(oxypropylene) propanol; the poly(oxy-propylene) content averages 4-12 moles.		Encapsulating agent
Poly(oxyethylene) adducts of mixed phytosterols (such sterols to consist of campesterol, stigmasterol and sitosterol with minor amounts of associated plant sterols) derived from edible vegetable oils; polyoxyethylene content averaging 5-26 moles.		Surfactant, related adjuvants
Poly(oxyethylene) (5) sorbitan monooleate		Surfactants, related adjuvants of surfactants
Polysorbate 60, conforming to 21 CFR 172.836		Surfactant
Potassium carbonate		Buffering agent
Potassium dihydrogen phosphate		Do.
Primary *n*-alkylamines, where the alkyl group (C_8-C_{18}) is derived from coconut, cottonseed, soya, or tallow acids.		Surfactant
Propylene dichloride		Solvent for formulations used before crop emerges from soil
Propylene glycol monomethyl ether		Solvent
Pyridoxine (CAS Reg. No. 65–23–6)	Maximum of 0.5% of formulation.	Synergist
Rosin, dark wood (as defined in 21 CFR 178.3870(a)(1)(v)).		Surfactants, related adjuvants of surfactants
Rosin, gum		Do.
Rosin, tall oil		Do.
Scandium chloride	10 ppm in formulation	Tagging agent
Sodium bisulfate (CAS Reg. No. 7681–38–1)		Acidifying/buffering agent
Sodium butyl naphthalenesulfonate		Surfactants, related adjuvants of surfactants
Sodium caseinate	Expires May 24, 2005.	Suspending agent and binder
Sodium 1,4-dicyclohexyl sulfosuccinate		Surfactants, related adjuvants of surfactants
Sodium 1,4-dihexyl sulfosuccinate		Do.
Sodium dihydrogen phosphate (CAS Reg. No. 7558–80–7) conforming to 21 CFR 182.6778.		Buffering agent
Sodium 1,4-diisobutyl sulfosuccinate		Surfactants, related adjuvants of surfactants
Sodium 1,4-dipentyl sulfosuccinate		Do.
Sodium 1,4-ditridecyl sulfosuccinate		Do.
Sodium fluoride	Not more than 0.25% of pesticide formulation.	Stabilizer carrier for formulations used before crop emerges from soil
Sodium metaborate		Sequestrant
Sodium molybdate		Plant nutrient
Sodium mono- and dimethyl naphthalenesulfonate; molecular weight (in amu) 245-260.		Surfactants, related adjuvants of surfactants
Sodium nitrate		Solid diluent
Sodium nitrite	Not more than 3% of pesticide formulation.	Stabilizer, inhibitor.
Sodium *o*-phenylphenate	Not more than 0.1% of pesticide formulation.	Preservative for formulation
Sodium salt of the insoluble fraction of rosin		Surfactants, related adjuvants of surfactants
Sodium salt of partially or completely saponified dark wood rosin (as defined in 21 CFR 178.3870(a)(4)).		Surfactants, related adjuvants of surfactants
Sodium tetraborate	Not more than 2% of pesticide formulation	Buffering agent; corrosion inhibitor
Sulfosuccinic acid ester with *N*-(2,-hydroxy-propyl) oleamide, ammonia and isopropylamine salts of.	Not more than 0.2% in the final solution.	Emulsifiers in pesticide concentrates applied with liquid fertilizer solutions before crop emerges from soil or not later than 4 weeks after planting
Tall oil diesters with polypropylene glycol (CAS Reg. No. 68648–12–4).		Component in water-soluble film
Tannin		Dispersing agent
Tertiary butylhydroquinone		Antioxidant
1-Tetradecanamine, *N,N*-dimethyl-, *N*-oxide (CAS Reg. No. 3332–27–2).		Component in water-soluble film
N,N,N',N"-Tetrakis-(2-hydroxypropyl) ethylenediamine		Stabilizer for formulations used before crop emerges from soil

Inert ingredients	Limits	Uses
α-[*p*-(1,1,3,3-Tetramethylbutyl)phenyl]-ω-hydroxypoly(oxyethylene) mixture of dihydrogen phosphate and monohydrogen phosphate esters and the corresponding sodium salts of the phosphate esters; the poly(oxyethylene) content averages 6 to 10 moles.		Surfactants, related adjuvants of surfactants
2,4,7,9-Tetramethyl-5-decyne 4,7-diol	In pesticide formulations, for application to soil prior to planting or to plants before edible parts form.	Do.
Tetrapotassium pyrophosphate (CAS Reg. No. 7320–345).	Not to exceed 10% of formulation.	Sequestrant, anticaking agent, conditioning agent
Tetrasodium *N*-(1,2-dicarboxyethyl)-*N*-octadecylsulfosuccinamate.		Do.
[2,2′(2,5-Thiophenediyl) bis (5-*tert*-butylbenzoxazole)] (CAS Reg. Number 7128–64–5).	10 ppm in pesticide formulations.	Quality control agent
Titanium dioxide (CAS Reg. No. 13463–67–7)		Pigment/coloring agent in plastic bags used to wrap growing banana (preharvest), colorant on seeds for planting
Toluene		Solvent, cosolvent
Toluenesulfonic acid and its ammonium, calcium, magnesium, potassium, sodium, and zinc salts.		Do.
Tri-*tert*- butylphenol polyglycol ether (molecular weight (in amu) 746).		Surfactant for formulations used before crop emerges from soil
Triethanolamine		Stabilizer, inhibitor for formulations used before crop emerges from soil
Triethylene glycol		Deactivator
Triethyl phosphate		Stabilizer for formulations used before crop emerges from soil
Trimethylolpropane (CAS Reg. No. 77–66–9)	Not more than 15% of the pesticide formulation.	Component of water-soluble film
Trimethylolpropane (CAS Reg. No. 77–99–6)	Not to exceed 15% by weight of the film.	Component in water-soluble film
α-[2,4,6-Tris[1-(phenyl)ethyl]phenyl]-ω-hydroxy poly(oxyethylene), the poly(oxyethylene) content averages 4-150 moles).	Not more than 15% of the formulation.	Surfactant.
α-[2,4,6-Tris[1-(phenyl)ethyl]phenyl]-ω-hydroxy poly(oxyethylene); mixture of monohydrogen and dihydrogen phosphate esters and the corresponding ammonium, calcium, magnesium, potassium, sodium, and zinc salts, the poly(oxyethylene) content averages 4-150 moles).	Not more than 15% of the formulation.	Do.
α-[2,4,6-Tris[1-(phenyl)ethyl]phenyl]-ω-hydroxy poly(oxyethylene) sulfate, and the corresponding ammonium, calcium, magnesium, potassium, sodium, and zinc salts, the poly(oxyethylene) content averages 4-150 moles.	Not more than 15% of the pesticide formulation.	Do.
Tryptophan (CAS Reg. No. 73–22–3)	Maximum of 0.5% of formulation.	Synergist
Valeric acid, normal	Not more than 2% in pesticide formulations.	Stenching agent or odorant
Vanillin		Attractant
Woolwax alcohols		Safener
Xylene		Solvent, cosolvent
Xylenesulfonic acid its ammonium calcium, magnesium, potassium, sodium, and zinc salts.		Surfactants, related adjuvants of surfactants
Yucca extract from Yucca schidigera		Wetting agent
Ytterbium chloride	10 ppm in formulation	Tagging agent
Yttrium chloride	10 ppm in formulation	Tagging agent
Zinc orthophosphate		Plant nutrient and safener
Zinc stearate, conforming to 21 CFR 182.5994 and 582.5994.		Flow control agent

■ 11. Section 180.930 is added to subpart D to read as follows:

§ 180.930 Inert ingredients applied to animals; exemptions from the requirement of a tolerance.

The following materials are exempted from the requirement of a tolerance when used in accordance with good agricultural practice as inert (or occasionally active) ingredients in pesticide formulations applied to animals:

Inert ingredients	Limits	Uses
Acetic acid (CAS Reg. No. 64–19–7)	Not more than 0.5% of pesticide formulation.	Catalyst
Acetic anhydride		Solvent, cosolvent, stabilizer
Acetyl tributyl citrate (CAS Reg. No. 77–90–7)		Component of plastic animal tags
Acetylated lanolin alcohol		Moisturizer
Alkanoic and alkenoic acids, mono- and diesters of α-hydro-ω-hydroxypoly(oxyethylene) with molecular weight (in amu) range of 200 to 6,000.		Emulsifiers
Alkyl (C_8-C_{24}) benzenesulfonic acid and its ammonium, calcium, magnesium, potassium, sodium, and zinc salts.		Surfactants, emulsifier, related adjuvants of surfactants
α-Alkyl (C_9-C_{18})-ω-hydroxy poly(oxyethylene): the poly(oxyethylene) content averages 2-20 moles.		Solvent, cosolvent, surfactant, and related adjuvants of surfactants
α-Alkyl (C_{12}-C_{15})-ω-hydroxypoly(oxyethylene/oxypropylene) hetero polymer in which the oxyethylene content is 8-13 moles and the oxypropylene content is 7-30 moles.		Solvent, cosolvent, surfactant, and related adjuvants of surfactants
α-Alkyl (C_8-C_{10}) hydroxypoly(oxypropylene) block polymer with polyoxyethylene; polyoxypropylene content averages 3 moles and polyoxyethylene content averages 5-12 moles.		Do.
α-Alkyl (C_6-C_{14})-ω-hydroxypoly(oxypropylene) block copolymer with polyoxyethylene; polyoxypropylene content is 1-3 moles; polyoxyethylene content is 7-9 moles; average molecular weight (in amu) approximately 635.		Surfactants, related adjuvants of surfactants
α-alkyl (C_{12}-C_{15})-ω-hydroxypoly (oxypropylene)poly (oxyethylene)copolymers (where the poly(oxypropylene) content is 3-60 moles and the poly(oxyethylene) content is 5-80 moles), the resulting ethoxylated propoxylated (C_{12}-C_{15}) alcohols having a minimum molecular weight (in amu) of 1,500, CAS Reg. No. 68551–13–3.	Not to exceed 20% of pesticide formulations	Surfactant
α-(*p*- Alkylphenyl)-ω-hydroxypoly (oxyethylene) produced by the condensation of 1 mole of alkylphenol (alkyl is a mixture of propylene tetramer and pentamer isomers and averages C_{13}) with 6 moles of ethylene oxide.		Do.
Alkyl (C_8-C_{18}) sulfate and its ammonium, calcium, magnesium, potassium, sodium, and zinc salts.		Do.
Amine salts of alkyl (C_8-C_{24}) benzenesulfonic acid (butylamine; dimethylamino propylamine; mono- and diisopropyl- amine; and mono-, di-, and triethanolamine).		Do.
Ascorbyl palmitate		Preservative
Attapulgite-type clay		Solid diluent, carrier
Barium sulfate (CAS Reg. No. 7727–43–7)		Carrier, density control agent
Benzoic acid		Preservative for formulations
Butane		Propellant
n-Butanol (CAS Reg. No. 71–36–3)		Solvent for blended emulsifiers
Butylated hydroxyanisole		Antioxidant
Butylated hydroxytoluene		Do.
α-(*p-tert*- Butylphenyl)-ω-hydroxypoly (oxyethylene) mixture of dihydrogen phosphate and monohydrogen phosphate esters and the corresponding ammonium, calcium, magnesium, monoethanolamine, potassium, sodium, and zinc salts of the phosphate esters; the poly(oxyethylene) content averages 4-12 moles.		Surfactants, related adjuvants of surfactants
Calcium carbonate		Solid diluent, carrier
Calcium chloride		Stabilizer
Calcium silicate, hydrated calcium silicate		Anticaking agent, solid diluent, carrier
Calcium stearate (CAS Reg. No. 1592–23–0)		Stabilizer, component of plastic animal tag
Calcium sulfate		Solid diluent, carrier
Calcium and sodium salts of certain sulfonated petroleum fractions (mahogany soaps); calcium salt molecular weight (in amu) 790-1,020, sodium salt molecular weight (in amu) 400-500.		Surfactants, related adjuvants of surfactants
Carbon black (CAS Reg. No. 1333–86–4)		Colorant/pigment in animal tag
Carnauba wax (CAS Reg. No. 8015–86–9)		Binder
Carrageenan, conforming to 21 CFR 172.620	Minimum molecular weight (in amu): 100,000.	Thickener
Cumene (isopropylbenzene)		Solvent, cosolvent
Cyclohexanone		Do.

Inert ingredients	Limits	Uses
D&C Green No. 6		Dye, coloring agent
D&C Red No. 17		Do.
D&C Violet No. 2		Do.
Diacetyl tartaric acid esters of mono- and diglycerides of edible fatty acids.		Emulsifier
Dialkyl (C_8-C_{18}) dimethylammonium chloride	Not more than 0.2% in silica hydrated silica.	Flocculating agent in the manufacture of silica hydrated silica for use as a solid diluent, carrier
Diatomite (diatomaceous earth)		Solid diluent, carrier
Dibutyltin dilaurate (CAS Reg. No. 77–58–7)		Component of plastic slow release tag
Dichlorodifluoromethane		Propellant
Diethylphthalate		Solvent, cosolvent
1,1-Difluoroethane (CAS Reg. No. 75–37–6)	For aerosol pesticide formulations used for insect control in food- and feed-handling establishments and animals.	Aerosol propellant
Dimethyl ether (CAS Reg. No. 115–10–6)		Propellant
3,6-Dimethyl-4-octyne-3,6-diol	Not more than 2.5% of pesticide formulation.	Surfactants, related adjuvants of surfactants
Dimethylpolysiloxane (CAS Reg. No. 9016–00–6)		Defoaming agent
α-(*o,p*-Dinonylphenyl)-ω-hydroxypoly (oxyethylene) mixture of dihydrogen phosphate and monohydrogen phosphate esters and the corresponding ammonium, calcium, magnesium, monoethanolamine, potassium, sodium, and zinc salts of the phosphate esters; the nonyl group is a propylene trimer isomer and the poly(oxyethylene) content averages 4-14 moles.		Surfactants, related adjuvants of surfactants
α-(*o,p*-Dinonylphenyl)-ω-hydroxypoly (oxyethylene), produced by the condensation of 1 mole of dinonylphenol (nonyl group is a propylene trimer isomer) with an average of 4-14 moles of ethylene oxide.		Do.
Dipropylene glycol monomethyl ether		Do.
Dodecylbenzenesulfonic acid, amine salts		Do.
α-(*p*-Dodecylphenyl)-ω-hydroxypoly (oxyethylene) produced by the condensation of 1 mole of dodecylphenol (dodecyl group is a propylene tetramer isomer) with an average of 4-14 or 30-70 moles of ethylene oxide; if a blend of products is used, the average number of moles of ethylene oxide reacted to produce any product that is a component of the blend shall be in the range of 4-14 or 30-70 moles.		Surfactants, emulsifier
Epoxidized soybean oil (CAS Reg. No. 8013–07–8)		Stabilizer, plasticizer, component animal tag
Ethyl alcohol		Solvent, cosolvent
Ethylene oxide adducts of 2,4,7,9-tetramethyl-5-decynediol, the ethylene oxide content averages 3.5, 10, or 30 moles.		Surfactants, related adjuvants of surfactants
2-Ethyl-1-hexanol	Not more than 2.5% of pesticide formulation.	Solvent, adjuvant of surfactants
Ethyl vinyl acetate (CAS Reg. No. 24937–78–8)		Component of plastic slow release tag
FD&C Blue No. 1		Dye, coloring agent
FD&C Yellow No. 6 Aluminum Lake (CAS Reg. No. 15790–07–5).	Not more than 2% by weight of pesticide formulation.	Pigment in animal tag and similar slow-release devices
Glycerol (glycerin)	Meets specifications of Food Chemicals Codex.	Solvent and thickener
Glycerol monooleate		Surfactants, related adjuvants of surfactants
Glyceryl monostearate		Emulsifier
Glyceryl tris-12-hydroxystearate		Flow control agent
Graphite		Solid diluent, carrier
n-Hexyl alcohol (CAS Reg. No. 111–27–3)		Solvent, cosolvent
2-(2′-Hydroxy-5′-methylphenyl)benzotriazole (CAS Reg. No. 2440–22–4).	Not more than 0.5% by weight of pesticide formulation.	Ultraviolet light absorber/stabilizer in animal tag and similar slow-release devices
Iron oxide (CAS Reg. No. 1309–37–1)		Colorant in pesticide formulations for animal tags
Isopropyl alcohol		Solvent, cosolvent
4,4′-Isopropylidenediphenol alkyl (C_{12}-C_{15}) phosphites (CAS Reg. No. 92908–32–2).	Not to exceed 1% of polymer	Stabilizer, component animal tag
Isopropyl myristate, CAS Reg. No. 110–27–0		Solvent
Kaolinite-type clay		Solid diluent, carrier
Kerosene, U.S.P. reagent		Solvent, cosolvent
Lactic acid		Solvent
α-Lauryl-ω-hydroxypoly(oxyethylene), average molecular weight (in amu) of 600.		Emulsifier

Inert ingredients	Limits	Uses
α-Lauryl-ω-hydroxypoly(oxyethylene) sulfate, sodium salt; the poly(oxyethylene) content is 3-4 moles.	.....	Surfactants, related adjuvants of surfactants
Lignosulfonate: ammonium, calcium, magnesium, potassium, sodium, and zinc salts.	.....	Surfactants, related adjuvants of surfactants
d-Limonene (CAS Reg. No. 5989–27–5)	.....	Solvent, fragrance
Magnesium carbonate	.....	Solid diluent, carrier
Magnesium silicate, hydrated magnesium silicate	.....	Do.
Manganous oxide	.....	Do.
Methyl alcohol	.....	Solvent, cosolvent
Methyl *n*-amyl ketone (CAS Reg. No. 110–43–0)	.....	Solvent, cosolvent
α-(Methylene (4-(1,1,3,3-tetramethylbutyl)-*o*- phenylene) bis-ω-hydroxypoly(oxyethylene) having 6-7.5 moles of ethylene oxide per hydroxyl group.	.....	Surfactants, related adjuvants of surfactants
Methyl esters of higher fatty acids conforming to 21 CFR 573.640.	.....	Antidusting agent
Methyl-*p*-hydroxybenzoate (Methyl paraben)	Meets specifications of Food Chemicals Codex; not to exceed 0.1% in formulations.	Preservative
Methyl isobutyl ketone	.....	Solvent, cosolvent
2-[Methyl [(perfluoroalkyl)alkyl(C_2-C_8)sulfonyl] amino]alkyl(C_2-C_8) acrylate—alkyl(C_2-C_8) methacrylates-*N*-methylolacrylamide copolymer:	.....	Water repellant agent
Mineral oil, U.S.P., or conforming to 21 CFR 172.878 or 178.3620(a), (b).	.....	Solvent, diluent
Mono-, di-, and trimethylnaphthalenesulfonic acids-formaldehyde condensates, sodium salts.	Not to exceed 0.006% in final formulation.	Dispersing-wetting agent in dip vat operations for large animals, such as cattle
Montmorillonite-type clay	.....	Solid diluent, carrier
Naphthalenesulfonic acid and its sodium salt	.....	Surfactants, related adjuvants of surfactants
Nitrile rubber modified acrylonitrile methylacrylate (CAS Reg. No. 27012–62–0) conforming to 21 CFR 177.1480.	.....	Component of plastic slow release tag
Nonyl, decyl, and undecyl glycoside mixture with a mixture of nonyl, decyl, and undecyl oligosaccharides and related reaction products (primarily decanol and undecanol) produced as an aqueous-based liquid (50 to 65% solids) from the reaction of primary alcohols (containing 15 to 20% secondary alcohol isomers) in a ratio of 20% C_9, 40% C_{10}, and 40% C_{11} with carbohydrates (average glucose to alkyl chain ratio 1.3 to 1.8).	.....	Surfactant
α-(*p*-Nonylphenyl)-ω-hydroxypoly(oxyethylene) mixture of dihydrogen phosphate and monohydrogen phosphate esters and the corresponding ammonium, calcium, magnesium, monoethanolamine, potassium, sodium, and zinc salts of the phosphate esters; the nonyl group is a propylene trimer isomer and the poly(oxyethylene) content averages 4-14 moles.	.....	Surfactants, related adjuvants of surfactants
α-(*p*-Nonylphenyl)-ω-hydroxypoly(oxyethylene) produced by the condensation of 1 mole of nonylphenol (nonyl group is a propylene trimer isomer) with an average of 4-15 or 30-90 moles of ethylene oxide; if a blend of products is used, the average number of moles of ethylene oxide reacted to produce any product that is a component of the blend shall be in the range of 4-15 or 30-90 moles.	.....	Surfactants, emulsifier, related adjuvants of surfactants.
α-(*p*-Nonylphenyl)-ω-hydroxypoly(oxyethylene) sulfate, and its ammonium, calcium, magnesium, potassium, sodium, and zinc salts; the nonyl group is a propylene trimer isomer and the poly(oxyethylene) content averages 4 moles.	.....	Surfactants, related adjuvants of surfactants
α-(*p*-Nonylphenyl)-ω-hydroxypoly(oxyethylene) sulfate, and its ammonium, calcium, magnesium, monoethanolamine, potassium, sodium, and zinc salts; the nonyl group is a propylene trimer isomer and the poly(oxyethylene) content averages 4-14 or 30-90 moles of ethyiene oxide.	.....	Surfactants, related adjuvants of surfactants
Octadecyl 3,5-di-*tert*-butyl-4-hydroxyhydro cinnamate (CAS Reg. No. 2082–79–3).	Not more than 0.5% by weight of pesticide formulation.	Thermal stabilizer/antioxidant in animal tag and similar slow-release devices
Octyl and decyl glucosides mixture with a mixture of octyl and decyl oligosaccharides and related reaction products (primarily *n*-decanol) produced as an aqueous-based liquid (68-72% solids) from the reaction of straight chain alcohols (C_8(45%), C_{10}) with anhydrous glucose.	.....	Do.

Inert ingredients	Limits	Uses
Octyl epoxytallate (CAS Reg. No. 61788–72–5)		Plasticizer, component animal tag
Oleic acid, conforming to 21 CFR 172.862 (CAS Reg. No. 112–80–1).		Defoaming agent
α-Oleoyl-ω-hydroxypoly(oxyethylene), average molecular weight (in amu) of 600.		Emulsifier
α-Oleoyl-ω-(oleyloxy)poly(oxyethylene) derived from α-hydro-ω-hydroxypoly(oxyethylene), molecular weight (in amu) 600.		Emulsifier, defoaming agent
Oxidized pine lignin, sodium salt (CAS Reg. No. 68201–23–0).	Maximum of 2% of formulation	Surfactant, related adjuvant of surfactant
Paraformaldehyde	Not more than 2% of pesticide formulation.	Preservative for formulation
Petroleum hydrocarbons, light, odorless, conforming to 21 CFR 172.884 or 178.3650.		Solvent, diluent
Petroleum hydrocarbons, synthetic isoparaffinic, conforming to 21 CFR 172.882 or 178.3530.		Do.
Phenol		Solvent, cosolvent
Pine lignin		Adsorbent
α-Pinene	Not more than 2% of formulation by weight.	Stabilizer
Polyethylene (CAS Reg. No. 9002–88–4) conforming to 21 CFR 172.615.		Component of plastic slow release tag
Polyethylene esters of fatty acids, conforming to 21 CFR 172.854.		Surfactants, related adjuvants of surfactants
Polyethylene glycol [α-hydro-ω-hydroxypoly(oxyethylene)]; mean molecular weight (in amu) 194 to 9,500 conforms to 21 CFR 178.3750.		Surfactants, related adjuvants of surfactants
Polyglyceryl phthalate esters of coconut oil fatty acids		Do.
Poly(methylene-*p*-*tert*- butylphenoxy)poly(oxyethylene) ethanol; the poly(oxyethylene) content averages 4-12 moles.		Do.
Poly(methylene-*p*-nonylphenoxy)poly(oxyethylene) ethanol; the poly(oxyethylene) content averages 4-12 moles.		Do.
Poly(methylene-*p*- nonylphenoxy)poly(oxypropylene) propanol; the poly(oxypropylene) content averages 4-12 moles.		Do.
Potassium hydroxide	Meeting Food Chemicals, Codex specifications.	Neutralizer
Propane		Propellant
n-Propanol		Solvent, for blended emulsifiers
2-Propenoic acid, 2-methyl-, polymer with ethyl 2-propenoate and methyl 2-methyl-2-propenoate, ammonium salt (CAS Registration No. 55989–05–4), minimum number average molecular weight (in amu), 18,900.		Encapsulating agent,dispensers, resins, fibers and beads
Propylene glycol		Solvent, cosolvent
Propylene glycol monomethyl ether		Deactivator, emmolient
Propyl gallate		Antioxidant
Propyl *p*-hydroxybenzoate (Propyl paraben)	Meets specifications of Food Chemicals Codex; not to exceed 0.1% in formulations.	Preservative
Pyrophylite		Solid diluent, carrier
Rhodamine B	Expires December 27, 2004.	Dye for use in ear tags only
Secondary alkyl (C_{11}-C_{15}) poly(oxyethylene) acetate, sodium salt; the ethylene oxide content averages 5 moles.		Surfactant
Silica, hydrated silica		Anticaking agent, solid diluent, carrier
Silica aerogel (finely powdered microcellular silica foam having a minimum silica content of 89.5%).		Component of antifoaming agent
Soapstone		Solid diluent
Sodium benzoate (CAS Reg. No. 532–32–1)		Anticaking agent/stabilizer/preservative
Sodium butylnaphthalenesulfonate		Not more than 0.5% of pesticide formulation
Sodium diisobutylnaphthalenesulfonate		Surfactants, related adjuvants of surfactants
Sodium dioctylsulfosuccinate		Do.
Sodium hydroxide		Neutralizer
Sodium isopropylisohexylnaphthalenesulfonate		Surfactants, related adjuvants of surfactants
Sodium isopropylnaphthalenesulfonate		Do.
Sodium monoalkyl and diakyl (C_8-C_{13}) phenoxybenzenedisulfonate mixtures containing not less than 70% of the monoalkylated product.		Do.
Sodium mono- and dimethylnaphthalenesulfonate, molecular weight (in amu) 245-260.		Do.

Inert ingredients	Limits	Uses
Sodium mono-, di-, and tributylnaphthalenesulfonates		Solvent, cosolvent stabilizer
Sodium *N*-oleoyl-*N*-methyl taurine	Not more than 1% of pesticide formulations.	Surfactant
Sodium starch glycolate (CAS Reg. No. 9063–38–1)	Granular and tableted products only; not to exceed 8% of the formulated product.	Disintegrant
Sodium sulfate		Solid diluent, carrier
Sorbitan fatty acid esters (fatty acids limited to C_{12}, C_{14}, C_{16}, and C_{18} containing minor amounts of associated fatty acids) and poly(oxyethylene) derivatives of sorbitan fatty acid esters; the poly(oxyethylene) content averages 16-20 moles.		Buffering agent; corrosion inhibition
Sorbitol		Antidusting agent.
Soy protein, isolated	Expires May 24, 2005.	Adhesive
Stearic acid (CAS Reg. No. 57–11–4)		Lubricant, component animal tag
α-Stearoyl-ω-hydroxypoly(oxyethylene), average molecular weight (in amu) of 600.		Emulsifier
α-Stearoyl-ω-hydroxypoly(oxyethylene); the poly(oxyethylene) content averages 8, 9, or 40 moles; if a blend of products is used, the average number of moles of ethylene oxide reacted to produce any product that is a component of the blend shall be 8, 9, or 40.		Surfactants; related adjuvants of surfactants
Sulfur (CAS Reg. No. 7704–34–9)		Stabilizer
Talc		Do.
Tall oil; fatty acids not less than 58%, rosin acids not more than 44%, unsaponifiables not more than 8%.		Surfactants, related adjuvants of surfactants
Tartrazine		Dye, coloring agent
α-[*p*-(1,1,3,3-Tetramethylbutyl)phenyl]-ω-hydroxypoly(oxyethylene) produced by the condensation of 1 mole of *p* (1,1,3,3-tetramethylbutyl)phenol with a range of 1-14 or 30-70 moles of ethylene oxide: if a blend of products is used, the average range number of moles of ethylene oxide reacted to produce any product that is a component of the blend shall be in the range of 1-14 or 30-70.		Surfactants, related adjuvants of surfactants
α-[*p*-(1,1,3,3-Tetramethylbutyl)phenyl]-ω-hydroxypoly(oxyethylene) produced by the condensation of 1 mole of *p*-(1,1,-3,3-tetramethylbutyl) phenol with an average of 4-14 or 30-70 moles of ethylene oxide; if a blend of products is used, the average number of moles of ethylene oxide reacted to produce any product that is a component of the blend shall be in the range of 4-14 or 30-70.		Surfactants, related adjuvants of surfactants
2,4,7,9-Tetramethyl-5-decyne-4.7-diol	Not more than 2.5% of pesticide formulation.	Do.
Titanium dioxide (CAS Reg. No. 13463–67–7)		Pigment/colorant in pesticide formulations for animal tag
Toluenesulfonic acid and its ammonium, calcium, magnesium, potassium, sodium, and zinc salts.		Do.
Triacetin (glyceryl triacetate)		Solvent, cosolvent
Tri-*tert*-butylphenol polyglycol ether (molecular weight (in amu) 746).		Dispersing agent
1,1,1-Trichloroethane		Solvent, cosolvent
Trichlorofluoromethane		Propellant
Tridecylpoly(oxyethylene) acetate sodiums salt; where the ethylene oxide content averages 6-7 moles.		Surfactants, related adjuvants of surfactants
Triethylene glycol diacetate (CAS Reg. No. 111–21–7)	For use on beef cattle only	Solvent
Trisodium phosphate		Precipitant, buffer, filler
Ultramarine blue(CAS Reg. No. 57455–37–5)	Not more than 1.5% of pesticide formulation.	Pigment/colorant in animal tag
Wheat shorts	Expires May 24, 2005.	Solid diluent
Wood rosin acid, potassium salts, conforming to 21 CFR 178.3870.		Surfactants, related adjuvants of surfactants
Xylene		Solvent, cosolvent
Xylenesulfonic acid and its ammonium, calcium, magnesium, potassium, sodium, and zinc salts.		Surfactants, related adjuvants of surfactants
Zinc oxide		Solid diluent, carrier
Zinc stearate, conforming to 21 CFR 182.5994 and 582.5994.		Water repellant, dessicant, and coating agent.
Zinc stearate (CAS Reg. No. 557–05–1)		Water repellant, desiccant, and coating agent; stabilizer, component of plastic animal tag

Inert ingredients	Limits	Uses
Zinc sulfate (basic and monohydrate)		Water repellant, dessicant, and coating agent

■ 12. Section 180.940 is added to subpart D to read as follows:

§ 180.940 Tolerance exemptions for active and inert ingredients for use in antimicrobial formulations (Food-contact surface sanitizing solutions).

Residues of the following chemical substances are exempted from the requirement of a tolerance when used in accordance with good manufacturing practice as ingredients in an antimicrobial pesticide formulation, provided that the substance is applied on a semi-permanent or permanent food-contact surface (other than being applied on food packaging) with adequate draining before contact with food.

(a) The following chemical substances when used as ingredients in an antimicrobial pesticide formulation may be applied to: Food-contact surfaces in public eating places, dairy-processing equipment, and food-processing equipment and utensils.

Pesticide Chemical	CAS Reg. No.	Limits
Acetic acid	64–19–7	When ready for use, the end-use concentration is not to exceed 290 ppm
α-Alkyl(C_{10}-C_{14})-ω-hydroxypoly (oxyethylene) poly(oxypropylene) average molecular weight (in amu), 768 to 837	None	None
α-Alkyl(C_{12}-C_{18})-ω-hydroxypoly (oxyethylene) poly(oxypropylene) average molecular weight (in amu), 950 to 1120	None	None
Ammonium chloride	12125–02–9	When ready for use, the end-use concentration is not to exceed 48 ppm
Ethanol	64–17–5	None
Ethylenediaminetetraacetic acid (EDTA), tetrasodium salt	64–02–8	None
Hydrogen peroxide	7722–84–1	When ready for use, the end-use concentration is not to exceed 91 ppm
Hypochlorous acid, sodium salt	7681–52–9	When ready for use, the end-use concentration of all hypochlorous acid chemicals in the solution is not to exceed 200 ppm determined as total available chlorine
Iodine	7553–56–2	When ready for use, the total end-use concentration of all iodide-producing chemicals in the solution is not to exceed 25 ppm of titratable iodine
Magnesium oxide	1309–48–4	None
Methylene blue	61–73–4	When ready for use, the end-use concentration is not to exceed 0.4 ppm
α-(p-Nonylphenyl)-ω-hydroxypoly (oxyethylene) average poly(oxyethylene) content 11 moles)	None	None
Octadecanoic acid, calcium salt	1592–23–0	None
1-Octanesulfonic acid, sodium salt	5324–84–5	When ready for use, the end-use concentration is not to exceed 46 ppm
Octanoic acid	124–07–2	When ready for use, the end-use concentration is not to exceed 52 ppm
Oxirane, methyl-, polymer with oxirane, minimum molecular weight (in amu), 1900	9003–11–6	None
Peroxyacetic acid	79–21–0	When ready for use, the end-use concentration is not to exceed 58 ppm
Peroxyoctanoic acid	33734–57–5	When ready for use, the end-use concentration is not to exceed 52 ppm
Phosphonic acid, (1-hydroxyethylidene)bis-	2809–21–4	When ready for use, the end-use concentration is not to exceed 14 ppm
Phosphoric acid, trisodium salt	7601–54–9	When ready for use, the end-use concentration is not to exceed 5916 ppm
Potassium bromide	7758–02–3	When ready for use, the end-use concentration is not to exceed 46 ppm total available halogen
Potassium iodide	7681–11–0	When ready for use, the total end-use concentration of all iodide-producing chemicals in the solution is not to exceed 25 ppm of titratable iodine
Potassium permanganate	7722–64–7	When ready for use, the end-use concentration is not to exceed 0.7 ppm
2-Propanol (isopropanol)	67–63–0	None
Quaternary ammonium compounds, alkyl (C_{12}-C_{18}) benzyldimethyl, chlorides	8001–54–5	When ready for use, the end-use concentration of all quaternary chemicals in the solution is not to exceed 200 ppm of active quaternary compound
Quaternary ammonium compounds, n-alkyl (C_{12}-C_{14}) dimethyl ethylbenzyl ammonium chloride, average molecular weight (in amu), 377 to 384	None	When ready for use, the end-use concentration of all quaternary chemicals in the solution is not to exceed 200 ppm of active quaternary compound

Pesticide Chemical	CAS Reg. No.	Limits
Quaternary ammonium compounds n-alkyl (C_{12}-C_{18}) dimethyl ethylbenzyl ammonium chloride average molecular weight (in amu) 384	None	When ready for use, the end-use concentration of all quaternary chemicals in the solution is not to exceed 200 ppm of active quaternary compound
Quaternary ammonium compounds di-n-alkyl (C_8-C_{10}) dimethyl ammonium chloride, average molecular weight (in amu), 332 to 361	None	When ready for use, the end-use concentration of this specific quaternary compound is not to exceed 150 ppm of active quaternary compound; the end-use concentration of all quaternary chemicals in the solution is not to exceed 200 ppm of active quaternary compound
Sodium bicarbonate	144–55–8	None
Sulfuric acid monododecyl ester, sodium salt (sodium lauryl sulfate)	151–21–3	When ready for use, the end-use concentration is not to exceed 3 ppm
1,3,5-Triazine-2,4,6(1H,3H,5H)-trione, 1,3-dichloro-, sodium salt	2893–78–9	When ready for use, the end-use concentration of all di- or trichloroisocyanuric acid chemicals in the solution is not to exceed 100 ppm determined as total available chlorine

(b) The following chemical substances when used as ingredients in an antimicrobial pesticide formulation may be applied to: Dairy processing equipment, and food-processing equipment and utensils.

Pesticide Chemical	CAS Reg. No.	Limits
Acetic acid	64–19–7	When ready for use, the end-use concentration is not to exceed 686 ppm
Acetic acid, chloro-, sodium salt, reaction products with 4,5-dihydro-2-undecyl-1H-imidazole-1-ethanol and sodium hydroxide	68608–66–2	When ready for use, the end-use concentration is not to exceed 42 ppm chloroacetic acid
Benzenesulfonic acid, dodecyl-	27176–87–0	When ready for use, the end-use concentration is not to exceed 5.5 ppm
Butanedioic acid, octenyl-	28805–58–5	When ready for use, the end-use concentration is not to exceed 156 ppm
Butoxy monoether of mixed (ethylene-propylene) polyalkylene glycol, minimum average molecular weight (in amu), 2400	None	None
Calcium chloride	10043–52–4	When ready for use, the end-use concentration is not to exceed 17 ppm
n-Carboxylic acids (C_6-C_{12}), consisting of a mixture of not less than 56% octanoic acid and not less than 40% decanoic acid	None	When ready for use, the end-use concentration is not to exceed 39 ppm
Decanoic acid	334–48–5	When ready for use, the end-use concentration is not to exceed 90 ppm
Ethanesulfonic acid, 2-[cyclohexyl (1-oxohexadecyl) amino]-, sodium salt	132–43–4	When ready for use, the end-use concentration is not to exceed 237 ppm
Ethylenediaminetetraacetic acid (EDTA), disodium salt	139–33–3	When ready for use, the end-use concentration is not to exceed 1400 ppm
FD&C Yellow No. 5 (Tartrazine) (conforming to 21 CFR 74.705)	1934–21–0	None
D-Gluconic acid, monosodium salt	527–07–1	When ready for use, the end-use concentration is not to exceed 760 ppm
Hydriodic acid	10034–85–2	When ready for use, the total end-use concentration of all iodide-producing chemicals is not to exceed 25 ppm of titratable iodine
Hydrogen peroxide	7722–84–1	When ready for use, the end-use concentration is not to exceed 465 ppm
Hypochlorous acid	7790–92–3	When ready for use, the end-use concentration of all hypochlorous acid chemicals in the solution is not to exceed 200 ppm determined as total available chlorine
Iodine	7553–56–2	When ready for use, the total end-use concentration of all iodide-producing chemicals in the solution is not to exceed 25 ppm of titratable iodine
Lactic acid	50–21–5	When ready for use, the end-use concentration is not to exceed 138 ppm
α-Lauroyl-ω-hydroxypoly (oxyethylene) with an average of 8-9 moles ethylene oxide, average molecular weight (in amu), 400	None	None
Nonanoic acid	112–05–0	When ready for use, the end-use concentration is not to exceed 90 ppm
1-Octanamine, N,N-dimethyl-	7378–99–6	When ready for use, the end-use concentration is not to exceed 113 ppm

Pesticide Chemical	CAS Reg. No.	Limits
1,2-Octanedisulfonic acid	113669–58–2	When ready for use, the end-use concentration is not to exceed 102 ppm
1-Octanesulfonic acid	3944–72–7	When ready for use, the end-use concentration is not to exceed 172 ppm
1-Octanesulfonic acid, sodium salt	5324–84–5	When ready for use, the end-use concentration is not to exceed 297 ppm
1-Octanesulfonic acid, 2-sulfino-	113652–56–5	When ready for use, the end-use concentration is not to exceed 102 ppm
Octanoic acid	124–07–2	When ready for use, the end-use concentration is not to exceed 176 ppm
Oxirane, methyl-, polymer with oxirane, ether with (1,2-ethanediyldinitrilo)tetrakis [propanol] (4:1)	11111–34–5	When ready for use, the end-use concentration is not to exceed 20 ppm
Oxychloro species (including chlorine dioxide) generated by acidification of an aqueous solution of sodium chlorite	None	When ready for use, the end-use concentration is not to exceed 200 ppm of chlorine dioxide as determined by the method titled, Iodometric Method for the Determination of Available Chlorine Dioxide (50-250 ppm available chlorine dioxide)
Peroxyacetic acid	79–21–0	When ready for use, the end-use concentration is not to exceed 315 ppm
Peroxyoctanoic acid	33734–57–5	When ready for use, the end-use concentration is not to exceed 122 ppm
Phosphonic acid, (1-hydroxyethylidene)bis-	2809–21–4	When ready for use, the end-use concentration is not to exceed 34 ppm
Phosphoric acid	7664–38–2	None
Phosphoric acid, monosodium salt	7558–80–7	When ready for use, the end-use concentration is not to exceed 350 ppm
Potassium iodide	7681–11–0	When ready for use, the total end-use concentration of all iodide-producing chemicals in the solution is not to exceed 25 ppm of titratable iodine
Propanoic acid	79–09–4	When ready for use, the end-use concentration is not to exceed 297 ppm
2-Propanol (isopropanol)	67–63–0	None
2,6-Pyridinedicarboxylic acid	499–83–2	When ready for use, the end-use concentration is not to exceed 1.2 ppm
Sodium mono-and didodecylphenoxy-benzenedisulfonate	None	When ready for use, the end-use concentration is not to exceed 1920 ppm
Sulfuric acid	7664–93–9	When ready for use, the end-use concentration is not to exceed 288 ppm
Sulfuric acid monododecyl ester, sodium salt (sodium lauryl sulfate)	151–21–3	When ready for use, the end-use concentration is not to exceed 350 ppm

(c) The following chemical substances when used as ingredients in an antimicrobial pesticide formulation may be applied to: Food-processing equipment and utensils.

Pesticide Chemical	CAS Reg. No.	Limits
Acetic acid	64–19–7	When ready for use, the end-use concentration is not to exceed 686 ppm
Acetic acid, chloro-, sodium salt, reaction products with 4,5-dihydro-2-undecyl-1H-imidazole-1-ethanol and sodium hydroxide	68608–66–2	When ready for use, the end-use concentration is not to exceed 42 ppm chloroacetic acid
α-Alkyl(C_{10}-C_{14})-ω-hydroxypoly (oxyethylene) poly (oxypropylene) average molecular weight (in amu), 768 to 837	None	None
α-Alkyl(C_{11}-C_{15})-ω-hydroxypoly (oxyethylene) with ethylene oxide content 9 to 13 moles	None	None
α-Alkyl(C_{12}-C_{15})-ω-hydroxypoly (oxyethylene) polyoxypropylene, average molecular weight (in amu), 965	None	None
α-Alkyl(C_{12}-C_{18})-ω-hydroxypoly (oxyethylene) poly(oxypropylene) average molecular weight (in amu), 950 to 1120	None	None
Alkyl (C_{12}-C_{15}) monoether of mixed (ethylene-propylene) polyalkylene glycol, cloud point of 70 - 77°C in 1% aqueous solution, average molecular weight (in amu), 807	None	None

Pesticide Chemical	CAS Reg. No.	Limits
Ammonium chloride	12125–02–9	When ready for use, the end-use concentration is not to exceed 48 ppm
Benzenesulfonamide, N-chloro-4-methyl, sodium salt	127–65–1	None
Benzenesulfonic acid, dodecyl-	27176–87–0	When ready for use, the end-use concentration is not to exceed 400 ppm
Benzenesulfonic acid, dodecyl-, sodium salt	25155–30–0	When ready for use, the end-use concentration is not to exceed 430 ppm
Benzenesulfonic acid, oxybis[dodecyl-	30260–73–2	When ready for use, the end-use concentration is not to exceed 474 ppm
[1,1'-Biphenyl]-2-ol	90–43–7	When ready for use, the end-use concentration is not to exceed 400 ppm
Boric acid, sodium salt	7775–19–1	None
Butanedioic acid, octenyl-	28805–58–5	When ready for use, the end-use concentration is not to exceed 156 ppm
Butanedioic acid, sulfo-, 1,4-dioctyl ester, sodium salt	1639–66–3	None
Butoxy monoether of mixed (ethylene-propylene) polyalkylene glycol, cloudpoint of 90 - 100°C in 0.5 aqueous solution, average molecular weight (in amu), 3300	None	None
Butoxy monoether of mixed (ethylene-propylene) polyalkylene glycol, minimum average molecular weight (in amu), 2400	None	None
Calcium bromide	7789–41–5	When ready for use, the end-use concentration of all bromide-producing chemicals in the solution is not to exceed 200 ppm total available halogen
Calcium chloride	10043–52–4	When ready for use, the end-use concentration is not to exceed 17 ppm
n-Carboxylic acids (C_6-C_{12}), consisting of a mixture of not less than 56% octanoic acid and not less than 40% decanoic acid	None	When ready for use, the end-use concentration is not to exceed 39 ppm
3-Cyclohexene-1-methanol,α,α,4-trimethyl-	98–55–5	None
1-Decanaminium, N-decyl-N, N-dimethyl-, chloride	7173–51–5	When ready for use, the end-use concentration is not to exceed 200 ppm of active quaternary compound
Decanoic acid	3347–48–5	When ready for use, the end-use concentration is not to exceed 234 ppm
Ethanesulfonic acid, 2-[cyclohexyl (1-oxohexadecyl) amino]-, sodium salt	132–43–4	When ready for use, the end-use concentration is not to exceed 237 ppm
Ethanol	64–17–5	None
Ethanol, 2 butoxy-	111–76–2	None
Ethanol, 2-(2-ethoxyethoxy)-	111–90–0	None
Ethylenediaminetetraacetic acid (EDTA), disodium salt	139–33–3	When ready for use, the end-use concentration is not to exceed 1400 ppm
Ethylenediaminetetraacetic acid (EDTA), tetrasodium salt	64–02–8	None
Fatty acids, coco, potassium salts	61789–30–8	None
Fatty acids, tall-oil, sulfonated, sodium salts	68309–27–3	When ready for use, the end-use concentration is not to exceed 66 ppm
FD&C Yellow No. 5 (Tartrazine) (conforming to 21 CFR 74.705)	1934–21–0	None
D-Gluconic acid, monosodium salt	527–07–1	When ready for use, the end-use concentration is not to exceed 760 ppm
Hydriodic acid	10034–85–2	When ready for use, the total end-use concentration of all iodide-producing chemicals in the solution is not to exceed 25 ppm of titratable iodine
Hydrogen peroxide	7722–84–1	When ready for use, the end-use concentration is not to exceed 1100 ppm
Hypochlorous acid	7790–92–3	When ready for use, the end-use concentration of all hypochlorous acid chemicals in the solution is not to exceed 200 ppm determined as total available chlorine
Hypochlorous acid, calcium salt	7778–54–3	When ready for use, the end-use concentration of all hypochlorous acid chemicals in the solution is not to exceed 200 ppm determined as total available chlorine
Hypochlorous acid, lithium salt	13840–33–0	When ready for use, the end-use concentration of all hypochlorous acid chemicals in the solution is not to exceed 200 ppm determined as total available chlorine and 30 ppm lithium
Hypochlorous acid, potassium salt	7778–66–7	When ready for use, the end-use concentration of all hypochlorous acid chemicals in the solution is not to exceed 200 ppm determined as total available chlorine

Pesticide Chemical	CAS Reg. No.	Limits
Hypochlorous acid, sodium salt	7681–52–9	When ready for use, the end-use concentration of all hypochlorous acid chemicals in the solution is not to exceed 200 ppm determined as total available chlorine
Iodine	7553–56–2	When ready for use, the total end-use concentration of all iodide-producing chemicals in the solution is not to exceed 25 ppm of titratable iodine
Lactic acid	50–21–5	None
α-Lauroyl-ω-hydroxypoly (oxyethylene) with an average of 8-9 moles ethylene oxide, average molecular weight (in amu), 400	None	None
Magnesium oxide	1309–48–4	None
Methylene blue	61–73–4	When ready for use, the end-use concentration is not to exceed 0.4 ppm
Naphthalene sulfonic acid, sodium salt	1321–69–3	When ready for use, the end-use concentration of all naphthalene sulfonate chemicals in the solution is not to exceed 332 ppm naphthalene sulfonates
Naphthalene sulfonic acid sodium salt, and its methyl, dimethyl and trimethyl derivatives	None	When ready for use, the end-use concentration of all naphthalene sulfonate chemicals in the solution is not to exceed 332 ppm naphthalene sulfonates
Naphthalene sulfonic acid sodium salt, and its methyl, dimethyl and trimethyl derivatives alkylated at 3% by weight with C_6-C_9 linear olefins	None	When ready for use, the end-use concentration of naphthalene sulfonate chemicals in the solution is not to exceed 332 ppm naphthalene sulfonates
Neodecanoic acid	26896–20–8	When ready for use, the end-use concentration is not to exceed 174 ppm
Nonanoic acid	112–05–0	When ready for use, the end-use concentration is not to exceed 90 ppm
α-(p-Nonylphenyl)-ω-hydroxypoly (oxyethylene) maximum average molecular weight (in amu), 748	None	None
α-(p-Nonylphenol)-ω-hydroxypoly (oxyethylene) average poly(oxyethylene) content 11 moles	None	None
α-(p-Nonylphenyl)-ω-hydroxypoly (oxyethylene) produced by the condensation of 1 mole p-nonylphenol with 9 to 12 moles ethylene oxide	None	None
α-(p-Nonylphenyl)-ω-hydroxypoly (oxyethylene), 9 to 13 moles ethylene oxide	None	None
Octadecanoic acid, calcium salt	1592–23–0	None
9-Octadecenoic acid (9Z)-, sulfonated	68988–76–1	When ready for use, the end-use concentration is not to exceed 312 ppm
9-Octadecenoic acid (9Z)-sulfonated, sodium salts	68443–05–0	When ready for use, the end-use concentration is not to exceed 200 ppm
1-Octanamine, N,N-dimethyl-	7378–99–6	When ready for use, the end-use concentration is not to exceed 113 ppm
1,2-Octanedisulfonic acid	113669–58–2	When ready for use, the end-use concentration is not to exceed 102 ppm
1-Octanesulfonic acid	3944–72–7	When ready for use, the end-use concentration is not to exceed 172 ppm
1-Octanesulfonic acid, sodium salt	5324–84–5	When ready for use, the end-use concentration is not to exceed 312 ppm
1-Octanesulfonic acid, 2-sulfino-	113652–56–5	When ready for use, the end-use concentration is not to exceed 102 ppm
Octanoic acid	124–07–2	When ready for use, the end-use concentration is not to exceed 234 ppm
Oxirane, methyl-, polymer with oxirane, minimum molecular weight (in amu), 1900	9003–11–6	None
Oxirane, methyl-, polymer with oxirane, block, average molecular weight (in amu), 1900	106392–12–5	None
Oxirane, methyl-, polymer with oxirane, block, minimum average molecular weight (in amu), 2000	None	None
Oxirane, methyl-, polymer with oxirane, block, 27 to 31 moles of polyoxypropylene, average molecular weight (in amu) 2000	None	None
Oxirane, methyl-, polymer with oxirane, ether with (1,2-ethanediyldinitrilo)tetrakis [propanol] (4:1)	11111–34–5	When ready for use, the end-use concentration is not to exceed 20 ppm
Oxychloro species (predominantly chlorite, chlorate and chlorine dioxide in an equilibrium mixture) generated either (i) by directly metering a concentrated chlorine dioxide solution prepared just prior to use, into potable water, or (ii) by acidification of an aqueous alkaline solution of oxychloro species (predominately chlorite and chlorate) followed by dilution with potable water	None	When ready for use, the end-use concentration is not to exceed 200 ppm of chlorine dioxide as determined by the method titled, ≥Iodometric Method for the Determination of Available Chlorine Dioxide (50-250 ppm available chlorine dioxide)

Pesticide Chemical	CAS Reg. No.	Limits
Oxychloro species (including chlorine dioxide) generated by acidification of an aqueous solution of sodium chlorite	None	When ready for use, the end-use concentration is not to exceed 200 ppm of chlorine dioxide as determined by the method titled, ≥Iodometric Method for the Determination of Available Chlorine Dioxide (50-250 ppm available chlorine dioxide)
2,4-Pentanediol, 2-methyl-	107–41–5	None
Peroxyacetic acid	79–21–0	When ready for use, the end-use concentration is not to exceed 315 ppm
Peroxyoctanoic acid	33734–57–5	When ready for use, the end-use concentration is not to exceed 122 ppm
Phenol, 4-chloro-2-(phenylmethyl)-	120–32–1	When ready for use, the end-use concentration is not to exceed 320 ppm
Phenol, 4-(1,1-dimethylpropyl)-	80–46–6	When ready for use, the end-use concentration is not to exceed 80 ppm
Phosphonic acid, (1-hydroxyethylidene)bis-	2809–21–4	When ready for use, the end-use concentration is not to exceed 34 ppm
Phosphoric acid	7664–38–2	None
Phosphoric acid, monosodium salt	7558–80–7	When ready for use, the end-use concentration is not to exceed 350 ppm
Phosphoric acid, trisodium salt	7601–54–9	When ready for use, the end-use concentration is not to exceed 5916 ppm
Poly(oxy-1,2-ethanediyl), α-[(1,1,3,3-tetramethylbutyl) phenyl]-ω-hydroxy-, produced with one mole of the phenol and 4 to 14 moles ethylene oxide	None	None
Potassium bromide	7758–02–3	When ready for use, the end-use concentration of all bromide-producing chemicals in the solution is not to exceed 200 ppm total available halogen
Potassium iodide	7681–11–0	When ready for use, the total end-use concentration of all iodide-producing chemicals in the solution is not to exceed 25 ppm of titratable iodine
Potassium permanganate	7722–64–7	When ready for use, the end-use concentration is not to exceed 0.7 ppm
Propanoic acid	79–09–4	When ready for use, the end-use concentration is not to exceed 297 ppm
2-Propanol (isopropanol)	67–63–0	None
2,6-Pyridinedicarboxylic acid	499–83–2	When ready for use, the end-use concentration is not to exceed 1.2 ppm
Quaternary ammonium compounds, alkyl (C_{12}-C_{18}) benzyldimethyl, chlorides	8001–54–5	When ready for use, the end-use concentration of this specific quaternary compound is not to exceed 200 ppm within the end-use total concentration that is not to exceed 400 ppm active quaternary compound
Quaternary ammonium compounds, n-alkyl (C_{12}-C_{14}) dimethyl ethylbenzyl ammonium chloride, average molecular weight (in amu), 377 to 384	None	When ready for use, the end-use concentration of this specific quaternary compound is not to exceed 200 ppm within the end-use total concentration that is not to exceed 400 ppm active quaternary compound
Quaternary ammonium compounds, n-alkyl (C_{12}-C_{18}) dimethyl ethylbenzyl ammonium chloride average molecular weight (in amu) 384	None	When ready for use, the end-use concentration of this specific quaternary compound is not to exceed 200 ppm within the end-use total concentration that is not to exceed 400 ppm active quaternary compound
Quaternary ammonium compounds, di-n-Alkyl (C_8-C_{10}) dimethyl ammonium chloride, average molecular weight (in amu), 332 to 361	None	When ready for use, the end-use concentration of this specific quaternary compound is not to exceed 240 ppm within the end-use total concentration that is not to exceed 400 ppm active quaternary compound
Sodium-α-alkyl(C_{12}-C_{15})-ω-hydroxypoly (oxyethylene) sulfate with the poly(oxyethylene) content averaging one mole	None	None
Sodium bicarbonate	144–55–8	None
Sodium bromide	7647–15–6	When ready for use, the end-use concentration of all bromide-producing chemicals in the solution is not to exceed 200 ppm total available halogen
Sodium iodide	7681–82–5	When ready for use, the total end-use concentration of all iodide-producing chemicals in the solution is not to exceed 25 ppm of titratable iodine
Sodium mono-and didodecylphenoxy-benzenedisulfonate	None	When ready for use, the end-use concentration is not to exceed 1920 ppm
Sulfuric acid	7664–93–9	When ready for use, the end-use concentration is not to exceed 228 ppm

Pesticide Chemical	CAS Reg. No.	Limits
Sulfuric acid monododecyl ester, sodium salt (sodium lauryl sulfate)	151–21–3	None
1,3,5-Triazine-2,4,6(1H,3H,5H)-trione, 1,3-dichloro-	2782–57–2	When ready for use, the end-use concentration of all di- or trichloroisocyanuric acid chemicals in the solution is not to exceed 100 ppm determined as total available chlorine
1,3,5-Triazine-2,4,6(1H,3H,5H)-trione, 1,3-dichloro-, potassium salt	2244–21–5	When ready for use, the end-use concentration of all di- or trichloroisocyanuric acid chemicals in the solution is not to exceed 100 ppm determined as total available chlorine
1,3,5-Triazine-2,4,6(1H,3H,5H)-trione, 1,3-dichloro-, sodium salt	2893–78–9	When ready for use, the end-use concentration of all di- or trichloroisocyanuric acid chemicals in the solution is not to exceed 100 ppm determined as total available chlorine
1,3,5-Triazine-2,4,6(1H,3H,5H)-trione, 1,3,5-trichloro-	87–90–1	When ready for use, the end-use concentration of all di- or trichloroisocyanuric acid chemicals in the solution is not to exceed 100 ppm determined as total available chlorine
1,3,5-Triazine, N,N',N''-trichloro-2,4,6-triamino-	7673–09–8	When ready for use, the end-use concentration of all di- or trichloroisocyanuric acid chemicals in the solution is not to exceed 200 ppm determined as total available chlorine
Xylenesulfonic acid, sodium salt	1300–72–7	When ready for use, the end-use concentration is not to exceed 62 ppm

§ 180.1001 [Removed]

■ 13. Section 180.1001 is removed.

■ 14. In § 180.1067, paragraph (b) is revised to read as follows:

§ 180.1067 Methyl eugenol and malathion combination; exemption from the requirement of a tolerance.

* * * * *

(b) This combination is to be impregnated on a carrier (cigarette filter tips (cellulose acetate); cotton strings; fiberboard squares) or mixed with a jel cleared under 40 CFR 180.920 or 180.950.

* * * * *

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–2004–0067; FRL–7351–6]

Citronellol; Exemption from the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of the citronellol on all food commodity when applied/used to control Tetranychid mites. Natural Plant Protection S.A. submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of citronellol.

DATES: This regulation is effective April 28, 2004. Objections and requests for hearings, identified by docket ID number OPP–2004–0067, must be received on or before June 28, 2004.

ADDRESSES: To submit a written objection or hearing request follow the detailed instructions as provided in Unit VIII. of the **SUPPLEMENTARY INFORMATION**. EPA has established a docket for this action under docket ID number OPP–2004–0067. 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., Confidential Business Information (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, 1921 Jefferson Davis Hwy., 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: Raderrio Wilkins, Biopesticides and Pollution Prevention Division (7511C), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–1259; e-mail address: *Wilkins.Raderrio@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)
- Pesticide manufacturing (NAICS 32532)
- Food manufacturing (NAICS 311)

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**.

B. How Can I Access Electronic Copies of this Document and Other Related Information?

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/*.

II. Background and Statutory Findings

In the **Federal Register** of May 23, 2000 (65 FR 33318) (FRL–6557–1), EPA issued a notice pursuant to section 408(d)(3) of the FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide tolerance petition (0F6145) by Natural Plant Protection S.A., 4061 North 156th Drive, Goodyear, AZ 85338. This notice included a summary of the petition prepared by the petitioner Natural Plant Protection S.A.There were no comments received in response to the notice of filing.

The petition requested that 40 CFR part 180 be amended by establishing a temporary exemption from the requirement of a tolerance for residues of citronellol.

Section 408(c)(2)(A)(i) of the FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is "safe." Section 408(c)(2)(A)(ii) of the FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Pursuant to section 408(c)(2)(B), in establishing or maintaining in effect an exemption from the requirement of a tolerance, EPA must take into account the factors set forth in section 408(b)(2)(C), which require EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . ." Additionally, section 408(b)(2)(D) of the FFDCA requires that the Agency consider "available information concerning the cumulative effects of a particular pesticide's residues" and "other substances that have a common mechanism of toxicity."

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides. Second, EPA examines exposure to the pesticide through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings.

III. Toxicological Profile

Consistent with section 408(b)(2)(D) of the FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness, and reliability and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Citronellol is a monoterpene alcohol found in over 30 essential oils, and is widely used as a fragrance component in the manufacture of perfumes, cosmetics, detergents and household cleaners. It is a naturally occurring substance in black currants, certain other fruits, wines, beer, and black tea. This chemical is also used as a synthetic flavoring agent in alcoholic and non-alcoholic beverages, and as a spice. Citronellol is generally regarded as safe (GRAS) under section 409 of FFDCA (21 CFR 172.515) as a synthetic flavoring agent and adjuvant which is permitted to be added directly to food for human consumption. It is also contained in approximately 25 essential oils, oleoresins and plant extracts that are GRAS under section 409 of FFDCA (21 CFR 182.20). The toxicity studies submitted in support of this tolerance exemption are referenced below.

1. *Acute oral toxicity (OPPTS Harmonized Guideline 870.1100; 152–10; MRID 45262003).* Male and female Sprague-Dawley rats were tested with a single exposure to a pesticide product containing an active ingredient, citronellol, at 0.42% of the product. The pesticide was tested at doses ranging from 2,500 to 5,500 milligrams/kilogram/body weight (mg/kg/bwt) and observed for 14 days. The oral lethal dose $(LD)_{50}$ for males and females were 5,242 mg/kg and 3,573 mg/kg, respectively. Classification: Acceptable. Toxicity Category III, based on the LD_{50} of female Sprague-Dawley rats.

2. *Acute dermal toxicity (OPPTS Harmonized Guideline 870.1200; 152–11; MRID 45262004).* Male and female New Zealand white rabbits were given 5,050 mg/kg of a pesticide product containing an active ingredient, citronellol, at 0.42% of the product, and observed for 14 days. Classification: Acceptable. Toxicity Category: IV.

3. *Acute inhalation toxicity (OPPTS Harmonized Guideline 870.1300; 152–12; MRID 45262005).* Male and female Sprague-Dawley rats were exposed for 4 hours to an atomospheric concentration of 2.64 mg/L of a pesticide product containing citronellol as an active ingredient and observed for 14 days. The acute inhalation LC_{50} was > 2.64 mg/L. Classification: Acceptable. Toxicity Category: IV.

4. *Primary eye irritation (OPPTS Harmonized Guideline 870.2400; 152–13; MRID 45262006).* An acute eye irritation study was conducted in male and female albino New Zealand white rabbits using a pesticide product containing an active ingredient, citronellol, at 0.42% of the product. The test substance was moderately irritating to the eyes of the test animals, causing corneal opacitiy (cloudiness) and conjunctivitis (redness) that cleared within 10 days following this exposure. Classification: Acceptable. Toxicity: Category II.

5. *Primary dermal irritation (OPPTS Harmonized Guideline 870.2500; 152–14; MRID 45262007).* The shaved skin of male and female New Zealand White rabbits was exposed to a single 0.5 mL dose of a pesticide product containing the active ingredient, citronellol, at 0.42% of the product. for 4 hours and observed for 14 days for signs of skin irritation. The test substance was moderately irritating to the skin of the test animals, causing very slight to well-defined erythema (skin redness) that cleared within 14 days following exposure. Classification: Acceptable. Toxicity Category: III.

6. *Hypersensitivity (OPPTS Harmonized Guideline 870.2500; 152–15; MRID 45262008).* The shaved skin of male and female Hartley guinea pigs was treated once weekly for 3 weeks with a pesticide product containing the active ingredient, citronellol, at 0.42% of the product. Skin redness (irritation) followed each treatment cleared within 48 hours. A challenge dose was given to an untreated site, and the animals observed for signs of allergic reaction (hypersensitiity) to the test material. The treated test and naive control animals showed no allergenicity (swelling, redness) at 24 and 48 hours after this challenge dose. The pesticide product was not a dermal sensitizer in Hartley guinea pigs. Classification: Acceptable.

The pesticide registrant requested waivers of required studies on the technical grade of the active ingredient

for acute toxicity, genotoxicity, reproductive toxicity, developmental toxicity, subchronic toxicity in mammalian species, and acute toxicity to non-target species. The waivers were based on the ubiquity of citronellol in nature; the long history of its use in cosmetics, fragrances, detergents, and household cleaners; the natural occurrence in fruits and beverages; the widespread use as a synthetic flavoring agent and adjuvant; and the low anticipated exposure to humans and the environment due to the very low concentration of citronellol in the pesticide product. In addition, data on the toxicity of citronellol from publicly available technical literature was presented to the Agency (MRID 452620–10) for acute oral toxicity in the rat (Toxicity Category III), acute dermal toxicity (Toxicity Category IV, no species indicated), dermal irritation (moderate in humans), and mutagenicity/genotoxicity (negative in Ames assay in three *Salmonella typhimurium* strains tested at 100 g). Toxicity data were also submitted for citronellyl acetate (and other esters of citronellol), which is widely used as a flavoring agent. According to the World Health Organization (WHO), dietary intake of citronellol is estimated, based on the quantity of citronellyl acetate consumed in the diet (Food Additives Series 40; 49*th* meeting of the Joint FAO/WHO Expert Committee on Food Additives (JEFCA), 1998). The rationale for the use of citronellyl acetate toxicity data to estimate the dietary toxicity of citronellol is based on data demonstrating that citronellyl acetate is readily hydrolyzed to citronellol in the intestines of mammals, and that citronellol is further metabolized to non-toxic, polar compounds that are excreted in the urine (JEFCA 1998). Data obtained from toxicity studies using citronellyl acetate as the test substance demonstrated an acute oral Toxicity Category IV in rat; no adverse effects with an oral dose of 290 mg/kg/day for 14 days and 13 weeks in mice, and no adverse effects in a chronic dietary/carcinogenicity study in rats fed 290 mg/kg/day for 103 weeks. Further, based on the data submitted by the registrant for the pesticide product, data on citronellol from the public literature, and the data on citronellyl acetate form the public literature, the no adverse effects to humans would be anticipated via acute, subchronic, or chronic dietary exposures to citronellol, particularly at the low levels of citronellol in the pesticide product under consideration for registration by the Agency.

IV. Aggregate Exposures

In examining aggregate exposure, section 408 of the FFDCA directs EPA to consider available information concerning exposures from the pesticide residue in food and all other non-occupational exposures, including drinking water from ground water or surface water and exposure through pesticide use in gardens, lawns, or buildings (residential and other indoor uses).

A. Dietary Exposure

1. *Food.* Dietary exposure is expected to occur for most, if not all individuals to citronellol primarily from the consumption of fruits, beverages, food seasonings and use as a flavoring agent/adjuvant in a wide variety of foods. The end-use product contains a low concentration of citronellol (0.42%) which is further reduced by dilution with water (no less than approximately 1:156 v/v) prior to application. Based on the extremely low application rate required to achieve the desired pesticidal effects, the Agency concluded that dietary exposure resulting from the proposed use on agricultural and green house crops will be minimal and lower than levels of citronellol currently consumed in foods where it is naturally occurring and/or present as a food additive.

2. *Drinking water exposure.* Citronellol residues in drinking water are expected to be minimal from its use as a pesticide. The pesticide product has a low use rate and the concentration of citronellol in the pesticide product is 0.42%. The product is not intended for aquatic use. Citronellol is insoluble in water and biodegrades rapidly in the soil, precluding its entry into the ground water and/or surface water. Therefore, the Agency has concluded that it is highly unlikely that any residues resulting from the pesticidal use of citronellol would migrate into drinking water from natural sources.

B. Other Non-Occupational Exposure

1. *Dermal exposure.* Non-occupational dermal exposures to citronellol from its pesticidal use are expected to be minimal to non-existent. Human dermal exposures to citronellol occur primarily from its use as a fragrance in cosmetics, soaps, detergents, creams, lotions, and dermallyapplied insect repellents, not from an agricultural use as a pesticide.

2. *Inhalation exposure.* Non-occupational inhalation exposures to citronellol from its pesticidal use are expected to be minimal to non-existent. The main sources of human exposure to citronellol by this route are from its use as a fragrance in cosmetics, soaps, detergents, creams, lotions, and dermally applied insect repellents.

V. Cumulative Effects

Section 408(b)(2)(D)(v) of the FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider the "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity."

EPA does not have, at this time, available data to determine whether citronellol has a common mechanism of toxicity with any other substances. It's mode of action is as a repellent, which is considered by the Agency as a non-toxic mode of action on target pest species. Further, citronellol does not appear to produce a toxic metabolite produced by other substances. Therefore, for the purpose of this tolerance exemption action, EPA has not assumed that citronellol has a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the policy statements released by EPA's Office of Pesticide Programs concerning common mechanism determinations and procedures for cumulating effects from substances found to have a common mechanism on EPA's website at *http://www.epa.gov/pesticides/cumulative/.*

VI. Determination of Safety for U.S. Population, Infants and Children

1. *U.S. population.* The Agency has determined that there is reasonable certainty that no harm will result from aggregate exposure to residues of citronellol to the U.S. population. This includes all anticipated dietary exposures and other exposures for which there is reliable information. The Agency arrived at this conclusion based on the anticipated low acute exposure estimates from its pesticidal use, the low mammalian toxicity of citronellol, the widespread use of citronellol in the human diet, cosmetics, and fragrances found in a variety of food products and beverages, and in insect repellents, and that citronellol is considered GRAS under 21 CFR 172.515 as a synthetic flavoring and adjuvant permitted to be added directly to food for human consumption.

2. *Infants and children.* FFDCA section 408 provides that EPA shall apply an additional tenfold margin of

exposure for infants and children in the case of threshold effects. In this instance, based on all the available information, including a lack of threshold effects, the Agency concluded that citronellol is practically non-toxic to mammals, including infants and children. Since there are no effects of concern, the application of an additional margin of safety does not apply.

VII. Other Considerations

A. Endocrine Disruptors

Based on available data, no endocrine system-related effects have been identified with consumption of citronellol. It is a naturally occurring substance and a food additive in a variety of food products, is widely used as a fragrance in the cosmetic industry, and is a component of several dermally applied insect repellents. In addition, there is no evidence to suggest that citronellol affects the immune system's function in any manner.

B. Analytical Method(s)

The Agency proposed to establish an exemption from the requirement of a tolerance without any numerical limitation for the reasons stated above, including citronellol's low toxicity. For the same reasons, the Agency concludes that an analytical method is not required for enforcement purposes for citronellol.

C. Codex Maximum Residue Level

There are no codex maximum residue levels established for residues of citronellol.

VIII. Objections and Hearing Requests

Under section 408(g) of the FFDCA, as amended by the FQPA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. Although the procedures in those regulations require some modification to reflect the amendments made to the FFDCA by the FQPA, EPA will continue to use those procedures, with appropriate adjustments, until the necessary modifications can be made. The new section 408(g) of the FFDCA provides essentially the same process for persons to "object" to a regulation for an exemption from the requirement of a tolerance issued by EPA under new section 408(d) of the FFDCA, as was provided in the old sections 408 and 409 of the FFDCA. However, the period for filing objections is now 60 days, rather than 30 days.

A. What Do I Need to Do to File an Objection or Request a Hearing?

You must file your objection or request a hearing on this regulation in accordance with the instructions provided in this unit and in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number OPP–2004–0067 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before June 28, 2004.

1. *Filing the request.* Your objection must specify the specific provisions in the regulation that you object to, and the grounds for the objections (40 CFR 178.25). If a hearing is requested, the objections must include a statement of the factual issues(s) on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the objector (40 CFR 178.27). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

Mail your written request to: Office of the Hearing Clerk (1900C), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. You may also deliver your request to the Office of the Hearing Clerk in Rm. 104, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. The Office of the Hearing Clerk is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Office of the Hearing Clerk is (703) 603–0061.

2. *Tolerance fee payment.* If you file an objection or request a hearing, you must also pay the fee prescribed by 40 CFR 180.33(i) or request a waiver of that fee pursuant to 40 CFR 180.33(m). You must mail the fee to: EPA Headquarters Accounting Operations Branch, Office of Pesticide Programs, P.O. Box 360277M, Pittsburgh, PA 15251. Please identify the fee submission by labeling it "Tolerance Petition Fees."

EPA is authorized to waive any fee requirement "when in the judgement of the Administrator such a waiver or refund is equitable and not contrary to the purpose of this subsection." For additional information regarding the waiver of these fees, you may contact James Tompkins by phone at (703) 305–5697, by e-mail at *tompkins.jim@epa.gov*, or by mailing a request for information to Mr. Tompkins at Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

If you would like to request a waiver of the tolerance objection fees, you must mail your request for such a waiver to: James Hollins, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

3. *Copies for the Docket.* In addition to filing an objection or hearing request with the Hearing Clerk as described in Unit VIII.A., you should also send a copy of your request to the PIRIB for its inclusion in the official record that is described in **ADDRESSES**. Mail your copies, identified by docket ID number OPP–2004–0067, to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. In person or by courier, bring a copy to the location of the PIRIB described in **ADDRESSES**. You may also send an electronic copy of your request via e-mail to: *opp-docket@epa.gov*. Please use an ASCII file format and avoid the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 6.1/8.0 or ASCII file format. Do not include any CBI in your electronic copy. You may also submit an electronic copy of your request at many Federal Depository Libraries.

B. When Will the Agency Grant a Request for a Hearing?

A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is a genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

IX. Statutory and Executive Order Reviews

This final rule establishes an exemption from the tolerance

requirement on all food commodities 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 rule has been exempted from review under Executive Order 12866 due to its lack of significance, this rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001). This final 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 exemption in this final 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 final 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 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 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 rule.

X. Congressional Review Act

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 this final rule in the **Federal Register**. This final rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 19, 2004.

James Jones,

Director, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is 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 180.1248 is added to subpart D to read as follows:

§ 180.1248 Exemption of citronellol from the requirement of a tolerance.

An exemption from the requirement of a tolerance is established for residues of the biochemical pesticide citronellol in or on all food commodities.

[FR Doc. 04–9618 Filed 4–27–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–2004–0068; FRL–7351–1]

Geraniol; Exemption from the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of the geraniol on all food commodity when applied/used to control Tetranychid mites. Natural Plant Protection S.A. submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of geraniol.

DATES: This regulation is effective April 28, 2004. Objections and requests for hearings, identified by docket ID number OPP–2004–0068, must be received on or before June 28, 2004.

ADDRESSES: To submit a written objection or hearing request follow the detailed instructions as provided in Unit VIII. of the **SUPPLEMENTARY INFORMATION.** EPA has established a

docket for this action under Docket ID number OPP–2004–0068. 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, 1921 Jefferson Davis Hwy., 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: Raderrio Wilkins, Biopesticides and Pollution Prevention Division (7511C), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–1259; e-mail address: *wilkins.raderrio@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**.

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 identification (ID) number OPP–2004–0068. 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, 1921 Jefferson Davis Hwy., 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.

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/*. A frequently updated electronic version of 40 CFR part 180 is available at E-CFR Beta Site Two at *http://www.gpoaccess.gov/ecfr/*, a beta site currently under development. The OPPTS harmonized test guidelines referenced in this document are available at *http://www.epa.gov/opptsfrs/home/guidelin.htm/*.

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.

II. Background and Statutory Findings

In the **Federal Register** of May 23, 2000 (65 FR 33318) (FRL–6557–1), EPA issued a notice pursuant to section 408(d)(3) of the FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide tolerance petition (PP 0F6073) by Natural Plant Protection S.A., 4061 North 156th Drive, Goodyear, AZ 85338. This notice included a summary of the petition prepared by the petitioner Natural Plant Protection S.A.. There were no comments received in response to the notice of filing.

The petition requested that 40 CFR part 180 be amended by establishing a temporary exemption from the requirement of a tolerance for residues of geraniol. Section 408(c)(2)(A)(i) of the FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is "safe." Section 408(c)(2)(A)(ii) of the FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Pursuant to section 408(c)(2)(B), in establishing or maintaining in effect an exemption from the requirement of a tolerance, EPA must take into account the factors set forth in section 408(b)(2)(C), which require EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue...." Additionally, section 408(b)(2)(D) of the FFDCA requires that the Agency consider "available information concerning the cumulative effects of a particular pesticide's residues" and "other substances that have a common mechanism of toxicity."

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides. Second, EPA examines exposure to the pesticide through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings.

III. Toxicological Profile

Consistent with section 408(b)(2)(D) of the FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness, and reliability and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Geraniol is a monoterpene alcohol found in over 250 essential oils, and is widely used as a fragrance component in the manufacture of detergents, soaps, creams, lotions, cosmetics, and aromatherapy products. This chemical is also used as a synthetic flavoring agent in beverages, ice cream, and candies, and is generally regarded as safe (GRAS) under section 409 of the FFDCA (21 CFR 182.60). The toxicity

studies submitted in support of this tolerance exemption are referenced below.

1. Acute oral toxicity (OPPTS 870.1100; 152-10; MRID 45262003). Male and female Sprague-Dawley rats were tested with a single exposure to a pesticide product containing an active ingredient, geraniol, at 0.42% of the product. The pesticide was tested at doses ranging from 2,500 to 5,500 mg/kg of body weight and observed for 14 days. The oral LD_{50} for males and females were 5,242 mg/kg and 3573 mg/kg, respectively. Classification: Acceptable. Toxicity Category III, based on the LD_{50} of female Sprague-Dawley rats.

2. Acute dermal toxicity (OPPTS 870.1200; 152-11; MRID 45262004). Male and female New Zealand White rabbits were given 5,050 mg/kg of a pesticide product containing an active ingredient, geraniol, at 0.42% of the product, and observed for 14 days. Classification: Acceptable. Toxicity Category: IV.

3. Acute inhalation toxicity (OPPTS 870.1300; 152-12; MRID 45262005). Male and female Sprague-Dawley rats were exposed for 4 hours to an atomospheric concentration of 2.64 mg/L of a pesticide product containing geraniol as an active ingredient and observed for 14 days. The acute inhalation LC_{50} was > 2.64 mg/L. Classification: Acceptable. Toxicity Category: IV.

4. Primary eye irritation (OPPTS 870.2400; 152-13; MRID 45262006). An acute eye irritation study was conducted in male and female albino New Zealand white rabbits using a a pesticide product containing an active ingredient, geraniol, at 0.42% of the product. The test substance was moderately irritating to the eyes of the test animals, causing corneal opacitiy (cloudiness) and conjunctivitis (redness) that cleared within 10 days following this exposure. Classification: Acceptable. Toxicity: Category II.

5. Primary dermal irritation (OPPTS 870.2500; 152-14; MRID 45262007). The shaved skin of male and female New Zealand White rabbits was exposed to a single 0.5 mL dose of a pesticide product containing the active ingredient, geraniol, at 0.42% of the product. for 4 hours and observed for 14 days for signs of skin irritation. The test substance was moderately irritating to the skin of the test animals, causing very slight to well-defined erythema (skin redness) that cleared within 14 days following exposure. Classification: Acceptable. Toxicity Category: III.

6. Hypersensitivity (OPPTS 870.2500; 152-15; MRID 45262008). The shaved skin of male and female Hartley guinea pigs was treated once weekly for 3 weeks with a pesticide product containing the active ingredient, geraniol, at 0.42% of the product. Skin redness (irritation) followed each treatment cleared within 48 hours. A challenge dose was given to an untreated site, and the animals observed for signs of allergic reaction (hypersensitiity) to the test material The treated test and naive control animals showed no allergenicity (swelling, redness) at 24 and 48 hours after this challenge dose. The pesticide product was not a dermal sensitizer in Hartley guinea pigs. Classification: Acceptable.

The pesticide registrant requested waivers of the required studies on the technical grade of the active ingredient for acute toxicity, genotoxicity, reproductive toxicity, developmental toxicity, subchronic, toxicity in mammalian species, and acute toxicity to non-target species . The waivers were based on the ubiquity of geraniol in nature; the long history of use in cosmetics, fragrances, detergents, and household cleaners; the natural occurrence in fruits and beverages; the wide use as a synthetic flavoring agent and adjuvant; and the low anticipated exposure to humans and the environment due to the very low concentration of geraniol (0.42%) in the pesticide product. In addition, data on the toxicity of geraniol from publicly available technical literature was presented to the Agency (MRID 452620-10) for acute oral toxicity in the rat (Toxicity category III), acute dermal toxicity (Toxicity category IV, no species indicated), dermal irritation (severe in humans), dermal sensitization (weak senistizaer, variable response, species not indicated), subchronic oral toxicity in the rat (no effects at 10,000 ppm in the diet for 16 weeks, no effects at 1,000 ppm for 26 weeks), and mutagenicity/genotoxicity (negative in the Ames assay in *Salmonella typhimurium* strains tested at 100 µg). Data for geranyl acetate (and other esters of geranyl), which is used as a flavoring agent and is readily hydrolyzed to geraniol in the intestines of mammals, were also submitted. This data demonstrated an acute oral Toxicity category IV; no adverse effects at 1,000 mg/kg/day fo r 14 days and 13 weeks in mice, and no adverse effects in a chronic dietary/carcinogenicity study in rats fed 1,000 mg/kg/day for 103 weeks. Further, according to the World Health Organizations (WHO), dietary intake of geraniol is estimated based on the quantity of geranyl acetate conumed in the diet (Food Additives Series 40; 49th meeting of the Joint FAO/WHO Expert Committee on Food Additives (JEFCA), 1998). Based on the data from the pesticide product submitted, the Agency, the data on geraniol from the public literature, and the data from geranyl acetate, the no adverse effects to humans would be anticipated via acute, subchronic, or chronic dietary exposures to geranyl acetate, particularly at the low levels of geraniol in the pesticide product under consideration for registration by the Agency.

IV. Aggregate Exposures

In examining aggregate exposure, section 408 of the FFDCA directs EPA to consider available information concerning exposures from the pesticide residue in food and all other non-occupational exposures, including drinking water from ground water or surface water and exposure through pesticide use in gardens, lawns, or buildings (residential and other indoor uses).

A. Dietary Exposure

1. *Food.* Dietary exposure is expected to occur for most, if not all individuals to geraniol primarily from the consumption of fruits, beverages, food seasonings and its use as a flavoring agent/adjuvant in a wide variety of foods. The end-use product contains a low concentration of citronellol (0.42%) which is further reduced by dilution with water (no less than approximately 1:156 v/v) prior to application. Based on the extremely low application rate required to achieve the desired pesticidal effects, the Agency concluded that dietary exposure resulting from the proposed use on agricultural and greenhouse crops will be minimal and lower than levels of citronellol currently consumed in foods where it is naturally-occurring and/or present as a food additive.

2. *Drinking water exposure.* Geraniol residues in drinking water are expected to be minimal from its use as a pesticide. The pesticide product has a low use rate and the concentration of citronellol in the pesticide product is only 0.42%. The product is not intended for aquatic uses. Geraniol is insoluble in water and biodegrades rapidly in the soil, precluding its entry into ground and/or surface waters. Therefore, the Agency has concluded that it is highly unlikely that any residues resulting from the pesticidal use of citronellol would migrate into drinking water from natural sources.

B. Other Non-Occupational Exposure

1. *Dermal exposure.* Non-occupational dermal exposures to geraniol from its pesticidal use are expected to be minimal to non-existent. Human dermal exposures to geraniol occur primarily from its use as a fragrance in cosmetics, soaps, detergents, creams, and lotions, not from the agricultural use as a pesticide.

2. *Inhalation exposure.* Non-occupational inhalation exposures to geraniol from its pesticidal use are expected to be minimal to non-existent. The main sources of human exposure to geraniol by this route are from its use as a fragrance in cosmetics, soaps, detergents, creams and lotions.

V. Cumulative Effects

Section 408(b)(2)(D)(v) of the FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider the "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity."

EPA does not have, at this time, available data to determine whether geraniol has a common mechanism of toxicity with any other substances. It's mode of action is as a repellent, which is considered by the Agency as a non-toxic mode of action on target pest species. Further, geraniol does not appear to produce a toxic metabolite produced by other substances. Therefore, for the purpose of this tolerance exemption action, EPA has not assumed that geraniol has a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanisms of toxicity and to evaluate the cumulative effects of such chemicals, see the policy statements released by EPA's Office of Pesticide Programs concerning common mechanism determinations and procedures for cumulating effects from substances found to have a common mechanism on EPA's website at *http://www.epa.gov/pesticides/cumulative/.*

VI. Determination of Safety for U.S. Population, Infants and Children

1. *U.S. population.* The Agency has determined that there is reasonable certainty that no harm will result from aggregate exposure to residues of geraniol to the U.S. population. This includes all anticipated dietary exposures and other exposures for which there is reliable information. The Agency arrived at this conclusion based on the anticipated low acute exposure estimates from its pesticidal use, the low mammalian toxicity of geraniol and the widespread use of geraniol in the human diet, cosmetics and fragrances found in a variety of food products and beverages, and that geraniol is considered GRAS under 21 CFR 172.515 as a synthetic flavoring and adjuvant permitted to be added directly to food for human consumption.

2. *Infants and children.* Section 408 of the FFDCA provides that EPA shall apply an additional tenfold margin of exposure for infants and children in the case of threshold effects. Margins of exposure are often referred to as uncertainty or safety factors, and are used to account for potential prenatal and postnatal toxicity and any lack of completeness of the data base Based on available data and other information, EPA may determine that a different margin of exposure will be safe for infants and children or that a margin of exposure approach is not appropriate. Based on all the available information the Agency reviewed on geraniol, including a lack of threshold effects, the Agency concluded that geraniol is practically non-toxic to mammals, including infants and children. Since there are no effects of concern, the provision requiring an additional margin of safety does not apply.

VII. Other Considerations

A. Endocrine Disruptors

Based on available data, no endocrine system-related effects have been identified with consumption of geraniol. It is naturally occurring and a food additive in a variety of food products, and is widely used as a fragrance in the cosmetic industry. In addition, there is no evidence to suggest that geraniol affects the immune system's function in any manner.

B. Analytical Method(s)

The Agency proposed to establish an exemption from the requirement of a tolerance without any numerical limitation for the reasons stated above, including geraniol low toxicity. For the same reasons, the Agency concludes that an analytical method is not required for enforcement purposes for geraniol.

C. Codex Maximum Residue Level

There are no codex maximum residue levels established for residues of geraniol.

VIII. Objections and Hearing Requests.

Under section 408(g) of the FFDCA, as amended by the FQPA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. Although the procedures in those regulations require some modification to reflect the amendments made to the FFDCA by the FQPA, EPA will continue to use those procedures, with appropriate adjustments, until the necessary modifications can be made. The new section 408(g) of the FFDCA provides essentially the same process for persons to "object" to a regulation for an exemption from the requirement of a tolerance issued by EPA under new section 408(d) of the FFDCA, as was provided in the old sections 408 and 409 of the FFDCA. However, the period for filing objections is now 60 days, rather than 30 days.

A. What Do I Need to Do to File an Objection or Request a Hearing?

You must file your objection or request a hearing on this regulation in accordance with the instructions provided in this unit and in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number OPP–2004–0068 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before June 28, 2004.

1. *Filing the request.* Your objection must specify the specific provisions in the regulation that you object to, and the grounds for the objections (40 CFR 178.25). If a hearing is requested, the objections must include a statement of the factual issues(s) on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the objector (40 CFR 178.27). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

Mail your written request to: Office of the Hearing Clerk (1900C), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. You may also deliver your request to the Office of the Hearing Clerk in Rm.104, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. The Office of the Hearing Clerk is open from 8 a.m. to 4 p.m., Monday through

Friday, excluding legal holidays. The telephone number for the Office of the Hearing Clerk is (703) 603–0061.

2. *Tolerance fee payment.* If you file an objection or request a hearing, you must also pay the fee prescribed by 40 CFR 180.33(i) or request a waiver of that fee pursuant to 40 CFR 180.33(m). You must mail the fee to: EPA Headquarters Accounting Operations Branch, Office of Pesticide Programs, P.O. Box 360277M, Pittsburgh, PA 15251. Please identify the fee submission by labeling it "Tolerance Petition Fees."

EPA is authorized to waive any fee requirement "when in the judgement of the Administrator such a waiver or refund is equitable and not contrary to the purpose of this subsection." For additional information regarding the waiver of these fees, you may contact James Tompkins by phone at (703) 305–5697, by e-mail at *tompkins.jim@epa.gov*, or by mailing a request for information to Mr. Tompkins at Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

If you would like to request a waiver of the tolerance objection fees, you must mail your request for such a waiver to: James Hollins, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

3. *Copies for the Docket.* In addition to filing an objection or hearing request with the Hearing Clerk as described in Unit VIII.A., you should also send a copy of your request to the PIRIB for its inclusion in the official record that is described in **ADDRESSES**. Mail your copies, identified by docket ID number OPP–2004–0068, to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. In person or by courier, bring a copy to the location of the PIRIB described in **ADDRESSES**. You may also send an electronic copy of your request via e-mail to: *opp-docket@epa.gov*. Please use an ASCII file format and avoid the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 6.1/8.0 or ASCII file format. Do not include any CBI in your electronic copy. You may also submit an electronic copy of your request at many Federal Depository Libraries.

B. When Will the Agency Grant a Request for a Hearing?

A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is a genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

IX. Statutory and Executive Order Reviews

This final rule establishes an exemption from the tolerance requirement on all food commodities 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 rule has been exempted from review under Executive Order 12866 due to its lack of significance, this rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001). This final 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 exemption in this final 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 final 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 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 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 rule.

X. Congressional Review Act

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 this final rule in the **Federal Register**. This final rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and record keeping requirements.

Dated: April 19, 2004.

James Jones,

Director, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is 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 180.1251 is added to subpart D to read as follows:

§ 180.1251 Geraniol; exemption from the requirement of a tolerance.

An exemption from the requirement of a tolerance is established for residues of the biochemical pesticide geraniol in or on all food commodities.

[FR Doc. 04–9577 Filed 4–27–04; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0, 43, 63, and 64

[IB Docket Nos. 02–324 and 96–261, FCC 04–53]

In the Matter of International Settlements Policy Reform and International Settlement Rates

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document is a summary of the *Report and Order* adopted by the Commission in this proceeding. The Commission exempted the application of the International Settlements Policy (ISP) from U.S.-international routes that complied with its Benchmarks Policy. The Commission also eliminated its International Simple Resale (ISR) Policy. The Commission maintained the application of its Benchmarks Policy to all U.S.-international routes. The Commission committed to developing and releasing a Notice of Inquiry regarding the nature and effect of high foreign mobile termination rates on U.S. consumers.

DATES: Effective May 28, 2004 except for §§ 43.51(d), 43.51(e), 64.1001, and 64.1002(c) which contain information requirements that have not yet been approved by Office of Management and Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of those sections. OMB, the general public, and other Federal agencies are invited to comment on the information collection requirements on or before June 28, 2004.

ADDRESSES: In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., Washington, DC 20554, or via the Internet to *Judith-B.Herman@fcc.gov,* and to Kristy L. LaLonde, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, NW., Washington, DC 20503 or via the Internet to *Kristy_L._LaLonde@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: James Ball, Chief, Policy Division, International Bureau, or Alexandra Field, Assistant Chief, Policy Division, International Bureau at (202) 418–1460. For additional information regarding the Paperwork Reduction Act information collections contact Judith B. Herman at 445 12th Street SW., Rm. 1–C804, Washington, DC, 20554 or via internet at *Judith-B.Herman@fcc.gov;* phone (202) 418–0214.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order* in IB Docket No. 96–261 & 02–324; FCC 04–53, adopted March 11, 2004 and released on March 30, 2004. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257), 445 12th Street, SW., Washington, DC 20554. The document is also available for download over the Internet at *http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC–04–53A1.pdf.* The complete text may also be purchased from the Commission's copy contractor, Qualex International, in person at 445 12th Street, SW., Room CY–B402, Washington, DC 20554, via telephone at (202) 863–2893, via facsimile at (202) 863–2898, or via e-mail at *qualexint@aol.com.* This Report and Order contains new or modified information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–3. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the modified information collections contained in this proceeding.

Summary of Report and Order

On October 10, 2002, the Commission adopted a Notice of Proposed Rulemaking in this proceeding 67 FR 65527 (Oct. 25, 2002) to obtain comment on proposals to modify the application of its International Settlements Policy (ISP), the competitive status of the U.S.-international telecommunications market, the success and effectiveness of Benchmarks Policy, and the issue of foreign mobile termination rates. On March 11, 2004 the Commission adopted a *Report and Order* in this proceeding. In the *Report and Order,* the Commission finds that the U.S.-international telecommunications market has been undergoing changes in recent years. There has been increasing competition on many U.S.-international routes accompanied by lower settlement rates and calling prices to U.S. customers. There also exists the potential for further development of competition as a result of emerging means of routing international traffic that do not involve the traditional carrier settlement process. At the same time, settlement rates on most routes continue to be above cost and there exists the continued potential for anticompetitive conduct and other forms of market failure. On balance, the Commission finds that the changes now unfolding in the U.S.-international market permit us to adopt a more limited application of our regulatory framework accompanied by competitive safeguards to protect U.S. customers against anticompetitive behavior. The Commission stated that, where there is vigorous competition, market forces are causing international termination rates to move toward cost on many routes.

The Commission concludes that reforming our rules to remove our International Settlements Policy (ISP)

from benchmark-compliant routes will give U.S. carriers greater flexibility to negotiate arrangements with foreign carriers. The Commission finds that doing so will encourage market-based arrangements between U.S. and foreign carriers that will further our long-standing policy goals of greater competition in the U.S.-international market and more cost-based rates for U.S. customers. Furthermore, in view of the Commission action removing the ISP from benchmark-compliant routes, this *Report and Order* eliminates the Commission's International Simple Resale (ISR) policy and associated filing requirements. The Commission also retains and clarifies the applicability of certain regulatory safeguards to protect U.S. customers from anticompetitive conduct should it occur in the future. Moreover, it retains its benchmarks policy but plans to subject it to further evaluation as to whether future modifications are warranted. Finally, the Commission is concerned about the increasingly high mobile termination rates that are being charged to U.S. carriers and their effect on U.S. consumers. Accordingly, the Commission decided to continue to evaluate the nature and effect of mobile termination rates on U.S. customers and commits to issuing a Notice of Inquiry seeking detailed information on the issue and what responses are available to the Commission. In addition, the Commission will continue to respond to carrier complaints in this area if foreign mobile termination rates charged to U.S. carriers are not consistent with its general accounting rate principles.

Procedural Matters

Paperwork Reduction Act

This *Report and Order* contains modified information collections. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collections contained in this *Report and Order* as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Public and agency comments are due June 28, 2004. PRA comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the function of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

OMB Approval Number: 3060–0454.

Title: Regulation of International Accounting Rates.

Form No.: N/A.

Type of Collection: Revision of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents: 5.

Estimated Time for Response: 1 hour.

Frequency of Reponse: On Occasion, annual reporting requirement.

Total Annual Burden: 150 hours.

Total Annual Cost: $7,000.

Needs and Uses: The information will be used by the Federal Communications Commission (FCC) and interested members of the public to monitor the international accounting rates to ensure that the public interest is being served and also to enforce Commission policies and rules.

Final Regulatory Flexibility Act Certification

The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." *See* 5 U.S.C. 601–612, the RFA has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law No. 104–121, Title II, 110 Stat. 857 (1996). The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. *See* 5 U.S.C. 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**." A "small business concern" is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the U.S. Small Business Administration (SBA). *See* 15 U.S.C. 632.

Pursuant to the RFA, the Commission incorporated an Initial Regulatory Flexibility Analysis (IRFA) into the *Notice of Proposed Rulemaking*. (17 FCC Rcd at 19982 & 19986–89 paragraphs 53 & 68–78.) We received no comments in response to the IRFA. For the reasons described below, we now certify that the policies and rules adopted in the present *Report and Order* will not have a significant economic impact on a substantial number of small entities.

The *Report and Order* finds that the changes now unfolding in the U.S.-international market permits it to adopt a more limited application of our regulatory framework accompanied by competitive safeguards to protect U.S. customers against anticompetitive behavior. The Commission continues to believe that, where there is vigorous competition, market forces are causing international termination rates to move toward cost on many routes. It concludes that reforming its rules to remove the International Settlements Policy (ISP) from benchmark-compliant routes will give U.S. carriers greater flexibility to negotiate arrangements with foreign carriers. The Commission believes that doing so will encourage market-based arrangements between U.S. and foreign carriers that will further its long-standing policy goals of greater competition in the U.S.-international market and more cost-based rates for U.S. customers. The Commission has decided to retain the benchmarks policy subject to evaluation as to future modifications. It similarly will continue to evaluate the nature and effect of high foreign mobile termination rates on U.S. customers. It concludes that the record before us regarding future benchmarks policy and on foreign mobile termination rates is insufficient to warrant specific Commission action at this time.

The *Report and Order* requires that the ISP be removed from all U.S.-international routes that are benchmark-compliant and affirms, adopts, or modifies certain competitive safeguards to prevent potential anticompetitive harm on such routes. The rules and policies contained in the *Report and Order* apply to all carriers providing facilities-based international common carrier service pursuant to section 214 of the Act. It is uncertain as to the number of small entities that will be affected by the proposals. Agency data indicate the number of section 214 applications filed with the Commission continues to increase each year. The total number of licensees is difficult to

determine, because many licenses are jointly held by several licensees. The *Report and Order* will reduce the administrative burden on all carriers, both small and large, of complying with the ISP and contract and accounting rate filing costs. The *Report and Order* reduces the filing of carrier-to-carrier contracts contained in section 43.51. The *Report and Order* clarifies that section 43.51 applies solely to U.S. carrier contracts for international common carrier service involving dominant foreign carriers on routes where the ISP applies. The Commission narrows the contract filing requirement and clarifies that rate filings need not be made for routes removed from the ISP. These modified filing requirements will eliminate many current-required contract filings and rate filings currently made by all U.S.-international facilities-based carriers, including small entities, in the normal course of business; and therefore, do not impose a significant economic impact on these small entities. In this *Report and Order*, we adopt one of the proposals set forth in the NPRM and determine that removing the ISP from additional U.S.-international routes will give U.S.-international facilities-based carriers the flexibility necessary to respond to dynamic price and service changes in the marketplace and will best protect U.S. customers from the rates, terms and conditions that violate the Communications Act.

Ordering Clauses

Pursuant to Sections 1, 4(i)–4(j), 201–205, 214, 303(r), and 309 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i)–154(j), 201–205, 214, 303(r), 309, the policies, rules, and requirements discussed herein *are adopted* and parts 43 and 63 of the Commission's rules, 47 CFR 0, 43, 63, and 64 *are amended* as specified in the rule changes, effective May 28, 2004. Except for §§ 43.51(d), 43.51(e), 64.1001 and 64.1002(c) which contain information requirements that have not yet been approved by Office of Management and Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of those sections.

The Commission's Consumer and Government Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*

The policies, rules, and requirements established in this decision shall take effect thirty days after publication in the **Federal Register** or in accordance with the requirements of 5 U.S.C. 801(a)(3) and 44 U.S.C. 3507.

List of Subjects in 47 CFR Parts 0, 43, 63, and 64

Communications and common carriers; reporting and recordkeeping requirements; Telecommunications.

The Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

■ Parts 0, 43, 63, and 64 of the Commission rules are amended as follows:

PART 0—COMMISSION ORGANIZATION

■ 1. The authority citation for part 0 continues to read as follows:

Authority: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

§ 0.457 [Amended]

■ 2. Section 0.457 is amended by removing paragraph (d)(1)(vi).

PART 43—REPORTS OF COMMUNICATION COMMON CARRIERS AND CERTAIN AFFILIATES

■ 3. The authority citation for part 43 continues to read as follows:

Authority: 47 U.S.C. 154; Telecommunications Act of 1996; Pub. L. 104–104, secs. 402(b)(2)(B), (c), 110 Stat. 56 (1996) as amended unless otherwise noted. 47 U.S.C. 211, 219, 220, as amended.

■ 4. Section 43.51 is amended by revising paragraphs (b)(2), (b)(3), (d) and (e), and adding Note 4 to § 43.51 to read as follows:

§ 43.51 Contracts and concessions.

* * * * *

(b) * * *

(2) A carrier that is engaged in foreign communications and that has been classified as dominant for any service on any of the U.S.-international routes included in the contract, except for a carrier classified as dominant on a particular route due only to a foreign carrier affiliation under § 63.10 of this chapter, or

(3) A carrier, other than a provider of commercial mobile radio services, that is engaged in foreign communications and enters into a contract, agreement, concession, license, authorization, operating agreement or other arrangement and amendments thereto with a foreign carrier that does not qualify for the presumption, set forth in Note 3 to this section, that it lacks market power on the foreign end of one or more of the U.S.-international routes included in the contract, unless the route appears on the Commission's list of U.S.-international routes that the Commission has exempted from the international settlements policy set forth in § 64.1002 of this chapter.

* * * * *

(d) Any U.S. carrier that interconnects to the U.S. public switched network an international private line that extends between the United States and a country that the Commission has not exempted from the international settlements policy shall file annually with the Chief of the International Bureau a certified statement containing the number and type (*e.g.*, a 64-kbps circuit) of private lines interconnected at the carrier's own switch, including any switch in which the carrier holds a leasehold interest. The certified statement shall specify the number and type of interconnected private lines on a country specific basis. The identity of the customer need not be reported, and the Commission will treat the country of origin information as confidential. Carriers need not file their contracts for such interconnections, unless they are specifically requested to do so. These reports shall be filed on a consolidated basis on February 1 (covering international private lines interconnected during the preceding January 1 to December 31 period) of each year. International private lines to countries which the Commission has exempted from the international settlements policy, set forth in § 64.1002 of this chapter, at any time during a particular reporting period are exempt from this filing requirement.

(e) Other filing requirements for carriers providing service on U.S.-international routes that are subject to the international settlements policy.

(1) For routes subject to the international settlements policy set forth in § 64.1002 of this chapter, if a U.S. carrier files an operating or other agreement with a foreign carrier pursuant to paragraph (a) of this section to begin providing switched voice, telex, telegraph, or packet-switched service between the United States and a foreign point, the carrier must also file with the International Bureau a modification request under § 64.1001 of this chapter. The operating or other agreement cannot become effective until the modification request has been granted under paragraph § 64.1001(e) of this chapter.

(2) For routes subject to the international settlements policy, if a carrier files an amendment, pursuant to

paragraph (a) of this section, to an existing operating or other agreement with a foreign carrier to provide switched voice, telex, telegraph, or packet-switched service between the United States and a foreign point, and the amendment relates to the exchange of services, interchange or routing of traffic and matters concerning rates, accounting rates, division of tolls, the allocation of return traffic, or the basis of settlement of traffic balances, the carrier must also file with the International Bureau a modification request under § 64.1001 of this chapter. The amendment to the operating or other agreement cannot become effective until the modification request has been granted under § 64.1001(e) of this chapter.

* * * * *

Note 4 to § 43.51: The Commission's list of international routes exempted from the international settlements policy is available on the International Bureau's World Wide Web site at *http://www.fcc.gov/ib.*

PART 63—EXTENSION OF LINES, NEW LINES AND DISCONTINUANCE, REDUCTION, OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON CARRIERS; AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS

■ 5. The authority citation for part 63 continues to read as follows:

Authority: Sections 1, 4(i), 4(j), 10, 11, 201–205, 214, 218, 403 and 651 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 160, 201–205, 214, 218, 403, and 571, unless otherwise noted.

§ 63.12 [Amended]

■ 6. Section 63.12 is amended by removing paragraph (c)(3) and redesignating (c)(4) as paragraph (c)(3).

■ 7. Section 63.14 is amended by revising paragraph (c) to read as follows:

§ 63.14 Prohibition on agreeing to accept special concessions.

* * * * *

(c) This section shall not apply to the rates, terms and conditions in an agreement between a U.S. carrier and a foreign carrier that govern the settlement of U.S. international traffic, including the method for allocating return traffic, if the U.S. international route is exempt from the international settlements policy set forth in § 64.1002 of this chapter.

Note to Paragraph (c): The Commission's list of international routes exempted from the international settlements policy is available on the International Bureau's World Wide Web site at *http://www.fcc.gov/ib.*

§ 63.16 [Removed]

■ 8. Section 63.16 is removed.

■ 9. Section 63.17 is amended by revising paragraphs (b) introductory text, (b)(1), and (b)(2) to read as follows:

§ 63.17 Special provisions for U.S. international common carriers.

* * * * *

(b) Except as provided in paragraph (b)(4) of this section, a U.S. common carrier, whether a reseller or facilities-based carrier, may engage in "switched hubbing" to countries that do not appear on the list of U.S. international routes exempted from the international settlements policy, set forth in § 64.1002 of this chapter provided the carrier complies with the following conditions:

(1) U.S.-outbound switched traffic shall be routed over the carrier's authorized U.S. international circuits extending between the United States and a country that is exempt from the international settlements policy (*i.e.*, the "hub" country), and then forwarded to the third country only by taking at published rates and reselling the international message telephone service (IMTS) of a carrier in the hub country;

(2) U.S.-inbound switched traffic shall be carried to a country that is exempt from the international settlements policy (*i.e.*, the "hub" country) as part of the IMTS traffic flow from a third country and then terminated in the United States over the carrier's authorized U.S. international circuits extending between the United States and the hub country.

* * * * *

Note to Paragraph (b): The Commission's list of international routes exempted from the international settlements policy is available on the International Bureau's World Wide Web site at *http://www.fcc.gov/ib.*

§ 63.22 [Amended]

■ 10. Section 63.22 is amended by removing paragraph (e) and redesignating paragraphs (f) and (g) as paragraphs (e) and (f).

■ 11. Section 63.23 is amended by revising paragraph (d) to read as follows:

§ 63.23 Resale-based international common carriers.

* * * * *

(d) The carrier may provide switched basic services over its authorized resold private lines in either of the following two circumstances:

(1) The country at the foreign end of the private line appears on the Commission's list of international routes exempted from the international settlements policy set forth in § 64.1002 of this chapter; or

(2) The carrier is exchanging switched traffic with a foreign carrier that lacks market power in the country at the foreign end of the private line. A foreign carrier lacks market power for purposes of this section if it does not appear on the Commission's list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points.

Note to Paragraph (d): The Commission's list of international routes exempted from the international settlements policy, and the Commission's list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points are available on the International Bureau's World Wide Web site at *http://www.fcc.gov/ib.*

* * * * *

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

■ 12. The authority citation for part 64 continues to read as follows:

Authority: 47 U.S.C. 154, 254(k); secs. 403(b)(2)(B), (c), Public Law 104–104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 225, 226, 228, and 254(k) unless otherwise noted.

■ 13. Section 64.1001 is amended by revising the section heading, paragraphs (a) and (b), by removing paragraphs (c) and (e), and by redesignating paragraphs (d), (f), and (g) as paragraphs (c), (d), and (e), to read as follows:

§ 64.1001 Requests to modify international settlement arrangements.

(a) The procedures set forth in this rule apply to carriers that are required to file with the International Bureau, pursuant to § 43.51(e) of this chapter, requests to modify international settlement arrangements. Any operating agreement or amendment for which a modification request is required to be filed cannot become effective until the modification request has been granted under paragraph (f) of this section.

(b) A modification request must contain the following information:

(1) The applicable international service;

(2) The name of the foreign telecommunications administration;

(3) The present accounting rate

(including any surcharges);
(4) The new accounting rate (including any surcharges);
(5) The effective date;
(6) The division of the accounting rate; and
(7) An explanation of any proposed modification(s) in the operating agreement with the foreign correspondent.

* * * * *

■ 14. Add § 64.1002 to subpart J to read as follows:

§ 64.1002 International settlements policy.

(a) Except as provided in paragraph (b) of this section, a common carrier that is authorized pursuant to part 63 of this chapter to provide facilities-based switched voice, telex, telegraph, or packet-switched service on a U.S. international route, and that enters into an operating or other agreement to provide any such service in correspondence with a foreign carrier that does not qualify for the presumption that it lacks market power on the foreign end of the route, must comply with the following requirements:

(1) The terms and conditions of the carrier's operating or other agreement relating to the exchange of services, interchange or routing of traffic and matters concerning rates, accounting rates, division of tolls, the allocation of return traffic, or the basis of settlement of traffic balances, are identical to the equivalent terms and conditions in the operating agreement of another carrier providing the same or similar service between the United States and the same foreign point.

(2) The carrier shall not bargain for or agree to accept more than its proportionate share of return traffic.

(3) The division of tolls shall be evenly-divided between the U.S. carrier and foreign carrier.

(4) The carrier must also duly comply with the requirements in § 43.51 and § 64.1001 of this chapter.

Note to Paragraph (a): Carriers shall rely on the Commission's list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points for purposes of determining which of their foreign carrier correspondent agreements are subject to the requirements of this paragraph. This list is available on the International Bureau's World Wide Web site at *http://www.fcc.gov/ib.*

(b) A carrier that enters into an operating or other agreement with a foreign carrier for the provision of a common carrier service on an international route is not subject to the requirements of paragraph (a) of this section if the route appears on the Commission's list of international routes that the Commission has exempted from the international settlements policy. This list is available on the International Bureau's World Wide Web site at *http://www.fcc.gov/ib.*

(c) A carrier that seeks to add a U.S. international route to the list of routes that are exempt from the international settlements policy shall make its request in writing to the International Bureau, accompanied by a showing that a U.S. carrier has entered into a benchmark-compliant settlement rate agreement with a foreign carrier that possesses market power in the country at the foreign end of the U.S. international route that is the subject of the request. The required showing shall consist of an effective accounting rate modification, filed pursuant to § 64.1001, that includes a settlement rate that is at or below the Commission's benchmark settlement rate adopted for that country in IB Docket No. 96–261, Report and Order, 12 FCC Rcd 19,806, 62 FR 45758, Aug. 29, 1997, available on the International Bureau's World Wide Web site at *http://www.fcc.gov/ib.*

(d) A carrier or other party may request Commission intervention on a route that the Commission has exempted from the international settlements policy by filing with the International Bureau a petition, pursuant to this section, demonstrating anticompetitive behavior that is harmful to U.S. customers. Carriers and other parties filing complaints must support their petitions with evidence, including an affidavit and relevant commercial agreements. The International Bureau will review complaints on a case-by-case basis and take appropriate action on delegated authority pursuant to § 0.261 of this chapter. Interested parties will have 10 days from the date of issuance of a public notice of the petition to file comments or oppositions to such petitions and subsequently 7 days for replies. In the event significant, immediate harm to the public interest is likely to occur that cannot be addressed through *post facto* remedies, the International Bureau may impose temporary requirements on carriers authorized pursuant to § 63.18 of this chapter without prejudice to its findings on such petitions.

Note 1 to § 64.1002: For purposes of this section, *foreign carrier* is defined in § 63.09 of this chapter.

Note 2 to § 64.1002: For purposes of this section, a *foreign carrier* shall be considered to possess market power if it appears on the Commission's list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points. This list is available on the International Bureau's World Wide Web site at *http://www.fcc.gov/ib.*

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 25

[MM Docket No. 93–25; FCC 04–44]

RIN 3060–AF39

Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Direct Broadcast Satellite Public Interest Obligations

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document vacates the first Order on Reconsideration adopted in this proceeding on April 9, 2003 and adopts in its place a second Order on Reconsideration and accompanying rules. The second Order differs from the Order on Reconsideration adopted April 9, 2003 with respect to Political Broadcasting Requirements and Guidelines Concerning Commercialization of Children's Programming. The second Order considers Petitions for Reconsideration and other pleadings filed in response to a 1998 Order adopting public interest obligations for DBS providers.

EFFECTIVE DATE: Effective May 28, 2004 except for §§ 25.701(d)(1)(i), 25.701(d)(1)(ii), 75.701(d)(2), 75.701(d)(3), 25.701(e)(3), 25.701 (f)(6)(i), and 25.701(f)(6)(ii) which contains information collection requirements that have not been approved by OMB. The Federal Communications Commission will publish a document in the **Federal Register** announcing the effective date.

FOR FURTHER INFORMATION CONTACT: Rosalee Chiara, Policy Division, Media Bureau, (202) 418–0754.

SUPPLEMENTARY INFORMATION: This is a summary of the *Second Order on Reconsideration of First Report and Order* (*"2nd Order"*) in MM Docket Nos. 93–25, FCC 04–44 adopted March 3, 2004 and released March 25, 2004. The full text of this decision is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554, and may be purchased from the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (202) 863–2893, facsimile (202) 863–2898, or via e-mail *qualexint@aol.com* or may be viewed via Internet at *http://www.fcc.gov/mb/.*

Synopsis of Second Order on Reconsideration of First Report and Order

I. Introduction

1. The Commission vacates the *Order* adopted in this proceeding on April 9, 2003, and adopts in its place this Sua Sponte *Order* and accompanying rules. The order reached results that differ from the *Order* with respect to two sections: The Political Broadcasting Requirements and Guidelines Concerning Commercialization of Children's Programming.

II. Background

2. In 1992, Congress directed the Commission to initiate a rulemaking to impose certain public interest obligations on DBS providers. In 1998, the Commission adopted the First Report and Order (*"1st R&O"*), 64 FR 5951, February 8, 1999, which implements these statutory obligations. Nine petitions for reconsideration and related pleadings were filed in response to the 1st *R&O*. The petitioners raise concerns regarding whether the Commission has correctly determined what entities are defined as DBS providers, whether it has properly implemented the Commission's political broadcasting requirements for DBS providers, and whether it has adequately addressed the issue of localism. Petitioners also assert that the Commission should have applied certain additional obligations to DBS providers, should have taken steps to protect children from harm associated with over-commercialization, should have prohibited DBS providers from meeting their public service obligation with existing programming, and challenge the Commission's determination to limit access to capacity reserved for educational and informational programming to one channel per national educational programming supplier.

III. Discussion

A. Definition of Providers of DBS Service

3. The Commission affirms its initial conclusion that the DBS public interest obligations should apply to DBS providers formerly licensed under part 100 of the Commission's rules, fixed satellite service licensees offering at least 25 channels of programming in the Ku band, and entities using non-U.S. licensed satellites to provide DBS service to subscribers in the United States.

B. Political Broadcasting Requirements

4. The Commission adopts specific, detailed rules on how DBS providers should comply with the political broadcasting requirements of sections 312(a)(7) and 315 of the Communications Act. These rules are the same as those applied to cable and broadcast with slight modifications to account for unique characteristics of DBS service.

C. Opportunities for Localism

5. The Commission finds that because of the passage of the Satellite Home Viewer Improvement Act, DBS providers are devoting a portion of their system channel capacity to locally originated broadcast station programming and that it would not serve the public interest to require additional requirements to "further the principle of localism" at this time.

D. Additional Obligations

6. The Commission affirmed its decision not to impose certain additional obligations on DBS providers.

E. Guidelines Concerning Commercialization of Children's Programming

7. On reconsideration, the Commission determined that, given the growth of the DBS industry and the technological advances of the service, it is now appropriate to require DBS providers to comply with advertising limits on children's programming that are applicable to cable operators.

F. Programming on Reserved Capacity

8. The Commission affirmed its decision to allow DBS providers to fulfill their 4% reservation requirement with programming carried before the rules went into effect.

G. Noncommercial Channel Limitation

9. The Commission affirmed its decision to limit access to the reserved capacity on each DBS system to one channel per qualified program supplier as long as demand for such capacity exceeds the available supply.

IV. Conclusion

10. The Commission grants in part and denies in part the petitions for reconsideration.

V. Paperwork Reduction Act

11. This Report and Order (*"R&O"*) contains modified information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collections contained in the proceeding.

12. Written comments by the public on the modified information collections are due June 28, 2004. Written comments must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on the modified information collections on or before June 28, 2004. In addition to filing comments with the Secretary, a copy of any Paperwork Reduction Act comments on the information collections contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., Washington, DC 20554, or via the Internet to *Judith-B.Herman@fcc.gov* and to Kim A. Johnson, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, NW., Washington, DC 20503 or via the Internet to *KimA.Johnson@omb.eop.gov* or by fax to 202–395–5167.

VI. Final Regulatory Flexibility Act Certification

13. The Regulatory Flexibility Act of 1980, as amended (RFA), *see* 5 U.S.C. 601–612 requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A "small business concern" is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

14. The *Order* mandates that DBS providers maintain political files that contain, at a minimum, (i) a record of all requests for DBS origination time, the disposition of those requests, and the charges made, if any, if the request is granted. The "disposition" includes the schedule of time purchased, when spots actually aired, the rates charged, and the classes of time purchased; and (ii) a record of the free time provided if free time is provided for use by or on behalf of candidates. DBS providers must also maintain records sufficient to

verify compliance with the rules establishing commercial limits for children's programming. Because DBS provides subscription services, DBS falls within the SBA-recognized definitions of "Cable Networks" and "Cable and Other Program Distribution." These definitions provide that small entities are ones with $12.5 million or less in annual receipts. Small businesses, *i.e.*, ones with less than $12.5 million in annual receipts, do not have the financial ability to become DBS licensees because of the high implementation costs associated with satellite services. Because this is an established service, with limited spectrum and orbital resources for assignment, we estimate that no more than 15 entities will be Commission licensees providing these services. In addition, because of high implementation costs and limited spectrum resources, we believe that none of the 15 licensees will be small entities. We expect that no small entities will be impacted by this rulemaking. Therefore, we certify that the requirements of the Order on Reconsideration will not have a significant economic impact on a substantial number of small entities.

15. We note that the American Cable Association ("ACA") (formerly the Small Cable Business Association) filed a Petition for Reconsideration of the *1st R&O's* Final Regulatory Flexibility Analysis, claiming generally that the Commission failed to properly take into account the harm that would be caused to small cable operators by the lack of rules requiring DBS providers to carry all local broadcast programming. The *Order* finds that although the Final Regulatory Flexibility Analysis issued in conjunction with the *1st R&O* was adequate, in any event the intervening adoption of broadcast signal carriage rules for DBS, similar to those imposed on cable systems, has alleviated the concerns articulated by ACA.

16. We certify that the rules in this Order will not have a significant economic impact on a substantial number of small entities.

Ordering Clause

17. The petitions for reconsideration filed by the American Cable Association (including its petition for reconsideration of the Final Regulatory Flexibility Act analysis), America's Public Television Stations and the Public Broadcasting Service, GE American Communications, Inc., Loral Space and Communications Ltd., PanAmSat Corporation, and Time Warner Cable *are denied* and the petitions for reconsideration filed by the Denver Area Educational Telecommunications Consortium, *et al.*, and the Center for Media Education, *et al.*, are granted in part and denied in part.

18. Pursuant to the authority contained in sections 4, 301, 302, 303, 307, 309, 312, 315, 332, and 335 of the Communications Act, as amended, 47 U.S.C. 154, 301, 303, 307, 309, 312, 315, 332, and 335, that revised CFR 25.701 *shall become effective* thirty (30) days after publication of the text or summary thereof in the **Federal Register**, except for §§ 25.701(d)(1)(i), 25.701(d)(1)(ii), 75.701(d)(2), 75.701(d)(3), 25.701(e)(3), 25.701 (f)(6)(i), and 25.701(f)(6)(ii) which involve Paperwork Reduction Act burdens, which *shall become effective* immediately upon announcement in the **Federal Register** of OMB approval.

19. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *Order*, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 25 Satellites.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rule Changes

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 25 as follows:

PART 25—SATELLITE COMMUNICATIONS

■ 1. The authority citation for part 25 continues to read as follows:

Authority: 47 U.S.C. 701–744. Interprets or applies sections 4, 301, 302, 303, 307, 309, and 332, of the Communications Act, as amended, 47 U.S.C. 154, 301, 302, 303, 307, 309, and 332, unless otherwise noted.

■ 2. Section 25.701 is revised to read as follows:

§ 25.701 Public interest obligations.

(a) DBS providers are subject to the public interest obligations set forth in paragraphs (b), (c), (d), (e) and (f) of this section. As used in this section, DBS providers are any of the following:

(1) Entities licensed to operate satellites in the 12.2 to 12.7 GHz DBS frequency bands; or

(2) Entities licensed to operate satellites in the Ku band fixed satellite service and that sell or lease capacity to a video programming distributor that offers service directly to consumers providing a sufficient number of channels so that four percent of the total applicable programming channels yields a set aside of at least one channel of non commercial programming pursuant to paragraph (e) of this section, or

(3) Non U.S. licensed satellite operators in the Ku band that offer video programming directly to consumers in the United States pursuant to an earth station license issued under part 25 of this title and that offer a sufficient number of channels to consumers so that four percent of the total applicable programming channels yields a set aside of one channel of non commercial programming pursuant to paragraph (e) of this section.

(b) Political broadcasting requirements —

(1) Legally qualified candidates for public office for purposes of this section are as defined in § 73.1940 of this chapter.

(2) DBS origination programming is defined as programming (exclusive of broadcast signals) carried on a DBS facility over one or more channels and subject to the exclusive control of the DBS provider.

(3) *Reasonable access.* (i) DBS providers must comply with section 312(a)(7) of the Communications Act of 1934, as amended, by allowing reasonable access to, or permitting purchase of reasonable amounts of time for, the use of their facilities by a legally qualified candidate for federal elective office on behalf of his or her candidacy.

(ii) *Weekend access.* For purposes of providing reasonable access, DBS providers shall make facilities available for use by federal candidates on the weekend before the election if the DBS provider has provided similar access to commercial advertisers during the year preceding the relevant election period. DBS providers shall not discriminate between candidates with regard to weekend access.

(4) *Use of facilities; equal opportunities.* DBS providers must comply with section 315 of the Communications Act of 1934, as amended, by providing equal opportunities to legally qualified candidates for DBS origination programming.

(i) *General requirements.* Except as otherwise indicated in § 25.701(b)(3), no DBS provider is required to permit the use of its facilities by any legally qualified candidate for public office, but if a DBS provider shall permit any such candidate to use its facilities, it shall afford equal opportunities to all other candidates for that office to use such facilities. Such DBS provider shall have no power of censorship over the

material broadcast by any such candidate. Appearance by a legally qualified candidate on any:

(A) Bona fide newscast;

(B) Bona fide news interview;

(C) Bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary); or

(D) On the spot coverage of bona fide news events (including, but not limited to political conventions and activities incidental thereto) shall not be deemed to be use of a DBS provider's facility. (Section 315(a) of the Communications Act.)

(ii) *Uses.* As used in this section and § 25.701(c), the term "use" means a candidate appearance (including by voice or picture) that is not exempt under paragraphs (b)(3)(i)(A) through (b)(3)(i)(D) of this section.

(iii) *Timing of request.* A request for equal opportunities must be submitted to the DBS provider within 1 week of the day on which the first prior use giving rise to the right of equal opportunities occurred: Provided, however, That where the person was not a candidate at the time of such first prior use, he or she shall submit his or her request within 1 week of the first subsequent use after he or she has become a legally qualified candidate for the office in question.

(iv) *Burden of proof.* A candidate requesting equal opportunities of the DBS provider or complaining of noncompliance to the Commission shall have the burden of proving that he or she and his or her opponent are legally qualified candidates for the same public office.

(v) *Discrimination between candidates.* In making time available to candidates for public office, no DBS provider shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; nor shall any DBS provider make any contract or other agreement that shall have the effect of permitting any legally qualified candidate for any public office to use DBS origination programming to the exclusion of other legally qualified candidates for the same public office.

(c) *Candidate rates.*

(1) *Charges for use of DBS facilities.* The charges, if any, made for the use of any DBS facility by any person who is a legally qualified candidate for any public office in connection with his or her campaign for nomination for election, or election, to such office shall not exceed:

(i) During the 45 days preceding the date of a primary or primary runoff election and during the 60 days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the DBS provider for the same class and amount of time for the same period.

(A) A candidate shall be charged no more per unit than the DBS provider charges its most favored commercial advertisers for the same classes and amounts of time for the same periods. Any facility practices offered to commercial advertisers that enhance the value of advertising spots must be disclosed and made available to candidates upon equal terms. Such practices include but are not limited to any discount privileges that affect the value of advertising, such as bonus spots, time sensitive make goods, preemption priorities, or any other factors that enhance the value of the announcement.

(B) The Commission recognizes non preemptible, preemptible with notice, immediately preemptible and run of schedule as distinct classes of time.

(C) DBS providers may establish and define their own reasonable classes of immediately preemptible time so long as the differences between such classes are based on one or more demonstrable benefits associated with each class and are not based solely upon price or identity of the advertiser. Such demonstrable benefits include, but are not limited to, varying levels of preemption protection, scheduling flexibility, or associated privileges, such as guaranteed time sensitive make goods. DBS providers may not use class distinctions to defeat the purpose of the lowest unit charge requirement. All classes must be fully disclosed and made available to candidates.

(D) DBS providers may establish reasonable classes of preemptible with notice time so long as they clearly define all such classes, fully disclose them and make them available to candidates.

(E) DBS providers may treat non preemptible and fixed position as distinct classes of time provided that they articulate clearly the differences between such classes, fully disclose them, and make them available to candidates.

(F) DBS providers shall not establish a separate, premium priced class of time sold only to candidates. DBS providers may sell higher priced non preemptible or fixed time to candidates if such a class of time is made available on a bona fide basis to both candidates and commercial advertisers, and provided such class is not functionally equivalent to any lower priced class of time sold to commercial advertisers.

(G) [Reserved]

(H) Lowest unit charge may be calculated on a weekly basis with respect to time that is sold on a weekly basis, such as rotations through particular programs or dayparts. DBS providers electing to calculate the lowest unit charge by such a method must include in that calculation all rates for all announcements scheduled in the rotation, including announcements aired under long term advertising contracts. DBS providers may implement rate increases during election periods only to the extent that such increases constitute "ordinary business practices," such as seasonal program changes or changes in audience ratings.

(I) DBS providers shall review their advertising records periodically throughout the election period to determine whether compliance with this section requires that candidates receive rebates or credits. Where necessary, DBS providers shall issue such rebates or credits promptly.

(J) Unit rates charged as part of any package, whether individually negotiated or generally available to all advertisers, must be included in the lowest unit charge calculation for the same class and length of time in the same time period. A candidate cannot be required to purchase advertising in every program or daypart in a package as a condition for obtaining package unit rates.

(K) DBS providers are not required to include non cash promotional merchandising incentives in lowest unit charge calculations; provided, however, that all such incentives must be offered to candidates as part of any purchases permitted by the system. Bonus spots, however, must be included in the calculation of the lowest unit charge calculation.

(L) Make goods, defined as the rescheduling of preempted advertising, shall be provided to candidates prior to election day if a DBS provider has provided a time sensitive make good during the year preceding the pre election periods, respectively set forth in paragraph (c)(1)(i) of this section, to any commercial advertiser who purchased time in the same class.

(M) DBS providers must disclose and make available to candidates any make good policies provided to commercial advertisers. If a DBS provider places a make good for any commercial advertiser or other candidate in a more

valuable program or daypart, the value of such make good must be included in the calculation of the lowest unit charge for that program or daypart.

(ii) At any time other than the respective periods set forth in paragraph (c)(1)(i) of this section, DBS providers may charge legally qualified candidates for public office no more than the charges made for comparable use of the facility by commercial advertisers. The rates, if any, charged all such candidates for the same office shall be uniform and shall not be rebated by any means, direct or indirect. A candidate shall be charged no more than the rate the DBS provider would charge for comparable commercial advertising. All discount privileges otherwise offered by a DBS provider to commercial advertisers must be disclosed and made available upon equal terms to all candidates for public office.

(2) If a DBS provider permits a candidate to use its facilities, it shall make all discount privileges offered to commercial advertisers, including the lowest unit charges for each class and length of time in the same time period and all corresponding discount privileges, available on equal terms to all candidates. This duty includes an affirmative duty to disclose to candidates information about rates, terms, conditions and all value enhancing discount privileges offered to commercial advertisers, as provided herein. DBS providers may use reasonable discretion in making the disclosure; provided, however, that the disclosure includes, at a minimum, the following information:

(i) A description and definition of each class of time available to commercial advertisers sufficiently complete enough to allow candidates to identify and understand what specific attributes differentiate each class;

(ii) A description of the lowest unit charge and related privileges (such as priorities against preemption and make goods prior to specific deadlines) for each class of time offered to commercial advertisers;

(iii) A description of the DBS provider's method of selling preemptible time based upon advertiser demand, commonly known as the "current selling level," with the stipulation that candidates will be able to purchase at these demand generated rates in the same manner as commercial advertisers;

(iv) An approximation of the likelihood of preemption for each kind of preemptible time; and

(v) An explanation of the DBS provider's sales practices, if any, that are based on audience delivery, with the stipulation that candidates will be able to purchase this kind of time, if available to commercial advertisers.

(3) Once disclosure is made, DBS providers shall negotiate in good faith to actually sell time to candidates in accordance with the disclosure.

(d) Political file. Each DBS provider shall keep and permit public inspection of a complete and orderly political file and shall prominently disclose the physical location of the file, and the telephonic and electronic means to access the file.

(1) The political file shall contain, at a minimum:

(i) A record of all requests for DBS origination time, the disposition of those requests, and the charges made, if any, if the request is granted. The "disposition" includes the schedule of time purchased, when spots actually aired, the rates charged, and the classes of time purchased; and

(ii) A record of the free time provided if free time is provided for use by or on behalf of candidates.

(2) DBS providers shall place all records required by this section in a file available to the public as soon as possible and shall be retained for a period of four years until December 31, 2006, and thereafter for a period of two years.

(3) DBS providers shall make available, by fax, e-mail, or by mail upon telephone request, photocopies of documents in their political files and shall assist callers by answering questions about the contents of their political files. Provided, however, that if a requester prefers access by mail, the DBS provider shall pay for postage but may require individuals requesting documents to pay for photocopying. To the extent that a DBS provider places its political file on its Web site, it may refer the public to the Web site in lieu of mailing photocopies. Any material required by this section to be maintained in the political file must be made available to the public by either mailing or Web site access or both.

(e) *Commercial limits in children's programs.* (1) No DBS provider shall air more than 10.5 minutes of commercial matter per hour during children's programming on weekends, or more that 12 minutes of commercial matter per hour on week days.

(2) This rule shall not apply to programs aired on a broadcast television channel which the DBS provider passively carries, or to channels over which the DBS provider may not exercise editorial control, pursuant to 47 U.S.C. 335(b)(3).

(3) DBS providers airing children's programming must maintain records sufficient to verify compliance with this rule and make such records available to the public. Such records must be maintained for a period sufficient to cover the limitations period specified in 47 U.S.C. 503(b)(6)(B).

Note 1 to paragraph (e): *Commercial matter* means airtime sold for purposes of selling a product or service.

Note 2 to paragraph (e): For purposes of this section, children's programming refers to programs originally produced and broadcast primarily for an audience of children 12 years old and younger.

(f) Carriage obligation for noncommercial programming—

(1) *Reservation requirement.* DBS providers shall reserve four percent of their channel capacity exclusively for use by qualified programmers for noncommercial programming of an educational or informational nature. Channel capacity shall be determined annually by calculating, based on measurements taken on a quarterly basis, the average number of channels available for video programming on all satellites licensed to the provider during the previous year. DBS providers may use this reserved capacity for any purpose until such time as it is used for noncommercial educational or informational programming.

(2) *Qualified programmer.* For purposes of these rules, a qualified programmer is:

(i) A noncommercial educational broadcast station as defined in section 397(6) of the Communications Act of 1934, as amended,

(ii) A public telecommunications entity as defined in section 397(12) of the Communications Act of 1934, as amended,

(iii) An accredited nonprofit educational institution or a governmental organization engaged in the formal education of enrolled students (A publicly supported educational institution must be accredited by the appropriate state department of education; a privately controlled educational institution must be accredited by the appropriate state department of education or the recognized regional and national accrediting organizations), or

(iv) A nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations.

(v) Other noncommercial entities with an educational mission.

(3) *Editorial control.* (i) A DBS operator will be required to make capacity available only to qualified

programmers and may select among such programmers when demand exceeds the capacity of their reserved channels.

(ii) A DBS operator may not require the programmers it selects to include particular programming on its channels.

(iii) A DBS operator may not alter or censor the content of the programming provided by the qualified programmer using the channels reserved pursuant to this section.

(4) Non-commercial channel limitation. A DBS operator cannot initially select a qualified programmer to fill more than one of its reserved channels except that, after all qualified entities that have sought access have been offered access on at least one channel, a provider may allocate additional channels to qualified programmers without having to make additional efforts to secure other qualified programmers.

(5) *Rates, terms and conditions.* (i) In making the required reserved capacity available, DBS providers cannot charge rates that exceed costs that are directly related to making the capacity available to qualified programmers. Direct costs include only the cost of transmitting the signal to the uplink facility and uplinking the signal to the satellite.

(ii) Rates for capacity reserved under paragraph (a) of this section shall not exceed 50 percent of the direct costs as defined in this section.

(iii) Nothing in this section shall be construed to prohibit DBS providers from negotiating rates with qualified programmers that are less than 50 percent of direct costs or from paying qualified programmers for the use of their programming.

(iv) DBS providers shall reserve discrete channels and offer these to qualifying programmers at consistent times to fulfill the reservation requirement described in these rules.

(6) *Public file.* (i) In addition to the political file requirements in § 25.701(d), each DBS provider shall keep and permit public inspection of a complete and orderly record of:

(A) Quarterly measurements of channel capacity and yearly average calculations on which it bases its four percent reservation, as well as its response to any capacity changes;

(B) A record of entities to whom noncommercial capacity is being provided, the amount of capacity being provided to each entity, the conditions under which it is being provided and the rates, if any, being paid by the entity;

(C) A record of entities that have requested capacity, disposition of those requests and reasons for the disposition.

(ii) All records required by this paragraph shall be placed in a file available to the public as soon as possible and shall be retained for a period of two years.

(7) *Effective date.* DBS providers are required to make channel capacity available pursuant to this section upon the effective date. Programming provided pursuant to this rule must be available to the public no later than six months after the effective date.

[FR Doc. 04–9170 Filed 4–27–04; 8:45 am]
BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 031124287–4060–02; I.D. 042204A]

Fisheries of the Exclusive Economic Zone Off Alaska; Groundfish by Vessels Using Non-Pelagic Trawl Gear in the Red King Crab Savings Subarea

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Closure.

SUMMARY: NMFS is closing directed fishing for groundfish with non-pelagic trawl gear in the red king crab savings subarea (RKCSS) of the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the 2004 red king crab prohibited species catch (PSC) limit that is specified for the RKCSS of the BSAI.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), April 23, 2004, until 2400 hrs, A.l.t., December 31, 2004.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and CFR part 679.

The final 2004 harvest specifications for groundfish of the BSAI (69 FR 9242, February 27, 2004), established the 2004 red king crab PSC limit that is specified for the RKCSS of the BSAI , as 42,495 animals.

In accordance with § 679.21(e)(7)(ii)(B), the Administrator, Alaska Region, NMFS, has determined that the amount of the 2004 red king crab PSC limit specified for the RKCSS will be caught. Consequently, NMFS is closing the RKCSS to directed fishing for groundfish with non-pelagic trawl gear.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent the Agency from responding to the most recent fisheries data in a timely fashion and would delay the closure of the RKCSS under the 2004 red king crab PSC limit that is specified for the RKCSS of the BSAI.

The AA also finds good cause to waive the 30–day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.21 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: April 22, 2004.

Alan D. Risenhoover,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 04–9648 Filed 4–23–04; 2:29 pm]
BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 69, No. 82
Wednesday, April 28, 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 TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–219–AD]

RIN 2120–AA64

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

AGENCY: Federal Aviation Administration, DOT.

ACTION: Proposed rule; withdrawal.

SUMMARY: This action withdraws a supplemental notice of proposed rulemaking (NPRM) that proposed a new airworthiness directive (AD), applicable to all Boeing Model 737–100, –200, –200C, –300, –400, and –500 series airplanes. That action would have superseded an existing AD that currently requires repetitive inspections to find cracks, fractures, or corrosion of each carriage spindle of the left and right outboard mid-flaps; and corrective action, if necessary. That action would also have mandated the previously optional overhaul or replacement of the carriage spindles, which would have ended the repetitive inspections required by the existing AD. Since the issuance of the supplemental NPRM, the Federal Aviation Administration (FAA) has issued another AD that adequately addresses the identified unsafe condition. Accordingly, the proposed rule is withdrawn.

FOR FURTHER INFORMATION CONTACT: Robert Hardwick, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6457; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to add a new airworthiness directive (AD), applicable to all Boeing Model 737–100, –200, –200C, –300, –400, and –500 series airplanes, was published as a supplemental notice of proposed rulemaking (NPRM) in the **Federal Register** on November 4, 2003 (68 FR 62409). The proposed rule would have superseded an existing AD that currently requires repetitive inspections to find cracks, fractures, or corrosion of each carriage spindle of the left and right outboard mid-flaps; and corrective action, if necessary. The proposed rule would also have mandated the previously optional overhaul or replacement of the carriage spindles, which would have ended the repetitive inspections required by the existing AD. That action was prompted by the FAA's determination to mandate the previously optional actions. The proposed actions were intended to prevent severe flap asymmetry due to fractures of the carriage spindles on an outboard mid-flap, which could result in reduced control or loss of controllability of the airplane.

Actions That Occurred Since the Supplemental NPRM Was Issued

Since the issuance of that supplemental NPRM, the FAA received a report of an in-service incident, which involved a dual failure that had been considered extremely improbable when the supplemental NPRM was drafted. To address the immediate safety concerns of this dual failure, we issued airworthiness directive (AD) 2003–24–08, amendment 39–13377 (68 FR 67027, December 1, 2003), applicable to all Boeing Model 737–100, –200, –200C, –300, –400, and –500 series airplanes, to require repetitive inspections to find cracks, fractures, or corrosion of each carriage spindle of the left and right outboard mid-flaps; and corrective action, if necessary. That AD also provides for an optional action of overhaul or replacement of the carriage spindles, which would extend the repetitive inspection interval.

We are currently considering superseding AD 2003–24–08 to mandate the optional overhaul or replacement of the carriage spindles and to add a maximum flight cycle life of carriage spindles, in addition to continuing the repetitive inspections.

FAA's Conclusions

Upon further consideration, the FAA has determined that the requirements of AD 2003–24–08 adequately addresses the identified unsafe condition specified in the supplemental NPRM. Accordingly, the supplemental NPRM is hereby withdrawn.

Withdrawal of this supplemental NPRM constitutes only such action, and does not preclude the agency from issuing another action in the future, nor does it commit the agency to any course of action in the future.

Regulatory Impact

Since this action only withdraws a supplemental NPRM, it is neither a proposed nor a final rule and therefore is not covered under Executive Order 12866, the Regulatory Flexibility Act, or DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979).

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Withdrawal

Accordingly, the supplemental notice of proposed rulemaking, Docket 2002–NM–219–AD, published in the **Federal Register** on November 4, 2003 (68 FR 62409), is withdrawn.

Issued in Renton, Washington, on April 20, 2004.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–9593 Filed 4–27–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2004–17513; Airspace Docket No. 04–AEA–04]

Proposed Establishment of Class E Airspace; Cooperstown, NY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to establish Class E airspace area at Cooperstown, NY. The development of a Standard Instrument Approach Procedure (SIAP) based on area navigation (RNAV) to serve flights into Cooperstown-Westville Airport, Cooperstown, NY under Instrument Flight Rules (IFR) has made this proposal necessary. Controlled airspace extending upward from 700 feet Above

Ground Level (AGL) is needed to contain aircraft executing the approach. The area would be depicted on aeronautical charts for pilot reference.

DATES: Comments must be received on or before May 28, 2004.

ADDRESSES: Send comments on the proposal to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You must identify the docket number FAA–2004–17513/ Airspace Docket No. 04–AEA–04 at the beginning of your comments. You may also submit comments on the Internet at *http://dms.dot.gov*.

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527) is on the plaza level of the Department of Transportation NASSIF Building at the above address.

An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division, Federal Aviation Administration, Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809.

FOR FURTHER INFORMATION CONTACT: Mr. Francis T. Jordan, Jr., Airspace Specialist, Airspace Branch, AEA–520, Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809, telephone: (718) 553–4521.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, or views, arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA–2004–17513/Airspace Docket No. 04–AEA–04." The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://dms.dot.gov*. Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov* or the Superintendent of Documents Web page at *htt://www.access.gpo.gov/nara*.

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration, Office Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is considering an amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) to establish Class E airspace area at Cooperstown, NY. The development of a SIAP to serve flights operating IFR into Cooperstown-Westville Airport makes this action necessary. Controlled airspace extending upward from 700 feet AGL is needed to accommodate aircraft using the SIAP. Class E airspace designations for airspace areas extending upward from 700 feet or more above the surface are published in Paragraph 6005 of FAA Order 7400.9L, dated September 2, 2003, and effective September 16, 2003, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation—(1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that would only affect air traffic procedures and air navigation, it is certified that this proposed rule would not have significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporated by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—[AMENDED]

1. The authority citation for 14 CFR Part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854; 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 74009L, dated September 2, 2003, and effective September 16, 2003, is proposed to be amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

AEA NY E5 Cooperstown, NY (NEW)

Cooperstown-Westville Airport,
Cooperstown, NY
(Lat. 42°37′45″ N., long. 74°53′28″ W.)

That airspace extending upward from 700 feet above the surface within a 6-mile radius of Cooperstown-Westville Airport, excluding that portion that coincides with the Oneonta, NY, Class E airspace area.

* * * * *

Issued in Jamaica, New York, on April 20, 2004.

John G. McCartney,

Assistant Manager, Air Traffic Division, Eastern Region.

[FR Doc. 04–9624 Filed 4–27–04; 8:45 am]

BILLING CODE 4910–13–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[WV064–6033b; FRL–7652–5]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Revision to the State Implementation Plan Addressing Sulfur Dioxide in Marshall County

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the State of West Virginia which consists of a Consent Order for PPG Industries, Inc., which will continue to achieve and maintain the national ambient air quality standards (NAAQS) for sulfur dioxide (SO_2) in Marshall County, West Virginia. In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by May 28, 2004.

ADDRESSES: Submit your comments, identified by WV064–6033 by one of the following methods:

A. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *E-mail: morris.makeba@epa.gov.*

C. *Mail:* Makeba Morris, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No.WV064–6033. EPA's policy is that all comments received will be included in the public docket without change, 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 regulations.gov or e-mail. The federal regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through 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.

Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; and the West Virginia Department of Environmental Protection, Division of Air Quality, 7012 MacCorkle Avenue, SE., Charleston, WV 25304–2943.

FOR FURTHER INFORMATION CONTACT: Ellen Wentworth, (215) 814–2034, or Denis Lohman, (215) 814–2192, or by e-mail at *wentworth.ellen@epa.gov*, or *lohman.denny@epa.gov.*

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, approving the SIP revision addressing SO_2 in Marshall County, West Virginia, that is located in the "Rules and Regulations" section of this **Federal Register** publication.

Dated: April 13, 2004.

Richard J. Kampf,

Acting Regional Administrator, Region III.

[FR Doc. 04–9579 Filed 4–27–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–2004–0091; FRL–6773–2]

Fenpyroximate; 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 fenpyroximate benzoic acid, 4-[[[(E)-(1,3-dimethyl-5-phenoxy-1H-pyrazol-4-yl) methylene]amino] oxy]methyl]-, 1,1-dimethylethyl ester] and its z-isomer benzoic acid, 4-[[[[(Z)-(1,3-dimethyl-5-phenoxy-1H-pyrazol-4-yl) methylene]aminio]oxy]methyl]-,1,1-dimethylethyl ester)] in or on wine grapes and hops under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA).

DATES: Comments must be received on or before June 28, 2004.

ADDRESSES: Submit your comments, identified by Docket ID No. 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.

Mail: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Mailcode: (7502C), 1200 Pennsylvania Ave., NW., Washington, DC 20460.

Hand Delivery: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, Attention: Docket ID number OPP–2004–0091. 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. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. 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 federal 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, 1921 Jefferson Davis Hwy., Arlington, VA, 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; 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.**

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 Access Copies of this Document and Other Related Information?

In addition to using EDOCKET (*http://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 atE-CFR Beta Site Two at *http://www.gpoaccess.gov/ecfr.* To access the OPPTS Harmonized Guideline referenced in this document, go directly to the guidelines at *http://www.epa.gov/opptsfrs/home/guidelin.htm.*

II. Background

In the **Federal Register** of February 18, 1999 (64 FR 8090) (FRL–6059–9), EPA issued a notice of filing under section 408(d)(3) of the FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 5E4435) by Nichino America, Inc., 4550 New Linden Hill Road, Wilmington, DE 19808. The petition requested that 40 CFR 180.566 be amended by establishing an import tolerance for residues of the insecticide fenpyroximate and its z-isomer, in or on grapes and hops (green and dried) at 1 parts per million (ppm) and hops at 10 ppm. The notice included a summary of the petition prepared by Nichino America, Inc., the registrant. There were no comments received in response to the notice of filing. On April 10, 2001 (66 FR 18561) (FRL–6773–2), EPA issued a final rule under section 408(d)(3) of the FFDCA, 21 U.S.C. 346a(d)(3), announcing the establishment of time-limited pesticide tolerances in conjunction to the original pesticide petition (PP 5E4435).

This tolerance was time-limited because the Agency lacked data on product chemistry for OPPTS Harmonized Guideline 830.6313, additional validation of analytical methods for plants, (multiresidue testing and specificity), storage stability studies for grapes and grape juice, additional grape field trials in Chile, and additional information on uses of fenpyroximate in Mexico. That data has been submitted, and the Agency has subsequently determined that the independent lab validation method submitted by Nichino America, Inc. needs further clarification. Nichino America, Inc. was requested to resubmit this data. All other required data identified by the Agency prior to the publication on April 10, 2001, of the Final Rule have been submitted to the Agency.

III. Proposal

EPA is proposing to extend the dates of expiration for the time-limited tolerances for residues of the insecticide fenpyroximate and its z-isomer, in or on grapes and hops (green and dried) at 1 ppm and hops at 10 ppm, from April 14, 2004, to December 31, 2009, to provide Nichino America, Inc. additional time to develop and resubmit additional information for an acceptable independent laboratory validation method. Previously, the Agency reviewed all available data, and concluded that these import tolerances meet the safety standard under FFDCA section 408(b)(2)(A)(ii). The basis for that conclusion is explained in the final rule promulgating the time-limited tolerances. The Agency has subsequently reviewed a complete toxicology data base for fenpyroximate and its z-isomer for the affected import tolerances, and determined that upon acceptable review of the recently submitted independent lab validation method, that these import tolerances may become permanent.

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). A regulatory flexibility analysis of this proposed rule under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) is not required since this action will not have a significant economic impact on a substantial number of small entities. Establishing pesticide tolerances has a positive economic impact on small entities because a pesticide tolerance allows the pesticide to be used in the production of food. 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: April 19, 2004.

Betty Shackleford,

Acting 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 180.566 is amended by revising the table in paragraph (a) to read as follows:

§ 180.566 Fenpyroximate; tolerances for residues.

(a) * * *

Commodity	Parts per million	Expiration/ revocation date
Grape, wine[1]	1.0	12/31/09
Hop[1]	10	12/31/09

[1]There are no U.S. registrations on hop and wine grape.

* * * * *

[FR Doc. 04–9614 Filed 4–27–04; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–910; MB Docket No. 04–97, RM–10897, RM–10898; MB Docket No. 04–98, RM–10899; MB Docket No. 04–99, RM–10900; MB Docket No. 04–100, RM–10901; MB Docket No. 04–101, RM–10902, RM–10903; MB Docket No. 04–102, RM–10904, RM–10905, RM–10906; MB Docket No. 04–103, RM–10907; MB Docket No. 04–104, RM–10908, MB Docket No. 04–105, RM–10909, RM–10910, RM–10911; MB Docket No. 04–106, RM–10912; MB Docket No. 04–107, RM–10913, RM–10914; MB Docket No. 04–108, RM–10915, RM–10916, RM–10917, RM–10918; MB Docket No. 04–109, RM–10919; MB Docket No. 04–110, RM–10920, RM–10921, RM–10922]

Radio Broadcasting Services; Canton, IL, Cedarville, IL, Council Grove, KS, Clifton, IL, Farmersburg, IN, Freeport, IL, Fowler, IN, Golden Meadow, LA, Homer, LA, Madison, IN, Pinckneyville, IL, Ringgold, LA, Smith Mills, KY and Terre Haute, IN

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document sets forth 14 reservation proposals requesting to amend the FM Table of Allotments by reserving certain vacant FM allotments for noncommercial educational use in Canton, Illinois, Cedarville, Illinois, Council Grove, Kansas, Clifton, Illinois, Farmersburg, Indiana, Freeport, Illinois, Fowler, Indiana, Golden Meadow, Louisiana, Homer, Louisiana, Madison, Indiana, Pinckneyville, Illinois, Terre Haute, Indiana, Ringgold, Louisiana and Smith Mills, Kentucky. The Audio Division requests comment on petitions filed by Illinois State University and Starboard Media Foundation, Inc. proposing the reservation of vacant Channel 277A at Canton, Illinois for noncommercial use. The reference coordinates for Channel *277A at Canton are 40–28–27 North Latitude and 90–3–1 West Longitude. The Audio Division requests comment on a petition filed by The Catholic Diocese of Rockford proposing the reservation of vacant Channel 258A at Cedarville, Illinois. The reference coordinates for Channel *258A at Cedarville are 42–21–50 North Latitude and 89–40–59 West Longitude. *See* **SUPPLEMENTARY INFORMATION**, *infra*.

DATES: Comments must be filed on or before May 27, 2004, and reply comments on or before June 11, 2004.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW.; Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, his counsel, or consultant, as follows: Todd D. Gray, Esq., Margaret L. Miller, Esq. and Barry S. Persh, Esq., c/o Illinois State University, Dow, Lohnes & Albertson, PLLC, 1200 New Hampshire Avenue, Suite 800, Washington, DC 20036; Mark Follett, Starboard Media Foundation, Inc., 2300 Riverside Drive, Green Bay, WI 54301; Dennis J. Kelly, Esq., c/o The Catholic Diocese of Rockford, Law Office of Dennis J. Kelly, Post Office Box 41177, Washington, DC 20018; James Miller, Miller Media, 115 Bobbie Drive, Swansea, IL 62226; Patrick J. Vaughn, General Counsel, American Family Association, Post Office Drawer 2440, Tupelo, MS 38803; Mark N. Lipp, Esq., c/o Word Power, Inc., Vinson & Elkins, LLP, The Willard Office Building, 1455 Pennsylvania Avenue, NW., Washington, DC 20004–1008; Harry C. Martin, Esq. and Lee G. Petro, Esq., c/o Living Proof, Inc, Fletcher, Heald & Hildreth PLC, 1300 North 17th Street, 11th Floor, Arlington, VA 22209; William D. Wallace, Esq., c/o The Trustees of Indiana University, Crowell & Moring LLP, 1001 Pennsylvania Avenue, NW., Washington, DC 20004; Russell C. Powell, Esq., c/o Great Plains Christian Radio, Inc, Taylor & Powell, LLP, 908 King Street, Suite 300, Alexandria, VA 22314; Joseph C. Chautin, III, Esq., c/o Providence Educational Foundation, Hardy, Carey & Chautin, L.L.P., 110 Veterans Blvd., Suite 300, Metairie, Louisiana 70005; David A. O'Connor, Esq., c/o Calvary of New Orleans, Holland & Knight LLP, 2099 Pennsylvania Avenue, NW., Suite 100, Washington, DC 20006; David A. O'Connor, Esq., c/o Southern Cultural Outreach Association, Inc., Holland & Knight LLP, 2099 Pennsylvania Avenue, NW., Suite 100, Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket Nos. 04–97, 04–98, 04–99, 04–100, 04–101, 04–102, 04–103, 04–104, 04–105, 04–106, 04–107, 04–108, 04–109, 04–110 adopted April 2, 2004, and released April 5, 2004. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC's Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com*.

The Audio Division requests comment on petitions filed by Starboard Media Foundation, Inc. proposing the reservation of vacant Channel 297A at Clifton, Illinois, vacant Channel 295A at Freeport, Illinois, and vacant Channel 291A at Fowler, Indiana for noncommercial use. The reference coordinates for Channel *297A at Clifton are 40–52–0 North Latitude and 87–58–0 West Longitude. The reference coordinates for Channel *295A at Freeport are 42–19–28 North Latitude and 89–35–13 West Longitude. The reference coordinates for Channel *291A at Fowler are 40–38–5 North Latitude and 87–18–46 West Longitude.

The Audio Division requests comment on petitions filed by Starboard Media Foundation and Miller Media proposing the reservation of vacant Channel 282A at Pinckneyville, Illinois for noncommercial use. The reference coordinates for Channel *282A at Pinckneyville are 38–5–30 North Latitude and 89–22–46 West Longitude.

The Audio Division requests comment on petitions filed by American Family Association, Starboard Media Foundation, Inc. and Word Power, Inc. proposing the reservation of vacant Channel 242A at Farmersburg, Indiana for noncommercial use. The reference coordinates for Channel *242A at Farmersburg are 39–15–18 North Latitude and 87–23–0 West Longitude.

The Audio Division requests comment on petitions filed by American Family Association proposing the reservation of vacant Channel 266A at Madison, Indiana and vacant Channel 272A at Homer, Louisiana for noncommercial use. The reference coordinates for Channel *266A at Madison are 38–49–15 North Latitude and 85–18–46 West Longitude. The reference coordinates for Channel *272A at Homer are 32–42–41 North Latitude and 92–56–35 West Longitude.

The Audio Division requests comment on petitions filed by Living Proof, Inc., Word Power, Inc and The Trustees of Indiana University proposing the reservation of vacant Channel 298B at Terre Haute for noncommercial use. The reference coordinates for Channel *298B at Terre Haute are 39–30–14 North Latitude and 87–26–37 West Longitude.

The Audio Division requests comment on a petition filed by Great Plains Christian Radio, Inc. proposing the reservation of vacant Channel 281C3 at Council Grove, Kansas for

noncommercial use. The reference coordinates for Channel *281C3 at Council Grove are 38–39–42 North Latitude and 96–29–18 West Longitude.

The Audio Division requests comment on petitions filed by American Family Association and Starboard Media Foundation, Inc. proposing the reservation of vacant Channel 233A at Smith Mills, Kentucky for noncommercial use. The reference coordinates for Channel *233A at Smith Mills are 37–47–26 North Latitude and 87–55–23 West Longitude.

The Audio Division requests comment on petitions filed by American Family Association Starboard Media Foundation, Inc., Providence Educational Foundation and Calvary of New Orleans proposing the reservation of vacant Channel 289C2 at Golden Meadow, Louisiana for noncommercial use. The reference coordinates for Channel *289C2 at Golden Meadow are 29–14–0 North Latitude and 90–15–0 West Longitude.

The Audio Division requests comment on petitions filed by American Family Association, Starboard Media Foundation, Inc. and Southern Cultural Outreach Association, Inc. proposing the reservation of vacant Channel 253C3 at Ringgold, Louisiana for noncommercial use. The reference coordinates for Channel *253C3 at Ringgold are 32–19–49 North Latitude and 93–12–33 West Longitude.

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* contact.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

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.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Illinois, is amended by adding Channel *277A and by removing Channel 277A at Canton; by adding Channel *258A and by removing Channel 258A at Cedarville; by adding Channel *297A and by removing Channel 297A at Clifton; and by adding Channel *295A and by removing Channel 295A at Freeport; and by adding Channel *282A and by removing Channel 282A at Pinckneyville.

3. Section 73.202(b), the Table of FM Allotments under Indiana, is amended by adding Channel *242A and by removing Channel 242A at Farmersburg; by adding Channel *291A and by removing Channel 291A at Fowler; by adding Channel *266A and by removing Channel 266A at Madison; and by adding Channel *298B and by removing Channel 298B at Terre Haute.

4. Section 73.202(b), the Table of FM Allotments under Kansas, is amended by adding Channel *281C3 and by removing Channel 281C3 at Council Grove.

5. Section 73.202(b), the Table of FM Allotments under Kentucky, is amended by adding Channel *233A and by removing Channel 233A at Smith Mills.

6. Section 73.202(b), the Table of FM Allotments under Louisiana, is amended by adding Channel *289C2 and by removing Channel 289C2 at Golden Meadow; by adding Channel *272A and by removing Channel 272A at Homer; and by adding Channel *253C3 and by removing Channel 253C3 at Ringgold.

Federal Communications Commission.

Peter H. Doyle,

Chief, Audio Division, Media Bureau.

[FR Doc. 04–9641 Filed 4–27–04; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register
Vol. 69, No. 82
Wednesday, April 28, 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.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

Meeting

AGENCY: Advisory Council on Historic Preservation.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given that the Advisory Council on Historic Preservation (ACHP) will meet on Tuesday, May 4, 2004. The meeting will be held in Room M–09 at the Old Post Office Building, 1100 Pennsylvania Avenue, NW., Washington, DC, beginning at 9 a.m.

The ACHP was established by the National Historic Preservation Act of 1966 (16 U.S.C. 470 *et seq.*) to advise the President and the Congress on matters relating to historic preservation and to comment upon Federal, federally assisted, and federally licensed undertakings having an effect upon properties listed in or eligible for inclusion in the National Register of Historic Places. The ACHP's members are the Architect of the Capitol; the Secretaries of the Interior, Agriculture, Defense, and Transportation; the Administrators of the Environmental Protection Agency and General Services Administration; the Chairman of the National Trust for Historic Preservation; the President of the National Conference of State Historic Preservation Officers; a Governor; a Mayor; a Native Hawaiian; and eight non-Federal members appointed by the President.

The agenda for the meeting includes the following:

I. Chairman's Welcome
II. *Preserve America* Program Development
III. *Preserve America* Executive Order Implementation
IV. Report of the Executive Committee
Adoption of amendments to section 106 regulations
V. Report of the Preservation Initiatives Committee
VI. Report of the Federal Agency Programs Committee
VII. Report of the Communications, Education, and Outreach Committee
VIII. Chairman's Report
IX. Executive Director's Report
X. New Business
XI. Adjourn

Note: The meetings of the ACHP are open to the public. If you need special accommodations due to a disability, please contact the Advisory Council on Historic Preservation, 1100 Pennsylvania Ave., NW., Room 809, Washington, DC, 202–606–8503, at least seven (7) days prior to the meeting.

For further information: Additional information concerning the meeting is available from the Executive Director, Advisory Council on Historic Preservation, 1100 Pennsylvania Avenue, NW., #809, Washington, DC 20004.

April 23, 2004.

John M. Fowler,

Executive Director.

[FR Doc. 04–9597 Filed 4–27–04; 8:45 am]

BILLING CODE 4310–10–M

DEPARTMENT OF AGRICULTURE

Forest Service

Wrangell-Petersburg Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Wrangell-Petersburg Resource Advisory Committee (RAC) will meet from 8:30 a.m. until 5:15 p.m. (or until the conclusion of public testimony) on Friday, May 7, and from 8 a.m. until 9 a.m., Saturday, May 8, 2004, in Wrangell, Alaska. The purpose of this meeting is to review, discuss and potentially recommend for funding proposals received pursuant to Title II, Public Law 106–393, H.R. 2389, the Secure Rural Schools and Community Self-Determination Act of 2000, also called the "Payments to States" Act. Public testimony regarding the proposals will also be taken.

DATES: The meeting will be held commencing at 8:30 a.m. on Friday, May 7, through 9 a.m., Saturday, May 8, 2004.

ADDRESSES: The meeting will be held at the Harding's Old Sourdough Lodge, 1104 Peninsula, Wrangell, Alaska.

FOR FURTHER INFORMATION CONTACT: Chip Weber, Wrangell District Ranger, P.O. Box 51, Wrangell, AK 99929, phone (907) 874–2323, e-mail *cweber@fs.fed.us*, or Patty Grantham, Petersburg District Ranger, P.O. Box 1328, Petersburg, AK 99833, phone (907) 772–3871, e-mail *pagrantham@fs.fed.us*. For further information on RAC history, operations, and the application process, a Web site is available at *www.fs.fed.us/r10/ro/payments*.

SUPPLEMENTARY INFORMATION: This meeting will focus on the review and discussion of proposals received by the RAC for funding under Title II of the Payments to States legislation (Pub. L. 106–393), particularly proposals that were of high interest to the committee, but lacked enough information for the committee to act. New information may be introduced concerning these proposals. New proposals (initial reading) may be discussed at this meeting. The committee may make recommendations for project funding at this meeting. A field trip to review proposals proximate to the Wrangell, Alaska, area may take place. The meeting is open to the public. Public input opportunity will be provided and individuals will have the opportunity to address the committee at that time.

Dated: April 21, 2004.

Scott Fitzwilliams,

Acting Forest Supervisor.

[FR Doc. 04–9582 Filed 4–27–04; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Tehama County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Tehama County Resource Advisory Committee (RAC) will meet in Red Bluff, California. Agenda items to be covered included: (1) Introductions, (2) Approval of Minutes, (3) Public Comment, (4) Chairman Report, (5) Reports from Committee's, (6) Approving Project Proposals, (7) Review New Member Applications, (8) General Discussion, (9) Next Agenda.

DATES: The meeting will be held on May 13, 2004 from 9 a.m. and end at approximately 12:00 p.m.

ADDRESSES: The meeting will be held at the Lincoln Street School, Conference Room A, 1135 Lincoln Street, Red Bluff, CA. Individuals wishing to speak or propose agenda items must send their names and proposals to Jim Giachino, DFO, 825 N. Humboldt Ave., Willows, CA 95988.

FOR FURTHER INFORMATION CONTACT: Bobbin Gaddini, Committee Coordinator, USDA, Mendocino National Forest, Grindstone Ranger District, P.O. Box 164, Elk Creek, CA 95939. (530) 968–5329; e-mail: *ggaddini@fs.fed.us*.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Committee discussion is limited to Forest Service staff and Committee members. However, persons who wish to bring matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting. Public input sessions will be provided and individuals who made written requests by May 11, 2004 will have the opportunity to address the committee at those sessions.

Dated: April 22, 2004.

Robert McCabe,

Acting Designated Federal Official.

[FR Doc. 04–9575 Filed 4–27–04; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

DOC has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: U.S. Census Bureau.

Title: State and Local Construction Coverage Study.

Form Number(s): SLUE–007(A), SLUE–007(B).

Agency Approval Number: None.

Type of Request: New collection.

Burden: 5,500 hours.

Number of Respondents: 5,500.

Avg. Hours Per Response: 1 hour.

Needs and Uses: The U.S. Census Bureau is requesting a new one time collection for the State and Local Construction Coverage Study. The Census Bureau collects monthly Value in Place (VIP) data on State and local government construction in the Construction Progress Reporting Surveys (CPRS) (OMB# 0607–0153). We also collect fiscal year data on similar construction in the Annual Survey of Government Finance (ASGF) (OMB # 0607–0585). It is expected that these estimates should be comparable on a fiscal basis; nevertheless, they have continued to differ significantly during the past decades. One major source of the differences is the undercoverage of the desired universe by the sampling frame used in the CPRS. The F.W. Dodge Division of McGraw-Hill Information Systems Company identifies and lists projects started by State and local governments nationwide. We select a sample of projects from this list for the CPRS. Due to the differences in the level of coverage by value and geographical area, various projects have no chance of being selected for the CPRS.

The most recent evaluation of this undercoverage was done in 1988, producing an undercoverage estimate of 18 percent. The continuing difference on the fiscal year basis between the CPRS and the ASGF indicates the need for a reevaluation of the sampling frame coverage.

We will utilize a mailout/mailback strategy to collect the data. Questionnaires will be mailed out in two waves (wave 1 to half of the sampled agencies and wave 2 to the other half) three months apart. Nonresponse followup will be conducted by telephone beginning 30 days after the initial mailout. We will not publish the results of this study, but we will use the factors determined by the study to adjust the final weighted estimates from the CPRS.

We will conduct this study on a one time basis. The Census Bureau will use the information collected for evaluation purposes and survey improvement through the adjustment of the State and local construction VIP estimate by the estimated coverage rate. The consequence for not conducting an undercoverage evaluation will be that the Census Bureau will produce less accurate estimates for the State and local government construction VIP. The Bureau of Economic Analysis uses the CPRS estimates to develop the construction components for input to the Gross Domestic Product (GDP) accounts. Other government agencies such as the Council of Economics Advisers, the Federal Reserve Bank Board, and the Department of Treasury use these estimates in making policy decisions.

Affected Public: State, local, or tribal government.

Frequency: One time.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13 U.S.C. 161 and 182.

OMB Desk Officer: Susan Schechter, (202) 395–5103.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dhynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Susan Schechter, OMB Desk Officer either by fax (202–395–7245) or e-mail (*susan_schechter@omb.eop.gov*).

Dated: April 22, 2004.

Madeleine Clayton,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 04–9609 Filed 4–27–04; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce (DOC) has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: Bureau of Industry and Security (BIS).

Title: Reporting and Recordkeeping Requirements Under the Wassenaar Arrangement.

Agency Form Number: N/A.

OMB Approval Number: 0694–0106.

Type of Request: Extension of a currently approved collection of information.

Burden: 24 hours.

Average Time Per Response: 1 to 15 minutes per response.

Number of Respondents: 35 respondents.

Needs and Uses: To fulfill U.S. commitments to the Wassenaar Arrangement with regard to dual-use items, section 743 of the EAR imposes reporting and recordkeeping requirements for license exception exports of certain items controlled under the Wassenaar Arrangement.

Affected Public: Individuals, businesses or other for-profit institutions.

Respondent's Obligation: Required to obtain or retain a benefit.

OMB Desk Officer: David Rostker.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance

Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, Washington, DC 20230.

Dated: April 22, 2004.

Madeleine Clayton,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 04–9610 Filed 4–27–04; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Approval of Triangular Transactions Involving Commodities Covered by a U.S. Import Certificate

ACTION: Proposed collection; comment request.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before June 28, 2004.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 or via the Internet at *dhynek@doc.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Marna Dove, BIS ICB Liaison, Office of the Chief Information Officer, Projects and Planning Division, Department of Commerce, Room 6622, 14th & Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

I. Abstract

This collection provides a means to authorize approved imports to the U.S. to be transhipped to another destination instead of being imported to the U.S. as approved on the Import Certificate.

II. Method of Collection

Written report.

III. Data

OMB Number: 0694–0009.

Form Number: Not applicable.

Type of Review: Regular submission for extension of a currently approved collection.

Affected Public: Individuals, businesses or other for-profit and not-for-profit institutions.

Estimated Number of Respondents: 1.

Estimated Time Per Response: 1/2 hour per response.

Estimated Total Annual Burden Hours: 1 hour.

Estimated Total Annual Cost: $20.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they will also become a matter of public record.

Dated: April 22, 2004.

Madeleine Clayton,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 04–9608 Filed 4–27–04; 8:45 am]

BILLING CODE 3510–DT–P

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Antidumping and Countervailing Duty Administrative Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of initiation of antidumping and countervailing duty administrative reviews.

SUMMARY: The Department of Commerce (the Department) has received requests to conduct administrative reviews of various antidumping and countervailing duty orders and findings with March anniversary dates. In accordance with the Department's regulations, we are initiating those administrative reviews.

EFFECTIVE DATE: April 28, 2004.

FOR FURTHER INFORMATION CONTACT: Holly A. Kuga, Office of AD/CVD Enforcement, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, telephone: (202) 482–4737.

SUPPLEMENTARY INFORMATION:

Background

The Department has received timely requests, in accordance with 19 CFR 351.213(b)(2002), for administrative reviews of various antidumping and countervailing duty orders and findings with March anniversary dates.

Initiation of Reviews

In accordance with 19 CFR 351.221(c)(1)(i), we are initiating administrative reviews of the following antidumping and countervailing duty orders and findings. We intend to issue the final results of these reviews not later than March 31, 2005.

	Period to be reviewed
Antidumping Duty Proceedings	
BRAZIL: Certain Hot-Rolled Carbon Steel Flat Products A–351–828	3/1/03–2/29/04
Companhia Siderurgica Nacional	
FRANCE: Stainless Steel Bar A–427–820	3/1/03–2/29/04
Ugitech, S.A. aka Ugine-Savoie	
GERMANY: Stainless Steel Bar A–428–830	3/1/03–2/29/04

	Period to be reviewed
BGH Edelstahl Freital GmbH/BGH Edelstahl Lippendorf GmbH/BGH Edelstahl Lugau GmbH/BGH Edelstahl Siegen GmbH	
THAILAND: Circular Welded Carbon Steel Pipes & Tubes A–549–502	3/1/03–2/29/04
Saha Thai Steel Pipe Company, Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA:	
Bars/Wedges A–570–803	2/1/03–1/31/04
Shanghai Xinike Trading Company, Ltd.[1]	
Glycine[2] A–570–836	3/1/03–2/29/04
Baoding Mantong Fine Chemistry Co., Ltd.	
Certain Preserved Mushrooms[3] A–570–851	2/1/03–1/31/04
UNITED KINGDOM: Stainless Steel Bar A–412–822	3/1/03–2/29/04
Corus Engineering Steels Limited	
Countervailing Duty Proceedings	
IRAN: In-Shell Raw Pistachios C–507–501	1/1/03–12/31/03
Tehran Negah Nima Trading Co., Inc., trading as Nima Trading Company	
REPUBLIC OF KOREA: Certain Cut-to-Length Carbon-Quality Steel Plate[4] C–580–837	1/1/03–12/31/03
Suspension Agreements	
None.	

[1] Company inadvertently omitted from previous initiation notice.
[2] If the above named company does not qualify for a separate rate, all other exporters of glycine from the People's Republic of China who have not qualified for a separate rate are deemed to be covered by this review as part of a single PRC entity of which the named exporters are a part.
[3] In the initiation notice published on March 26, 2004 (69 FR 15788), the review period for Certain Preserved Mushrooms from the People's Republic of China was incorrect. The correct review period is listed above.
[4] This case was inadvertently listed in the "Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part" notice that published in the **Federal Register** on March 26, 2004 (69 FR 15788). Since the Department did not receive any requests for review of this case, there is no administrative review being conducted for the 1/1/03–12/31/03 period.

During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an antidumping duty order under § 351.211 or a determination under § 351.218(f)(4) to continue an order or suspended investigation (after sunset review), the Secretary, if requested by a domestic interested party within 30 days of the date of publication of the notice of initiation of the review, will determine whether antidumping duties have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. The request must include the name(s) of the exporter or producer for which the inquiry is requested.

Interested parties must submit applications for disclosure under administrative protective orders in accordance with 19 CFR 351.305.

These initiations and this notice are in accordance with section 751(a) of the Tariff Act of 1930, as amended (19 U.S.C. 1675(a)), and 19 CFR 351.221(c)(1)(i).

Dated: April 22, 2004.

Holly A. Kuga,

Acting Deputy Assistant Secretary, Group II for Import Administration.

[FR Doc. 04–9644 Filed 4–27–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–831]

Fresh Garlic From the People's Republic of China: Rescission of Antidumping Duty New Shipper Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of rescission of the antidumping duty new shipper review of fresh garlic from the People's Republic of China.

SUMMARY: In response to a request from Tancheng County Dexing Foods Co., Ltd., the Department of Commerce initiated a new shipper review of the antidumping duty order on fresh garlic from the People's Republic of China. The period of review is November 1, 2002, through April 30, 2003. For the reasons discussed below, we are rescinding this new shipper review.

EFFECTIVE DATES: April 28, 2004.

FOR FURTHER INFORMATION CONTACT: Catherine Cartsos or Mark Ross, Office of AD/CVD Enforcement 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–1757 and (202) 482–4794, respectively.

SUPPLEMENTARY INFORMATION:

Scope of the Order

The products covered by this antidumping duty order are all grades of garlic, whole or separated into constituent cloves, whether or not peeled, fresh, chilled, frozen, provisionally preserved, or packed in water or other neutral substance, but not prepared or preserved by the addition of other ingredients or heat processing. The differences between grades are based on color, size, sheathing, and level of decay.

The scope of this order does not include the following: (a) Garlic that has been mechanically harvested and that is primarily, but not exclusively, destined for non-fresh use; or (b) garlic that has been specially prepared and cultivated prior to planting and then harvested and otherwise prepared for use as seed.

The subject merchandise is used principally as a food product and for seasoning. The subject garlic is currently classifiable under subheadings 0703.20.0010, 0703.20.0020, 0703.20.0090, 0710.80.7060, 0710.80.9750, 0711.90.6000, and 2005.90.9700 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this order is dispositive. In order to be excluded from the antidumping duty order, garlic entered under the HTSUS subheadings listed above that is (1) mechanically harvested and primarily, but not exclusively,

destined for non-fresh use or (2) specially prepared and cultivated prior to planting and then harvested and otherwise prepared for use as seed must be accompanied by declarations to the U.S. Customs and Border Protection (CBP) to that effect.

Background

On July 7, 2003, the Department of Commerce (the Department) published in the **Federal Register** the *Notice of Initiation of New Shipper Antidumping Duty Reviews: Fresh Garlic From the People's Republic of China* (68 FR 40242). On July 15, 2003, the Department issued an antidumping questionnaire to Tancheng County Dexing Foods Co., Ltd. (Tancheng Dexing). On December 16, 2003, the Department issued a supplemental questionnaire to Tancheng Dexing.

On August 28, 2003, and January 20, 2004, the Department received responses to sections A, C, and D of the Department's original questionnaire and supplemental questionnaire, respectively, from Tancheng Dexing.

On March 10, 2004, Tancheng Dexing withdrew its request for a review.

Rescission of New Shipper Review

We are rescinding the new shipper review with respect to Tancheng Dexing. On March 10, 2004, Tancheng Dexing withdrew its request for a review. Although Tancheng Dexing withdrew its request after the 60-day deadline, we found it reasonable to extend the deadline because we had not committed significant resources yet to the new shipper review of Tancheng Dexing. *See Fresh Garlic from the People's Republic of China: Partial Rescission of Antidumping Duty Administrative Review*, 68 FR 46580 (August 6, 2003). Specifically, we had not started calculating a margin for Tancheng Dexing and we had not yet verified Tancheng Dexing's data. Further, Tancheng Dexing was the only party to request the review. In a March 19, 2004, letter to Tancheng Dexing, we expressed our intent to extend the deadline for the withdrawal of the request of the review and rescind the new shipper review subsequently. We did not receive any submissions opposing the withdrawal of the request for the review or our intent to rescind. For these reasons, we have accepted Tancheng Dexing's withdrawal and are rescinding the new shipper review of the antidumping duty order on fresh garlic from the People's Republic of China (PRC) with respect to Tancheng Dexing in accordance with 19 CFR 351.214(f)(1).

Cash Deposits

Bonding is no longer permitted to fulfill security requirements for shipments from Tancheng Dexing of fresh garlic from the PRC entered, or withdrawn from warehouse, for consumption in the United States on or after the publication of this notice of rescission of antidumping duty new shipper review in the **Federal Register**. Further, effective upon publication of this notice for all shipments of the subject merchandise exported by Tancheng Dexing and entered, or withdrawn from warehouse, for consumption, the cash-deposit rate will be the PRC-countrywide rate, which is 376.67 percent.

Assessment of Antidumping Duties

The Department shall instruct CBP to assess antidumping duties on all appropriate entries. Since we are rescinding this antidumping duty new shipper review, the PRC-wide rate of 367.67 percent in effect at the time of entry applies to all exports of fresh garlic from the PRC produced and exported by Tancheng Dexing during the period of review. The Department will issue appropriate assessment instructions directly to CBP within 15 days of publication of this notice of rescission of antidumping duty new shipper review.

Notification to Interested Parties

This notice serves as a reminder to importers of their responsibility under 19 CFR 352.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and subsequent assessment of double antidumping duties.

This notice is published in accordance with section 751(B) of the Tariff Act of 1930, as amended, and 19 CFR 351(f)(3).

Dated: April 20, 2004.

Jeffrey May,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 04–9642 Filed 4–27–04; 8:45 am]

BILLING CODE 3510–DS–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–802]

Gray Portland Cement and Clinker From Mexico: Notice of Extension of the Time Limit for the Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of extension of the time limit for the preliminary results of antidumping duty administrative review.

SUMMARY: The Department of Commerce is extending the time limit for the preliminary results of the administrative review of the antidumping duty order on gray portland cement and clinker from Mexico until June 14, 2004. This extension applies to the administrative review of two exporters, CEMEX, S.A. de C.V., and GCC Cemento, S.A. de C.V. The period of review is August 1, 2002, through July 31, 2003.

EFFECTIVE DATE: April 28, 2004.

FOR FURTHER INFORMATION CONTACT: Jeffrey Frank or Hermes Pinilla, AD/CVD Enforcement 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0090 and (202) 482–3477, respectively.

Background

On September 30, 2003, the Department of Commerce (the Department) published in the **Federal Register** the *Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part and Deferral of Administrative Review* (68 FR 56262) in which it initiated an administrative review of the antidumping duty order on gray portland cement and clinker from Mexico.

Extension of Time Limit for Preliminary Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), provides that the Department will issue the preliminary results of an administrative review of an antidumping duty order within 245 days after the last day of the anniversary month of the date of publication of the order. Currently, the due date for the preliminary results is May 2, 2004. The Act also provides that the Department may extend the 245-day period up to 365 days if it determines

that it is not practicable to complete the review within the foregoing time period.

This review involves complex factual and legal issues regarding sales of a new type of cement and the reporting of downstream sales, and the Department needs additional time to consider these issues. For these reasons, the Department has determined that it is not practicable to complete the preliminary results within the time limit mandated by section 751(a)(3)(A) of the Act. Therefore, in accordance with that section, the Department is extending the time limit for completion of the preliminary results by 43 days. The preliminary results of review are now due no later than June 14, 2004. The Department intends to issue the final results of review 120 days after the publication of the preliminary results. This extension of the time limit is in accordance with section 751(a)(3)(A) of the Act.

Dated: April 20, 2004.

Jeffrey May,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 04–9643 Filed 4–27–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 042204D]

NOAA Recreational Fisheries Strategic Plan Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meetings.

SUMMARY: The National Marine Fisheries Service (NOAA Fisheries) is hosting a series of public meetings to present a draft of the NOAA Recreational Fisheries Strategic Plan 2005 2010. The primary goal of the meeting is to collect public input on the DRAFT Plan. Additional meetings are planned for the Pacific Northwest (one), Hawaii (one) and the Atlantic (three) and Gulf Coast (two). Specific dates, times, and locations of these meetings will be published in the **Federal Register**.

DATES: The meetings will be held on May 4, 10, 26, and June 2, 2004. See **SUPPLEMENTARY INFORMATION** for specific dates, times, addresses and directions.

ADDRESSES: The meetings will be held in Seal Beach, CA, Dania Beach, FL, Portland, OR, and Tuckerton, NJ. See **SUPPLEMENTARY INFORMATION** for specific dates, times, addresses and directions. Copies of the DRAFT Plan will be available at each meeting, or can be made available in advance of the meeting on the web at *http://www.nmfs.noaa.gov/recfish/* or by contacting Mr. Michael Kelly, Division Chief, NOAA Fisheries Office of Constituent Services, (301) 713–2379.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Kelly, Division Chief, NOAA Fisheries Office of Constituent Services, (301) 713–2379.

SUPPLEMENTARY INFORMATION:

May 4, 2004 6:00–9:00 p.m.
Seal Beach City Council Chambers
Seal Beach, CA

Directions: From Interstate 405 to Seal Beach Blvd. South. Travel about 2.5 miles to the Pacific Coast Hwy, turn Right. Travel 0.4 mile to Main Street, turn Left. Travel two blocks to Central Ave., turn Right. Travel one block to Eight Street. City of Seal Beach Administration Building is 2nd building to right of the corner at 211 Eighth Street.

May 10, 2004 6:00–9:00 p.m.
International Game Fish Association Headquarters
300 Gulf Stream Way
Dania Beach, FL

Directions: Take I–95 to Griffin Road Exit 26; west on Griffin to first light (Anglers Ave.); south to Gulf Stream Way; left at Sportsman's Park. Tri Rail www.tri-rail.com Ft. Lauderdale Airport Station

May 26, 2004 6:00–9:00 p.m.
Pacific States Marine Fisheries Commission
205 SE Spokane Street, Suite 100
Portland, OR

Directions from Portland Airport: Follow NE AIRPORT WAY toward PORTLAND/SALEM. Take I–205 SOUTH/PORTLAND(I–84) exit. Take the I–84 WEST/US–30 WEST exit towards PORTLAND, exit ι21B. Take the I–5 SOUTH towards BEAVERTON/SALEM. Take the I–5 SOUTH exit towards BEAVERTON/SALEM. Take the LAKE OSWEGO(OR–43) exit, exit ι299A. Continue on SW HOOD AVE towards LAKE OSWEGO. Bear RIGHT on SW MACADAM AVE. Turn LEFT on SELLWOOD BRG. SELLWOOD BRG becomes SE TACOMA ST. Turn LEFT on SE 6TH AVE. Turn LEFT on SE SPOKANE ST. Arrive at 205 SE SPOKANE ST, PORTLAND

June 2, 2004 6:00–9:00 p.m.
Jacques Cousteau Coastal Learning Center
130 Great Bay Blvd.
Tuckerton, NJ

Directions: Take the New Jersey Garden State Parkway to exit 58 head off ramp towards Tuckerton Seaport and the Borough of Tuckerton. At the second light (intersection with Route 9) make a right onto Route 9 south. Pass the Tuckerton Seaport on your left (Lake on your right). Make a left at the light onto Great Bay Blvd. Follow Great Bay Blvd. pass the Tuckerton First Aid building on your right after the intersection (Radio Road) look for a shell driveway and a mailbox (#130) on your right. We are set back in the woods. If you go over a bridge you have gone too far.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Michael Kelly at 301 713–9504 at least 5 days prior to the meeting date.

Dated April 22, 2004.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs,National Marine Fisheries Service.

[FR Doc. 04–9651 Filed 4–27–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 042104B]

North Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of a public committee meeting.

SUMMARY: The North Pacific Fishery Management Council's (Council) Crab Plan Team will meet in Anchorage, AK.

DATES: The meeting will be held on May 18, 2004, from 10 a.m. to 5 p.m. and May 19, 2004, from 9 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at the West Coast International Inn, 3333 W. International Airport Road, Prospect Room, Anchorage, AK 99502.

Council address: North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: Diana Stram, North Pacific Fishery Management Council; telephone: 907–271–2809.

SUPPLEMENTARY INFORMATION: The committee's agenda includes the following issues: (1) review and approve agenda; (2) review purpose and

products of spring and fall Crab Plan Team meeting; (3) process information requirements for Data Quality Act and National Standard Guidelines; (4) stock assessment and catch data; (5) progress with revising overfishing definitions; (6) update on crab rationalization; and (7) plans for and scheduling summer/fall 2004 meeting.

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 Gail Bendixen, 907–271–2809, at least five business days prior to the meeting date.

Dated: April 22, 2004.

Alan D. Risenhoover,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E4–942 Filed 4–27–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 042104A]

North Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of a public meeting.

SUMMARY: The Pacific Northwest Crab Industry Advisory Committee will meet in Seattle, WA.

DATES: The meeting will be held on May 12, 2004, beginning at 9 a.m.

ADDRESSES: The meeting will be held at the Alaska Fisheries Science Center, 7600 Sand Point Way NE., Building 4, Room 2076 (Jim Traynor Seminar Room) Seattle, WA.

Council address: North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: Diana Stram, North Pacific Fishery Management Council; telephone: 907–271–2809.

SUPPLEMENTARY INFORMATION: The meeting agenda consists of the following topics: (1) election of officers; (2) update on the implementation of the crab rationalization plan; and (3) update on pribilof collaborative.

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 Gail Bendixen at 907–271–2809 at least seven business days prior to the meeting date.

Dated: April 22, 2004.

Alan D. Risenhoover,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E4–943 Filed 4–27–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF DEFENSE

Department of the Army

Availability of U.S. Patent and U.S. Patent Applications for Non-Exclusive, Exclusive, or Partially Exclusive Licensing

AGENCY: Department of the Army, DoD.

ACTION: Notice of availability.

SUMMARY: In accordance with 35 U.S.C. 209 and 37 CFR part 404 announcement is made of the availability for licensing of the U.S. Patents for non-exclusive, exclusive, or partially exclusive licensing listed under **SUPPLEMENTARY INFORMATION.** The inventions listed have been assigned to the United States Government as represented by the Secretary of the Army, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Ms. Laura Rothenberg Haug, Chief Counsel, U.S. Army Developmental Test Command, 314 Longs Corner Road, ATTN: CSTE–DTC–CC, Aberdeen Proving Ground, MD 21005–5055, phone: (410) 278–1059; fax: (410) 278–3733 or e-mail: *cc@dtc.army.mil.*

SUPPLEMENTARY INFORMATION: *1. Title:* "Apparatus for Providing GPS Positioning Information to a Plurality of Computers from only one GPS Receiver."

Description: The present invention comprises an apparatus for providing GPS positioning information to a master computer and a plurality of slave computers from only one GPS receiver. The apparatus includes a circuit adapted to be coupled between the GPS receiver and the computers for providing each computer with a replica of a positioning information signal from the GPS receiver so that each computer receives all of the positioning information it would have received if it had been connected to its own GPS receiver. In addition, the apparatus includes a circuit adapted to be coupled between the GPS receiver and the computers for providing each computer with a replica of a synchronizing signal from the GPS receiver so that each computer receives the synchronizing signal it would have received if it had been connected to its own GPS receiver. Further, the apparatus includes a circuit adapted to be coupled between the GPS receiver and the master computer for passing a control signal from the master computer to the GPS receiver to set up and control the state of the GPS receiver.

Patent Number: 6,674,400.

Issue Date: January 6, 2004.

2. Title: "GPS Tracker."

Description: The present invention comprises a vehicle tracking system that includes a plurality of trackers, each adapted to be attached to a respective movable vehicle, and a remotely located controller for individually polling by radio each of the trackers to determine the position of the polled tracker. Each tracker includes a positioning receiver which receives satellite signals from a Global Positioning System and transmits a first positioning signal containing the position of the tracker to a micro controller unit. The micro controller unit receives the signal and transmits a second positioning signal containing the position of the tracker to a communicator. The communicator radios the second positioning signal to the remotely located controller to communicate the position of the tracker in response to a radioed polling signal from the remotely located controller.

Patent Number: 6,628,232.

Issue Date: September 30, 2003.

3. Title: "Large Dynamic Range Digitizing Apparatus and Method."

Description: The present invention comprises an apparatus and method for digitizing an analog signal and optimizing the dynamic range of the digitized signal. Dual analog-to-digital converters are preceded by respective amplifiers with different gains for receiving an analog input signal. The digital output signal from the analog-to-digital converter preceded by the amplifier of higher gain is selected and stored when it is not clipped. Otherwise, the analog-to-digital converter preceded by the amplifier of lower gain is selected and its digital output signal is stored. Once digital memory is filled, an adaptive formatting program selects the most appropriate parts of the memory words to achieve maximum resolution and dynamic range in an output word size.

Patent Number: 6,445,328.

Issue Date: September 3, 2002.

4. Title: "Equipment Roller/Slide Support."

Description: The present invention comprises a roller slide apparatus for mounting heavy equipment on support structures and which allows safe repositioning of the equipment for servicing and repair includes a lower plate assembly connected to a support structure, an upper mounting plate connected to the equipment, and a bearing assembly connected to both the lower mounting plate assembly and the upper mounting plate for facilitating movement of the upper mounting plate from a first operative position where the upper mounting plate is substantially superimposed over the lower mounting plate assembly to a second operative position where the upper mounting plate is moved away from the lower mounting plate assembly. Locking devices for maintaining the upper mounting plate in either the first or second operative positions, includes flanges formed on the mounting plates and extensions that slide into holes formed in flange or plate elements.

Patent Number: 6,254,047.

Issue Date: July 3, 2001.

5. Title: "System for Detecting Gunshots."

Description: The present invention provides a system for detecting gunshots includes an input device including a microphone for converting acoustic noises into signals and amplifiers for amplifying the input signals, a threshold detector for receiving the amplified signals and comparing the signals with a predetermined threshold value and for producing an output signal when the threshold value is exceeded. A pulse width detector is connected to the threshold detector for producing an output signal only if the width of the threshold detector output signal is within a predetermined range of values. A pulse count detector is also connected to the threshold detector for producing an output signal when the level of the threshold output signal is above a peak threshold level or the number of threshold level output signals that exceed a threshold level are less than a preset limit. An output device indicates that a gunshot has occurred only when signals are received from the pulse width detector and the pulse count detector during a sampling period.

Patent Number: 6,185,153.

Issue Date: February 6, 2001.

6. Title: "System and Method for Performing Jamming Testing on Communication Networks."

Description: The present invention comprises a system is tested for jamming resistance by supplying a simulated jamming signal. The simulated jamming signal is produced by calculating a propagation path loss in the terrain between the system under test and a location where the jammer would be, predicting a jamming level in accordance with the propagation path loss, and generating a simulated jamming signal. The simulated jamming signal is supplied to the antenna port of the system under test. The testing does not require the use of either a real jammer or a pilot signal generator at the location where the jammer would be.

Patent Number: 5,886,626.

Issue Date: March 23, 1999.

7. Title: "Ballistic Optical Camera Trigger."

Description: The present invention comprises a ballistic optical camera trigger having an integrated circuit capable of converting light to a proportional frequency, wherein the integrated circuit has a fast response time and a wide dynamic range which allows it to sense positive or negative changes in light fast enough to trigger without delay for high speed imaging without computational delays or jitter causing interference. The frequency output of the integrated circuit is tracked by a phase lock loop/voltage controlled oscillator to allow it to follow slow changes in light, but not fast changes in light caused by, for example, a projectile such as a bullet. The frequency output from the integrated circuit is provided to one input of a logic gate which receives at another input thereof, a shaped pulse from the phase lock loop/voltage controlled oscillator circuit, wherein the output of the logic gate is applied to a one-shot for outputting a trigger signal.

Patent Number: 5,581,078.

Issue Date: December 3, 1996.

Brenda S. Bowen,

Alternate Army Federal Register Liaison Officer.

[FR Doc. 04–9599 Filed 4–27–04; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Notice of Availability of the Draft Environmental Impact Statement for the Va Shly'ay Akimel Ecosystem Restoration Feasibility Study, Maricopa County, AZ

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of availability.

SUMMARY: The Environmental Impact Statement (EIS) addresses foreseeable environmental impacts from measures being investigated to include habitat restoration, channel realignment, and sand and gravel mining quarry pit reshaping within and around the Salt River, Maricopa County, AZ. U.S. Army Corps of Engineers, the Salt River Pima-Maricopa Indian Community (SRPMIC) and the City of Mesa have cooperated in conducting this feasibility study. U.S. Army Corps of Engineers is the lead Federal Agency for this study.

The purpose of the Va Shly'ay Akimel Ecosystem Restoration Study is to produce available riparian ecosystem that will support native wildlife and vegetation, which will improve the overall ecological heath of the river and return the project area to a less degraded, more natural condition. The Study resulted in a report recommending that congress authorize a project for implementation by the Corps of Engineers to address the problems and needs of the study area.

Six alternatives, including the no action alternative, are evaluated in the Draft EIS. In general, the primary difference among alternatives is the acreage of each vegetation type and the resulting water necessary to maintain the vegetation. Other differences are the inclusion or exclusion of structural features such as river channelization and bank stabilization.

This study area includes a 14-mile reach of the Salt River within the SRPMIC and City of Mesa, and its upper banks. The SRPMIC and the City of Mesa identified the need for ripairan ecosystem restoration and restoration of the river channel functions.

DATES: The draft EIS will be released for public review on or about May 3, 2004.

The Environmental Protection Agency plans to publish a notice of availability of the Draft EIS in the **Federal Register** on or about May 7, 2004. The public review of the Draft EIS ends on June 21, 2004. The final public hearing is scheduled for Thursday, June 3, 2004, at 6:30 p.m., at the Lehi Community Center, 1231 East Oak Street, Mesa, Arizona. Comments concerning this Draft EIS should be submitted to the address listed below by June 21, 2004.

ADDRESSES: District Engineer, U.S. Army Corps of Engineers, Los Angeles District, ATTN: CESPL–PD–RN, P.O. Box 532711, Los Angeles, CA 90053–2325.

FOR FURTHER INFORMATION CONTACT: Ms. Sarah Laughlin, Environmental Coordinator, telephone (540) 231–8303, or Ms. Kayla Eckert, Study Manager, telephone (602)–640–2001. The SRPMIC, a cooperating entity, requests inquiries to Ms. Marilyn Ethelbah, Cultural and Environmental Services, telephone (480) 850–4157, or for any additional information. The City of Mesa requests inquires to Mr. Gordon Haws, Senior Engineer, telephone (480) 644–2251, or for any additional information.

SUPPLEMENTARY INFORMATION: *1. Authorization.* This study was prepared as an interim response to the following authorities provided by Congress: (1) House Resolution 2425 (HR 2425), dated May 17, 1994, which states: "* * * the Secretary of the Army is requested to review reports of the Chief of Engineers on the State of Arizona * * * in the interest of flood damage reduction, environmental protection and restoration, and related purposes." (2) The second authority is given in Public Law 761, Seventy-fifth Congress, dated June 28, 1938, known as section 6 of the Flood Control Act of 1938 of Public Law 761, which reads in part, "The Secretary of War is hereby authorized and directed to cause preliminary examination and surveys * * * at the following localities * * * Gila River and tributaries, Arizona." The Energy and Water development Appropriations Act of 2001 (Pub. L. 106–377, dated October 17, 2000) provided $150,000 for the U.S. Army Corps of Engineers to evaluate opportunities for environmental restoration and related matters on the Salt River in Arizona.

2. Background. The Salt River is a major tributary to the Gila River in Arizona. The river originates in eastern Arizona and flows westward to its confluence with the Gila River west of downtown Phoenix. Prior to agricultural development and urbanization of the Phoenix metropolitan area, the Salt River was a perennial stream fed by snowmelt from mountains in eastern Arizona. In the early part of the 20th century, major modifications to the river system occurred as part of the Salt River Project, which placed several dams along the Salt River to allow diversions of water for agricultural and urban uses. Sand and gravel mining operations and other activities along the river induce additional changes to the river channel and hydrology. As diversions of water increased, the perennial flows in the river ceased, causing the groundwater table to drop. These changes in hydrological conditions caused the natural riparian ecosystem to decline to the point that only small, isolated fragments of this former habitat remain. At the present time, the study area consists of a highly disturbed riverbed with minimal extant native vegetation.

This DEIS provides: (1) A description of restoration alternatives, including the no-action alternative; (2) an analyzes of the existing and future conditions of the area without the project; (3) and analyzes the impacts associated with five alternatives that have been determined to be the most feasible, including the preferred alternative (proposed action).

3. Proposed Action. The proposed action includes the establishment of approximately 200 acres of wetlands; 880 acres of cottonwood/willow stands; 380 acres of mesquite bosque; and 24 acres of Sonoran desert scrub shrub. Each vegetation types will be irrigated through either a drip irrigation system or a type of flood irrigation; both systems will use surface water currently owned by the SRPMIC, or groundwater pumped from an existing or new well. Other features include removal of invasive vegetation, reshaping of abandon sand and gravel mining pits, reshaping of some sections of the river channel to return water flow to a more natural pathway, a grade control structure, and a recreation trail system.

4. Alternatives.

a. No action: No vegetation or structural features would be placed within the Salt River.

b. Five alternatives are evaluated in the Draft EIS. In general, the primary difference among alternatives is the acreage of each vegetation type and the resulting water necessary to maintain the vegetation. Other differences are the inclusion or exclusion of structural features such as river channelization and bank stabilization.

5. Scoping Process. Participation of all interested Federal, State and county resource agencies, as well as Native American peoples, groups with environmental interests, and all interested individuals are encouraged. The public review period will conclude 45 days after publication of this notice.

The U.S. Army Corps of Engineers and the SRPMIC and City of Mesa, the local sponsors, will consider public concerns on the Draft EIS. A summary of the public hearing and written comment letters and responses will be incorporated into the Final EIS as appropriate.

Brenda S. Bowen,

Alternate Army Federal Register Liaison Officer.

[FR Doc. 04–9601 Filed 4–27–04; 8:45 am]

BILLING CODE 3710–KF–M

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Chief of Engineers Environmental Advisory Board; Meeting

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of open meeting.

SUMMARY: In accordance with 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), announcement is made of the forthcoming meeting. The meeting is open to the public.

Name of Committee: Chief of Engineers Environmental Advisory Board (EAB).

Date: May 13, 2004.

Location: The Faculty Club, University of California, Berkeley, CA 94720–6050, (510) 540–5678.

Time: 9 a.m. to 12 p.m.

FOR FURTHER INFORMATION CONTACT: Mr. Norman Edwards, Headquarters, U.S. Army Corps of Engineers, Washington, DC 20314–1000; Phone: 202–761–1934.

SUPPLEMENTARY INFORMATION: The Board advises the Chief of Engineers on environmental policy, identification and resolution of environmental issues and missions, and addressing challenges, problems and opportunities in an environmentally sustainable manner. The EAB will visit many locations in the San Francisco Bay area prior to the meeting to gain a better perspective of the water resources issues and challenges in the region. The public meeting, however, will focus on general issues of national significance rather than on individual project or region related topics. The intent of this meeting is to present an opportunity for the Chief of Engineers to receive the views of his EAB. Time will be provided for public comment. Each speaker will be limited to no more than three minutes

in order to accommodate as many people as possible within the limited time available. If you wish to receive electronic notice of future meetings you may subscribe to a list server at: *http://www.usace.army.mil/inet/functions/cw/hot_topics/Eab.htm.*

Brenda S. Bowen,

Alternate Army Federal Register Liaison Officer.

[FR Doc. 04–9600 Filed 4–27–04; 8:45 am]

BILLING CODE 3710–92–M

DEPARTMENT OF ENERGY

Comment Period Extension and Additional Public Scoping Meetings for an Environmental Impact Statement for the Alignment, Construction, and Operation of a Rail Line to a Geologic Repository at Yucca Mountain, Nye County, Nevada; Correction

AGENCY: Department of Energy.

ACTION: Notice of Comment Period Extension and Additional Public Meetings; correction.

SUMMARY: The Department of Energy published a document in the **Federal Register** of April 26, 2004, concerning the additional scoping meetings to be held in support of the Rail Alignment EIS. The document contained an incorrect date and location for the Las Vegas, NV scoping meetings.

FOR FURTHER INFORMATION CONTACT: Robin Sweeney at 1–800–967–3477.

Correction

In the **Federal Register** of April 26, 2004, in FR Vol 69, No. 80, on Page 22496, in the first column, correct the date and location for the Las Vegas, NV scoping meeting to read: Las Vegas, Nevada. Cashman Center, Rooms 103–106, 850 Las Vegas Blvd. North, May 17, 2004, from 4–8 p.m.

Dated: April 26, 2004.

Margaret S.Y. Chu,

Director, Office of Civilian Radioactive Waste Management.

[FR Doc. 04–9719 Filed 4–27–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Paducah

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Paducah. The 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, May 20, 2004, 5:30 p.m.–9:30 p.m.

ADDRESSES: 111 Memorial Drive, Barkley Centre, Paducah, Kentucky.

FOR FURTHER INFORMATION CONTACT: William E. Murphie, Deputy Designated Federal Officer, Department of Energy Portsmouth/Paducah Project Office, 1017 Majestic Drive, Suite 200, Lexington, Kentucky 40513, (859) 219–4001.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE and its regulators in the areas of environmental restoration and waste management activities.

Tentative Agenda

5:30 p.m. Informal Discussion.
6 p.m. Call to Order; Introductions; Approve April Minutes; Review Agenda.
6:05 p.m. DDFO's Comments.
6:25 p.m. Ex-officio Comments.
6:35 p.m. Federal Coordinator Comments.
6:45 p.m. Public Comments and Questions.
6:55 p.m. Break.
7:05 p.m. Task Forces/Presentations:
- Waste Disposition;
- Water Quality;
- Long Range Strategy/Stewardship;
- Community Outreach.

8:05 p.m. Public Comments and Questions.
8:15 p.m. Administrative Issues:
- Review of Work Plan;
- Review of Next Agenda;
- Review of Chairs Meeting.

8:35 p.m. Review of Action Items.
8:50 p.m. Subcommittee Reports:
- Executive Committee.

9:15 p.m. Final Comments.
9:30 p.m. Adjourn.

Copies of the final agenda will be available at the meeting.

Public Participation: The meeting is open to the public. Written statements may be filed with the Committee either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact David Dollins at the address listed below or by telephone at (270) 441–6819. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Each individual wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: The minutes of this meeting will be available for public review and copying 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–Friday, except Federal holidays. Minutes will also be available at the Department of Energy's Environmental Information Center and Reading Room at 115 Memorial Drive, Barkley Centre, Paducah, Kentucky between 8 a.m. and 5 p.m. on Monday thru Friday or by writing to: David Dollins, Department of Energy Paducah Site Office, Post Office Box 1410, MS–103, Paducah, Kentucky 42001 or by calling him at (270) 441–6819.

Issued in Washington, DC on April 22, 2004.

Rachel M. Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. 04–9603 Filed 4–27–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Oak Ridge Reservation

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Oak Ridge. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, May 12, 2004; 6 p.m.

ADDRESSES: DOE Information Center, 475 Oak Ridge Turnpike, Oak Ridge, TN.

FOR FURTHER INFORMATION CONTACT: Pat Halsey, Federal Coordinator, Department of Energy Oak Ridge Operations Office, P.O. Box 2001, EM–90, Oak Ridge, TN 37831. Phone (865) 576–4025; Fax (865) 576–5333 or e-mail: *halseypj@oro.doe.gov* or check the Web site at *www.oakridge.doe.gov/em/ssab.*

SUPPLEMENTARY INFORMATION: *Purpose of the Board:* The purpose of the Board is to make recommendations to DOE and its regulators in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda: Presentation on the Capacity Assessment Remedial Action

Report, developed as part of the Oak Ridge Federal Facility Agreement to track Accelerated Closure Program wastes slated for disposal at the Environmental Management Waste Management Facility in Bear Creek Valley. The document is scheduled for publication in early May 2004 and yearly thereafter.

Public Participation: The meeting is open to the public. Written statements may be filed with the Committee either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Pat Halsey at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Each individual wishing to make public comment will be provided a maximum of five minutes to present their comments.

Minutes: Minutes of this meeting will be available for public review and copying at the Department of Energy's Information Center at 475 Oak Ridge Turnpike, Oak Ridge, TN, between 8 a.m. and 5 p.m. Monday through Friday, or by writing to Pat Halsey, Department of Energy Oak Ridge Operations Office, P.O. Box 2001, EM–90, Oak Ridge, TN 37831, or by calling her at (865) 576–4025.

Issued at Washington, DC, on April 22, 2004.

Rachel M. Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. 04–9606 Filed 4–27–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Fossil Energy

National Coal Council

AGENCY: Department of Energy.

ACTION: Notice of open meeting cancellation.

On April 6, 2004, the Department of Energy published a notice of open meeting announcing a May 27, 2004, meeting of the National Coal Council 69 FR 18064. Today's notice is announcing the cancellation of that meeting. The meeting will be rescheduled later this summer.

Issued in Washington, DC on April 23, 2004.

Rachel M. Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. 04–9604 Filed 4–27–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Fossil Energy; Coal Policy Committee of the National Coal Council

AGENCY: Department of Energy.

ACTION: Notice of open meeting cancellation.

On April 6, 2004, the Department of Energy published a notice of open meeting announcing a May 6, 2004, meeting of the Coal Policy Committee (a subcommittee) of the National Coal Council 69 FR 18063. Today's notice is announcing the cancellation of that meeting; however, the meeting has been rescheduled on May 27, 2004, in Pittsburgh, PA. The meeting will be held at the Sheraton Station Square Hotel, Pittsburgh, PA from 9 a.m. to 12 noon. A revised tentative agenda follows:

Coal Policy Committee Report—Georgia Ricci Nelson

National Energy Legislation—The Honorable Melissa Hart, U.S. Congress

Carbon Sequestration—Gary Kaster, American Electric Power

Carbon Management and Hydrogen Economy—Dr. Ed Rubin, Carnegie-Mellon University

The Outlook for the Appalachian Coal Market—Tom Hoffman, Vice President, Consol Energy Company

Adjourn

For further information, please contact Robert Kane at (202) 586–4753 or Estelle W. Hebron at (202) 586–6837.

Issued in Washington, DC, on April 23, 2004.

Rachel M. Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. 04–9605 Filed 4–27–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Nuclear Energy Research Advisory Committee

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Nuclear Energy Research Advisory Committee. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770), requires that public notice of the meetings be announced in the **Federal Register**.

DATES: Tuesday, May 18, 2004, 9 a.m. to 6 p.m., Wednesday, May 19, 2004, 9 a.m. to 1 p.m.

ADDRESSES: Marriott Georgetown University Conference Center, 3800 Reservoir Road, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Roth, Designated Federal Officer, Nuclear Energy Research Advisory Committee, U.S. Department of Energy, NE–20, 1000 Independence Avenue, SW., Washington, DC 20585, telephone number (301) 903–5501, e-mail: *mark.roth@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting: To provide advice to the Director of the Office of Nuclear Energy, Science and Technology (NE) of the Department of Energy on the many complex planning, scientific and technical issues that arise in the development and implementation of the Nuclear Energy research program.

Tentative Agenda:

Tuesday May 18, 2004:

Welcome Remarks; Status of Nuclear Energy's FY 2004 Budget Request; Subcommittee Reports and Organizational Issues.

Wednesday, May 19, 2004:

Subcommittee Reports and Organization Issues (continued), Open Discussion, Public Comment.

Public Participation: The day and a half meeting is open to the public on a first-come, first-serve basis because of limited seating. Written statements may be filed with the committee before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Mark Roth at the address or telephone listed above. Requests to make oral statements must be made and received five days prior to the meeting; reasonable provision will be made to include the statement in the agenda. The Chair of the committee is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business.

Minutes: The minutes of this meeting will be available for public review and copying at the Freedom of Information Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday, except holidays.

Issued in Washington, DC on April 22, 2004.

Rachel M. Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. 04–9602 Filed 4–27–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–24–005]

Algonquin Gas Transmission Company; Notice of Motion To Withdraw Pleadings and Terminate Proceedings

April 21, 2004.

Take notice that on April 19, 2004, Algonquin Gas Transmission Company (Algonquin) filed a motion to withdraw its pleadings and terminate the proceedings in Docket Nos. RP04–24–000, 001, 002, and 003, as a result of reaching a Settlement Agreement. Algonquin requests expedited treatment of its motion.

Specifically, in its motion, Algonquin requests that the Commission: (i) approve the withdrawal of the Algonquin FERC filings in Docket Nos. RP04–24–000, 001, 002, and 003; (ii) terminate, as of the date of such order, in these dockets numbers, including the hearing procedures established by the Commission; and (iii) provide any necessary authorizations for Algonquin's system operations during the pendency of these proceedings, as they pertain to services provided on the AFT–1(X–38) and AFT–CL(X–37) facilities.

Algonquin states that it is seeking the Commission's approval to withdraw its pleadings and terminate these proceedings as a result of reaching a Settlement Agreement with USGen New England, Inc. (USGen). Algonquin states that granting this motion would resolve all issues raised in these proceedings in a manner that is consistent with the Commission's prior orders. Additionally, Algonquin states that the termination of these proceedings will not harm Algonquin's other customers, since the terms of the Settlement Agreement will only affect USGen.

Any person desiring to be heard or to protest said filing should file a comment 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 comments 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 "e-library". 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: May 3, 2004.

Magalie R. Salas,

Secretary.

[FR Doc. E4–945 Filed 4–27–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–24–004]

Algonquin Gas Transmission Company; Notice of Compliance Tariff Sheet Filing

April 21, 2004.

Take notice that on April 19, 2004, Algonquin Gas Transmission Company (Algonquin) tendered for filing: (i) An original and five copies of the tariff sheets listed in Appendix A of the filing, as part of its FERC Gas Tariff, Fourth Revised Volume No. 1; (ii) three firm transportation service agreements with negotiated rates, effective March 1, 2004, included in Appendix B of the filing; and (iii) one interruptible service agreement with discounted and negotiated rates, effective January 1, 2005, included in Appendix B of the filing.

Algonquin states that the purpose of this filing is to implement tariff revisions and service agreements for transportation service to be rendered by Algonquin to USGen New England, Inc. (USGen) as part of a Settlement Agreement designed to resolve all issues between Algonquin and USGen in Case No. 03–30465 (PM) in the United States Bankruptcy Court for the District of Maryland (Greenbelt Division) as well as in FERC Docket Nos. RP04–24–000, *et al.* Algonquin states that while the effective dates of the revised tariff sheets and service agreements are proposed to be March 1, 2004, and January 1, 2005, the effectiveness of these proposed tariff sheets and the agreements is contingent upon the Settlement Agreement becoming effective, including the satisfaction of the conditions precedent contained in the Settlement Agreement. Algonquin requests that the Commission act on the instant filing at the same time as it acts on its April 19, 2004, motion to withdraw pleadings and terminate proceedings in this docket in Docket Nos. RP04–24–000, RP04–24–001, RP04–24–002 and RP04–24–003.

Algonquin states that copies of its filing have been mailed to all affected customers of Algonquin and interested State commissions.

Any person desiring to be heard or to protest said filing should file a comment 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 comments 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 "e-library". 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: May 3, 2004.

Magalie R. Salas,

Secretary.

[FR Doc. E4–946 Filed 4–27–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–263–000]

Algonquin Gas Transmission Company; Notice of Filing of Tariff Sheets and Negotiated Rate Service Agreements

April 22, 2004.

Take notice that on April 19, 2004, Algonquin Gas Transmission Company (Algonquin) tendered for filing: (i) Tariff sheets listed in Appendix A of the filing, as part of its FERC Gas Tariff, Fourth Revised Volume No. 1; (ii) three firm transportation service agreements with negotiated rates, effective March 1, 2004, included in Appendix B of the filing; and (iii) one interruptible service agreement with discounted and negotiated rates, effective January 1, 2005, included in Appendix B of the filing.

This April 19, 2004, filing was previously assigned Docket No. RP04–24–004 and was noticed by the Commission on April 21, 2004. The April 19, 2004, filing has been redocketed as Docket No. RP04–263–000 and the April 21, 2004, notice in Docket No. RP04–24–004 has been rescinded.

Algonquin states that the purpose of this filing is to implement tariff revisions and service agreements for transportation service to be rendered by Algonquin to USGen New England, Inc. (USGen) as part of a Settlement Agreement designed to resolve all issues between Algonquin and USGen in Case No. 03–30465 (PM) in the United States Bankruptcy Court for the District of Maryland (Greenbelt Division) as well as in FERC Docket Nos. RP04–24–000, *et al.* Algonquin states that while the effective dates of the revised tariff sheets and service agreements are proposed to be March 1, 2004, and January 1, 2005, the effectiveness of these proposed tariff sheets and the agreements is contingent upon the Settlement Agreement becoming effective, including the satisfaction of the conditions precedent contained in the Settlement Agreement. Algonquin requests that the Commission Act on the instant filing at the same time as it acts on its April 19, 2004, motion to withdraw pleadings and terminate proceedings in Docket Nos. RP04–24–000, RP04–24–001, RP04–24–002 and RP04–24–003.

Algonquin states that copies of its filing have been mailed to all affected customers of Algonquin and interested state commissions.

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 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: May 3, 2004.

Linda Mitry,

Acting Secretary.

[FR Doc. E4–950 Filed 4–27–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–215–000]

Tennessee Gas Pipeline Company, Complainant, v. Columbia Gulf Transmission Company, Respondent; Notice of Complaint

March 15, 2004.

Take notice that on March 12, 2004, Tennessee Gas Pipeline Company (Tennessee), pursuant to sections 4(a), 5(a), and 16 of the Natural Gas Act (NGA), and rule 206 of the Federal Energy Regulatory Commission's rules of practice and procedure, filed a Complaint and Request for Processing Under Fast Track Procedures against Columbia Gulf Transmission Company (Columbia Gulf). Tennessee alleges that Columbia Gulf has exercised its control over the Western Shore line of the Blue Water Project (BWP) and denied Tennessee a new interconnection to the BWP at Egan, Louisiana, in violation of the Commission's interconnect policy, open access principles, and the NGA. Tennessee requests the Commission to order Columbia Gulf to immediately allow the installation of the new Egan interconnection and to fashion such other and further relief as the Commission finds necessary and proper to remedy Columbia Gulf's unlawfully anti-competitive conduct and practices.

Any person desiring to be heard 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. The answer to the complaint and all comments, interventions or protests must be filed on or before the comment date. 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 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, contact (202) 502–8659. The answer to the complaint, 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 electronic filings.

Comment Date: April 5, 2004.

Magalie R. Salas,

Secretary.

[FR Doc. E4–947 Filed 4–27–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER04–543–001, et al.]

CMS Energy Resource Management Company, et al.; Electric Rate and Corporate Filings

April 21, 2004.

The following filings have been made with the Commission. The filings are

listed in ascending order within each docket classification.

1. CMS Energy Resource Management Company

[Docket No. ER04–543–001]

Take notice that on April 14, 2004, CMS Energy Resource Management Company (CMS ERM) submitted for filing a revised power marketing tariff together with an appendix to implement market behavior rules to replace the April 7, 2004 filing in Docket No. ER04–543–002. CMS states that this filing is intended to change the name of the entity on their existing power marketing tariff, and to engraft the Commission approved market behavior rules into the tariff.

Comment Date: May 5, 2004.

2. Salmon River Electric Cooperative, Inc.

[Docket No. ER04–630–001]

Take notice that on April 20, 2004, Salmon River Electric Cooperative, Inc. (Salmon River) filed with the Commission, pursuant to section 205 of the Federal Power Act, 16 U.S.C. 824d, and part 35 of the Commission's regulations, 18 CFR part 35, an amendment to its March 9, 2004 filing to include an Assignment Agreement supplementing its filing of two Electric Service Agreements for Transmission Services between Salmon River and Lois von Morganroth designated as Rate Schedules FERC Nos. 4 and 5.

Comment Date: May 3, 2004.

3. Mobile Energy Services Company, LLC

[Docket No. ER04–750–000]

Take notice that on April 20, 2004, pursuant to section 35.15, 18 CFR 35.15 (2003) of the Commission's Regulations, Mobile Energy Services Company, LLC (MESC) filed with the Commission a Notice of Cancellation of market-based rate authority under the applicant's FERC Electric Tariff No. 1, effective April 30, 2004.

Comment Date: April 27, 2004.

4. PJM Interconnection, L.L.C.

[Docket No. ES04–23–000]

Take notice that on April 12, 2004, PJM Interconnection, L.L.C. (PJM) submitted an application pursuant to section 204 of the Federal Power Act requesting that the Commission authorize the continued borrowing of funds from a long-term unsecured promissory note not to exceed $15 million.

PJM also requests a waiver from the Commission's competitive bidding and negotiated placement requirements at 18 CFR 34.2.

Comment Date: May 10, 2004.

5. Connexus Energy

[Docket No. ES04–25–000]

Take notice that on April 14, 2004, Connexus Energy (Connexus) submitted an application pursuant to section 204 of the Federal Power Act requesting that the Commission: (1) Authorize the issuance of a long-term promissory note in an amount not to exceed $25 million with the National Rural Utilities Cooperative Finance Corporation (CFC); (2) authorize the renewal of a line of credit in an amount not to exceed $20 million with the CFC; and (3) authorize the borrowing under a new line of credit not to exceed $10 million with the CoBank, ACB.

Connexus also requests a waiver from the Commission's competitive bidding and negotiated placement requirements at 18 CFR 34.2 and an exemption from the *Westar* restrictions.

Comment Date: May 11, 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. E4–944 Filed 4–27–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Middle Chattahoochee Project No. 2177–053 Georgia/Alabama]

Georgia Power Company; Notice of Availability of Environmental Assessment

April 22, 2004.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR part 380 (Order No. 486, 52 FR 47897), the Office of Energy Projects (staff) has reviewed the application for a new major license for the Middle Chattahoochee Project, located on the Chattahoochee River in Harris and Muscogee Counties, Georgia, and Lee and Russell Counties, Alabama, and prepared an Environmental Assessment (EA) for the project. The project does not affect Federal lands.

In this EA, the staff analyzes the potential environmental effects of the existing project and concludes that licensing the project, with staff's recommended measures, would not constitute a major federal action significantly affecting the quality of the human environment.

A copy of the EA and application 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 "e-Library" 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. Register online at *http://www.ferc.gov/esubscribenow.htm* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Any comments should be filed within 30 days from the date of this notice and should be addressed to Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Please affix "Middle Chattahoochee Project No. 21770–53" to all comments. For further information, please contact Ronald McKitrick by e-mail at *ronald.mckitrick@ferc.gov* or phone 770–452–3778.

The Commission strongly encourages electronic filings. Comments 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.

Magalie R. Salas,

Secretary.

[FR Doc. E4–951 Filed 4–27–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2574–032—Maine]

Merimil Limited Partnership; Notice of Availability of Final Environmental Assessment

April 22, 2004.

In accordance with the National Environmental Policy Act of 1969 (NEPA) and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR part 380 (Order No. 486, 52 FR 47897), the Office of Energy Projects has reviewed the application for license for the Lockwood Hydroelectric Project, located on the Kennebec River in Kennebec County, Maine, and prepared this final environmental assessment (FEA). The FEA contains staff's analysis of the environmental effects of the proposal and concludes that licensing the project, with additional staff-recommended measures, would not constitute a major Federal action significantly affecting the human environment.

A copy of the FEA is available for review at the Commission in the Public Reference Room, or it 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, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–949 Filed 4–27–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–91–000]

Questar Pipeline Company; Notice of Technical Conference

April 22, 2004.

Take notice that a technical conference will be held on Thursday, May 6, 2004, at 10 a.m., in a room to be designated at the offices of the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A technical conference is being held to address Commission staff's questions resulting from Questar's compliance filing and protesters' comments.

The parties should be prepared to discuss all issues raised by Questar's fuel-cost tracking filing made on November 28, 2003, including those related to lost and unaccounted for gas, and the appropriateness of including costs associated with the Kastler plant in Questar's transportation fuel charges.

Magalie R. Salas,

Secretary.

[FR Doc. E4–948 Filed 4–27–04; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–019; FRL–7352–5]

OPP Pesticide Research and Training Program; Notice of Funds Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA's Office of Pesticide Programs (OPP) is soliciting proposals from colleges, universities, and other institutions to train graduate and undergraduate students from culturally diverse backgrounds in the Agency's regulatory support and laboratory research activities. These activities are undertaken to provide safer, reduced risk pesticides and to protect public health and the environment. The laboratory research and regulatory support projects with OPP laboratories (located in Ft. Meade, MD) and divisions will be funded separately over a 5–year period. The total funding available for award for laboratory research projects involving graduate students in fiscal year (FY) 2004 is expected to be approximately $90,000. The total funding for regulatory support projects involving graduate and undergraduate students in FY 2004 will range from $60,000 to $100,000. At the conclusion of the first 1–year period of performance on each project, incremental funding may be available for each year, allowing the project to continue for up to 5 periods of performance (approximately 5 years), depending on applicant need and the Agency budget in outlying years. This program will support laboratory research training in areas such as deoxyribonucleic acid (DNA) microarray analysis of toxicogenomic effects of pesticides on cell response and regulatory support training in areas such as the development of assessments of pesticide use patterns, as provided for in section 20 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

DATES: Applications must be received by EPA on or beforeMay 28, 2004.

ADDRESSES: Applications may be submitted by mail, fax, or electronically. Please follow the detailed instructions provided in Unit IV.H.1. of the **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Cynthia Doucoure, Biological and Economic Analysis Division (7503C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8133; fax number: (703) 308–8091; e-mail address: *doucoure.cynthia@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Overview Information

The following listing provides certain key information concerning the funding opportunity.

- *Federal agency name*: Environmental Protection Agency (EPA).
- *Funding opportunity title*: OPP Pesticide Research and Training Program.
- *Announcement type*: The initial announcement of a funding opportunity.
- *Catalog of Federal Domestic Assistance (CFDA) number*: Training and Fellowships for the Environmental Protection Agency (Training and Fellowship Grants) No. 66.607. Research Grants No. 66.500, or under Surveys, Studies, Investigations, Training Demonstrations and Educational Outreach No. 66.716
- *Dates*: Applications must be received by EPA on or beforeMay 28, 2004.

II. General Information

A. Does this Action Apply to Me?

This action may be of particular interest to colleges, universities, and other institutions who have experience and expertise in science and technology programs, specifically in chemical engineering, biology, biochemistry, DNA microarray, entomology, agronomy, toxicology, ecology, and plant/weed science. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be interested in this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Additional Information, Including Copies of this Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under docket identification (ID) numberOPP–2004–019. 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, 1921 Jefferson Davis Hwy., 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.

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 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 the Unit II.B.1. Once in the system, select "search," then key in the appropriate docket ID number.

III. Introduction

OPP has provided funding for several grants designed to train graduate and undergraduate students from culturally diverse backgrounds in the Agency's regulatory support and laboratory research activities. In 2002, OPP funded two grants. Through these grants, 10 students received training in various areas including assessment of use patterns to help formulate regulatory decisions on pesticides in EPA's Biological and Economic Analysis Division (BEAD) and in the analysis of residues in peach samples treated with four different insecticides at the Analytical Chemistry Laboratory at Ft. Meade, MD. In 2003, OPP funded a grant to provide DNA microarray technology training at the Ft. Meade laboratory to determine the effects of various pesticides on bacterial cell response. Through this grant, a Ph.D. candidate and a postdoctoral student gained experience in working with and developing this innovative new method that will provide useful data for healthcare facilities, patients, and scientists.

To continue this multifaceted training program, OPP is soliciting proposals from colleges, universities, and other institutions with reputable science and engineering programs to train students in either laboratory research or regulatory support activities. Approximately $90,000 is available to fund grants for laboratory research with universities that have accredited chemical engineering, molecular biology, biochemistry, and DNA microarray programs; another $60,000 to $100,000 is available to fund regulatory support grants with educational institutions that have accredited entomology, agronomy, toxicology, ecology, biology, and plant/weed science programs.

IV. Program Description

A. Purpose and Scope

This program was initiated to train graduate and undergraduate students from culturally diverse backgrounds in OPP's regulatory support and laboratory research activities undertaken to provide safer, reduced risk pesticides and protect public health and the environment. Students are afforded an opportunity to get involved in a broad range of projects that provide hands on OPP training in laboratory research employing the latest technology and in the generation of biological and economic data to support the formulation of regulatory decisions on pesticides. Students receive environmental training and are encouraged to pursue public service careers in various environmentally related fields. These programs are included in the Catalog of Federal Domestic Assistance under numbers 66.607, 66.500, and 66.716 at *http://www.cfda.gov/public/whole.pdf.*

B. Goal and Objectives

Through the proposals sought under this OPP Pesticide Research and Training Program, EPA intends to work with colleges, universities, and other institutions with reputable science and engineering programs, specifically in chemical engineering, molecular biology, biochemistry, DNA microarray, entomology, agronomy, toxicology, ecology, biology, and plant/weed science, to develop an effective environmental training program. Highly motivated and academically qualified graduate and undergraduate students, from culturally diverse backgrounds, will participate in projects designed to educate them about the scientific and economic data needed to support the formulation of regulatory decisions on pesticides. For example, students assigned to BEAD's branches will be trained in the development of assessments of pesticide use patterns, and students assigned to BEAD's laboratories will learn how to perform research using newly developing technology and methods to generate supporting data. Other projects may include training in the development of human health and ecological risk assessments, pesticide registration/reregistration support, or information technology support activities.

C. Eligibility

1. *Applicants.* Grant funds are available to accredited 4–year colleges, universities, and other institutions with reputable science and engineering programs specifically in chemical engineering, biology, biochemistry, DNA microarray, entomology, agronomy, toxicology, ecology, and plant/weed science.

To be eligible for consideration, applicants must meet all of the following criteria. Failure to meet the following criteria will result in the automatic disqualification for consideration of the proposal for funding:

- Be an applicant who is eligible to receive funding under this announcement.
- The proposal must address all of the high priority areas for consideration.
- The proposal must meet all format and content requirements contained in this notice.
- The proposal must comply with the directions for submittal contained in this notice.

There are no cost sharing requirements for this project.

2. *Qualifications.* Applicants will be evaluated on the following criteria:

- Experience and expertise in science and engineering programs,

specifically in chemical engineering, molecular biology, biochemistry, DNA microarray, entomology, agronomy, toxicology, ecology, biology, and plant/weed science.

- Commitment by the college, university, or other institution to provide highly motivated and academically qualified graduate and undergraduate students from culturally diverse backgrounds to participate in this training program; use of the institution's biotechnology laboratories, graphics, slides, etc. for preparation of publications and presenting seminars, which will result from these projects.
- The college, university, or other institution has historically attracted a substantial number of highly qualified students from culturally diverse backgrounds.
- The college, university, or other institution has qualified faculty needed to provide detailed instructions in the type of courses that will prepare students for the type of training and easy comprehension expected in the training program.

D. Authority

EPA expects to enter into cooperative agreements under the authority provided in FIFRA section 20 which authorizes the Agency to issue grants or cooperative agreements for research, public education, training, monitoring, demonstration, and studies. Regulations governing these cooperative agreements are found at 40 CFR part 30 for institutions of higher education, colleges and universities, and non-profit organizations; and 40 CFR part 31 for states and local governments. In addition, the provisions in 40 CFR part 32, governing government wide debarment and suspension; and the provisions in 40 CFR part 40, regarding restrictions on lobbying apply. All costs incurred under this program must be allowable under the applicable OMB Cost Circulars: A–87 (states and local governments), A–122 (nonprofit organizations), or A–21 (universities). Copies of these circulars can be found at *http://www.whitehouse.gov/omb/circulars/*. In accordance with EPA policy and the OMB circulars, as appropriate, any recipient of funding must agree not to use assistance funds for lobbying, fund-raising, or political activities (e.g., lobbying members of Congress or lobbying for other Federal grants, cooperative agreements, or contracts). See 40 CFR part 40.

E. Activities to be Funded

The grant will fund training of graduate and undergraduate students from culturally diverse backgrounds in OPP regulatory support and laboratory research projects. Graduate students will be trained in laboratory research using newly developing technology and methods. They will receive DNA microarray analysis training used by OPP to determine the effects of pesticides on cell response. Graduate and undergraduate students will be trained in projects such as the development of assessments on pesticide use patterns, human health, and ecological risk that are used to generate data to provide support in formulating regulatory decisions on pesticides. Other possible projects include registration and reregistration support or information technology support activities.

F. Award and Distribution of Funds

1. *Available funding.* The funding for the selected award projects are in the form of cooperative agreements awarded under FIFRA section 20. The total funding available for award in FY 2004 is expected to be approximately $90,000. The total funding available for award for regulatory support projects will range from $60,000 to $100,000. At the conclusion of the first 1–year period of performance on each project, incremental funding of up to $200,000 may be made available for distribution to all training projects each year allowing the project to continue for a total of 5 periods of performance (approximately 5 years) and totaling up to $990,000 for the 5–year period, depending on applicant need and the Agency budget in outlying years.

2. *Evaluation process and criteria.* Applicants will be screened to ensure that they meet all eligibility criteria and will be disqualified if they do not meet all eligibility criteria. All laboratory research and regulatory support proposals will be reviewed, evaluated, and ranked by a selected panel of EPA reviewers based on the following evaluation criteria and weights:

Laboratory Research Proposals (100 points)

- Project proposals must meet minimum requirements for experience and expertise in science and engineering programs, specifically in DNA microarray technology, biochemical engineering, molecular biology, andbiochemistry (Weighting: 40 points)
- Qualification and experience of the applicant in providing highly motivated and academically qualified graduate students to participate in training programs. This project will be carried out at EPA's Fort Meade, Maryland Laboratory, and students are expected to be able to conduct literature searches and carry out all aspects of laboratory research projects, prepare publications, and present seminars, which will result from projects. (Weighting: 40 points)
- Experience of the applicant in attracting a substantial number of highly qualified students from culturally diverse backgrounds. (Weighting: 10 points)
- Provisions for a quantitative or qualitative evaluation of the project success at achieving stated goals. (Weighting: 10 points)

Regulatory Support Proposals (100 points)

- Regulatory support proposals must meet minimum requirements for experience and expertise in science programs, specifically in entomology, agronomy, toxicology, ecology, biology, and plant/weed science (Weighting: 40 points)
- Qualification and experience of the applicant in providing highly motivated and academically qualified graduate and undergraduate students to participate in training programs that included the use of the university's or other entities' facilities for preparation of publications and presenting seminars, which will result from projects. (Weighting: 25 points)
- Experience of the applicant in attracting a substantial number of highly qualified students from culturally diverse backgrounds. (Weighting: 25 points)
- Provisions for a quantitative or qualitative evaluation of the project success at achieving stated goals. (Weighting: 10 points)

3. *Selection official.* The funding decision will be made from the group of top rated proposals by the Division Director of the Biological and Economic Analysis Division, Office of Pesticide Programs. The Agency reserves the right to reject all proposals and make no awards.

4. *Dispute resolution process.* The procedures for dispute resolution at 40 CFR 30.63 and 40 CFR 31.70 apply.

G. Application Requirements

1. *Content requirements.* Proposals must be typewritten, double-spaced in 12 point or larger print using 8.5 x 11 inch paper with minimum 1 inch horizontal and vertical margins. Pages must be numbered in order starting with the cover page and continuing through the appendices. One original and one electronic copy (e-mail or disk) is required.

All proposals must include:

- *Completed Standard Form SF 424*, Application for Federal Assistance.* Please include organization fax number and e-mail address. The

application forms are available on line at*http://www.epa.gov/ogd/grants/how_to_apply.htm.*

- *Completed Section B—Budget Categories, on page 1 of Standard Form SF 424A* (see allowable costs discussion below).* Blank forms may be located at*http://www.epa.gov/ogd/grants/how_to_apply.htm.*
- *Detailed itemization of the amounts budgeted by individual Object Class Categories (see allowable costs discussion below).* Statement regarding whether this proposal is a continuation of a previously funded project. If so, please provide the assistance number and status of the current grant/cooperative agreement.
- *Executive Summary.* The Executive Summary shall be a stand alone document, not to exceed one page, containing the specifics of what is proposed and what you expect to accomplish regarding measuring or movement toward achieving project goals. This summary should identify the measurable results you expect including general and specific public service benefits.
- *Table of contents.* A one page table listing the different parts of your proposal and the page number on which each part begins.
- *Proposal narrative.* Includes Parts I–V as identified below (not to exceed 10 pages).
- *Part I—Project title.* Self explanatory.
- *Part II—Objectives.* A numbered list (1, 2, etc.) of concisely written project objectives, in most cases, each objective can be stated in a single sentence.
- *Part III—Justification.* For each objective listed in Part II, discuss the potential outcome in terms of either regulatory support or laboratory research training to provide safer, reduced risk pesticides and protect public health and the environment.
- *Part IV—Approach and methods.* Describe in detail how the program will be carried out. Describe how the system or approach will support the program goals.
- *Part V—Impact assessment.* Please state how you will evaluate the success of the program in terms of measurable results. How and with what measures will humans be better protected as a result of the program.

2. *Appendices.* These appendices must be included in the cooperative agreement proposal. Additional appendices are not permitted.

- *Timetable.* A timetable that includes what will be accomplished under each of the objectives during the project and when completion of each objective is anticipated.
- *Major participants.* List all affiliates or other organizations, educators, trainers, and others having a major role in the proposal. Provide name, organizational affiliation, or occupation and a description of the role each will play in the project. A brief resume (not to exceed two pages) should be submitted for each major project manager, educator, support staff, or other major participant.

3. *Allowable costs.* EPA grant funds may only be used for the purposes set forth in the cooperative agreement, and must be consistent with the statutory authority for the award. Cooperative agreement funds may not be used for matching funds for other Federal grants, lobbying, or intervention in Federal regulatory or adjudicatory proceedings. In addition, Federal funds may not be used to sue the Federal government or any other governmental entity. All costs identified in the budget must conform to applicable Federal Cost Principles contained in OMB Circular A–87; A–122; and A–21, as appropriate.

4. *Federal requirements for recipients.* An applicant whose proposal is selected for Federal funding must complete additional forms prior to award (see 40 CFR 30.12 and 31.10), and will be required to certify that they have not been debarred or suspended from participation in Federal assistance awards in accordance with 40 CFR part 32. In addition, Applicants must comply with the Intergovernmental Review Process. Further information regarding this requirement will be provided if your proposal is selected for funding.

H. Application Procedures

1. *Submission instructions.* You may submit an application through the mail, by fax, or electronically. Regardless of submission method, all applications must be received by EPA on or beforeMay 28, 2004.

As indicated above, each application must include the original paper copy of the submission, along with one electronic copy. The electronic copy of your application package, whether submitted separately by e-mail or on a disk, please ensure that the electronic copy is consolidated into a single file, and that you use Word Perfect WP8/ 9 for Windows, or Adobe pdf 4/5. If mailing a disk, please use a 3.5 disk that is labeled as a proposal for the Office of Pesticide Programs Pesticide Research and Training Program, and include your pertinent information. Please check your electronic submissions to ensure that it does not contain any computer viruses.

Submit your application using one of the following methods:

By mail to: Cynthia Doucoure, Biological and Economic Analysis Division (7503C), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

By fax to: Cynthia Doucoure at fax number: (703) 308–8091.

By e-mail to: *doucoure.cynthia@epa.gov.*

2. *Notification process.* The Biological and Economic Analysis Division in OPP will mail an acknowledgment to applicants upon receipt of the application. Once all of the applications have been reviewed, evaluated, and ranked, applicants will be notified of the outcome of the competition. A listing of the successful proposal will be posted on the*http://www.epa.gov/pesticides/* website at the conclusion of the competition. The website may also contain additional information about this announcement including information concerning deadline extensions or other modifications.

I. Recipient Reporting Requirements

The successful recipient will be required to submit annual reports, and to submit annual financial reports. The specific information contained within the report will include at a minimum, a comparison of actual accomplishments to the objectives established for the period. The Biological and Economic Analysis Division may request additional information relative to the scope of work in the cooperative agreement and which may be useful for Agency reporting under the Government Performance and Results Act.

V. Submission to Congress and the Comptroller General

Grant solicitations such as this are considered rules for the purpose of the Congressional Review Act (CRA) (5 U.S.C. 801 *et seq.*). The CRA 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 grant solicitation 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 its publication in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects

Environmental protection, Grants, Pesticides, Training.

Dated: April 20, 2004.

Margaret Schneider,

Acting Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances.

[FR Doc. 04–9616 Filed 4–27–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPPT–2004–0042; FRL–7351–5]

Educational Outreach and Baseline Assessment of Existing Exposure and Risks of Exposure to Lead Poisoning of Tribal Children; Notice of Funds Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is soliciting grant proposals from Indian tribes to support tribal lead outreach and educational awareness and conduct baseline assessment of existing exposure and risks of exposure to lead poisoning of tribal children. EPA is awarding grants which will provide approximately $1.2 million to Indian tribes to perform those activities and to encourage Indian tribes to consider continuing such activities in the future. This notice describes eligibility, activities, application procedures and requirements, and evaluation criteria.

DATES: All grant proposals must be received on or before June 28, 2004.

ADDRESSES: Grant proposals must be submitted by mail. Please follow the detailed instructions as provided in Unit II. of the **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: *For general information contact*: Colby Lintner, Regulatory Coordinator, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov.*

For technical information contact: Darlene Watford, Program Assessment and Outreach Branch, National Program Chemicals Division (7404T), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 566–0516; e-mail address: *watford.darlene@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Overview Information

The following listing provides certain key information concerning the availability of funds opportunity.

- *Federal Agency name*: Environmental Protection Agency (EPA).
- *Funding opportunity title*: Educational Outreach and Baseline Assessment of Existing Exposure and Risks of Exposure to Lead Poisoning of Tribal Children.
- *Announcement type*: Notice of availability.
- *Catalog of Federal Domestic Assistance (CFDA) number*: 66.715.
- *Dates*: All grant proposals must be received on or before June 28, 2004.

II. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are a Federally-Recognized Indian tribe or tribal consortium. For the purposes of this notice, a partnership between two or more Federally-Recognized Indian Tribes is considered a consortium. Potentially affected entities may include, but are not limited to:

- 921150 American Indian and Alaskan Native Tribal Governments.

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the **Federal Register** document published by the Bureau of Indian Affairs (BIA) on July 12, 2002 (67 FR 46328) which lists all Federally-Recognized Indian Tribes. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT.**

B. How Can I 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 OPPT–2004–0042. The official public docket consists of documents specifically referenced in this action 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 EPA Docket Center, Rm. B–102 Reading Room, EPA West, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The EPA Docket Center Reading Room telephone number is (202) 566–1744 and the telephone number for the OPPT Docket, which is located in EPA Docket Center, is (202) 566–0280.

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 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 Unit II.B.1. Once in the system, select "search," then key in the appropriate docket ID number.

You may also access this document at the Office of Pollution Prevention and Toxics Lead Home Page at *http://www.epa.gov/lead/new.htm/.*

C. How and to Whom Do I Submit a Grant Proposal?

You may submit one original and three double-sided copies of the grant proposal through the mail to: Darlene Watford, Program Assessment and Outreach Branch, National Program Chemicals Division (7404T), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

For overnight/express delivery service, send grant proposals to: Darlene Watford, Program Assessment and Outreach Branch, National Program Chemicals Division (7404T), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1301 Constitution Ave., NW., EPA West (Old Customs Bldg.), 4th Floor Connecting Wing, Rm. 4355, Washington, DC 20004–0001.

III. What Action is the Agency Taking?

EPA is soliciting proposals from tribes or tribal consortia for grants to support educational outreach activities and/or baseline assessment of existing exposure and risks of exposure to lead poisoning of tribal children. The educational outreach grants will provide tribes with the means to launch efforts to educate tribal families about dangers to children of exposure to lead-based paint hazards. The baseline assessments may include inspecting pre-1978 tribal housing and/or child-occupied facilities for lead-based paint hazards, blood-lead screening to collect blood-lead level data of tribal children, testing of paint, dust, and soil for hazardous lead levels, training individuals to perform lead inspections and risk assessments, and funding contractor support necessary to implement these activities. EPA is awarding grants which will provide approximately $1.2 million for tribes or tribal consortia to perform these activities. Decisions on awarding the grant funds will be made based on the evaluation of the proposals using the criteria specified in Unit IV. Tribes or tribal consortia that submit qualifying proposals will be notified by EPA of their selection and will be required to submit official grant applications as a part of the award process.

IV. What Should I Consider as I Prepare My Grant Proposal?

A. Scope and Purpose

The purpose of these grants is to support tribal lead awareness outreach (educational) activities and the efforts of Indian tribes to identify children's risks to lead by conducting a baseline assessment of existing exposure and/or potential lead exposures. The outreach activities may be provided to children, parents, daycare providers, and legal custodians on the potential health risks associated with lead exposure. As a result of the baseline assessment, tribes may use the resulting data to evaluate whether there is a need to develop and implement an authorized tribal lead-based paint program (40 CFR 745.324).

B. Eligibility

Eligible recipients are any Federally-Recognized Indian Tribes or tribal consortia only. Federally-Recognized Indian Tribes are listed in the **Federal Register** document published by the BIA on July 12, 2002 (67 FR 46328). Only one grant proposal may be submitted by each tribe or tribal consortia under this notice. However, the grant proposal may include outreach activities, baseline assessment activities, or both. There are no requirements for matching funding under this grant program. There is no requirement that a tribe provide documentation that it meets the treatment in a manner similar to a State (TAS) standard.

C. Activities to be Funded

EPA will provide financial assistance in the form of grants to Indian tribes or tribal consortia to conduct any or all of the following activities:

1. *Outreach (educational) activities.* EPA will provide financial assistance in the form of grants to Indian tribes or tribal consortia to develop and conduct organized outreach efforts to educate tribal families about the dangers to children from exposure to lead-based paint hazards, distribute educational information, and encourage tribal families to have their children screened for lead poisoning and have their homes tested for lead hazards. Activities may include, but are not limited to, training medical professionals, developing culturally specific lead outreach materials, distributing pamphlets, and establishing an in-home education program to visit the homes of young tribal children.

Tribes may develop their own outreach materials; however, the use and reproduction of pre-existing products is strongly encouraged and preferred. EPA is aware that many State, tribal, and local departments of health and environmental protection, as well as advocacy groups and community development groups, have developed useful lead poisoning prevention materials to conduct outreach and awareness (educational) activities. EPA and other Federal agencies have developed, and currently provide, a wide range of outreach materials available from the National Lead Information Center (1–800–424–LEAD). Trained specialists at the Center can help identify specific types of lead awareness materials that already exist and thereby help grantees avoid spending funds to recreate these materials. Grant funding may be used to duplicate existing lead outreach materials or to develop and implement a lead poisoning awareness and prevention program. Any new lead awareness materials developed must be consistent with the Federal (EPA, Department of Housing and Urban Development (HUD), and Centers for Disease Control and Prevention (CDC, formerly the Centers for Disease Control)) lead hazard awareness and poisoning prevention programs (*http://www.epa.gov/lead/*, *http://www.hud.gov/offices/lead/*, and *http://www.cdc.gov/nceh/lead/lead.htm/*) and receive approval from the appropriate EPA Regional Lead Contact listed in Unit IV.C.2.v. prior to distribution.

2. *Baseline assessment activities*—i. *Conduct blood-lead screening of tribal children age 6 years and under.* For blood-lead screening activities, the focus should be on tribal children between the ages of 12–36 months because blood-lead levels tend to be highest in this age group, and more children in this age group tend to have blood-lead levels >10 (micrograms/deciliter (µg/dL). The CDC's recommended level of concern that encourages followup activities is 10 µg/dL, with specific actions/interventions recommended at various elevated blood-lead levels. All blood-lead samples collected from tribal children must be analyzed using a Clinical Laboratory Improvement Amendments (CLIA)-certified laboratory. Portable, hand-held blood-lead analyzers may be used, but must be operated by a laboratory that is CLIA certified for moderately complex analysis. CLIA, published in 1992 (42 CFR part 405), is administered by the Centers for Medicare and Medicaid Services (CMS, formerly the Health Care Finance Administration). CLIA-certified laboratories must successfully participate in a testing proficiency program that is CLIA approved. Information regarding CLIA may be downloaded from the CMS web site at *http://www.cms.gov/clia/*.

ii. *Conduct inspections and risk assessments of pre-1978 tribal housing and/or child occupied facilities for lead-based paint hazards.* (Housing and facilities may be owned or occupied by tribal members.) This includes collection and analysis of paint, dust, and soil samples for hazardous lead levels. Inspections and risk assessments may only be conducted by individuals certified by EPA for Indian country in the EPA Region where the tribe is located or certified by the recipient tribe if the tribe has received EPA program authorization. Inspections and risk assessments must be conducted according to the work practice standards found in 40 CFR 745.227 or those of the authorized tribal program. Analysis of paint, dust, and soil samples must be conducted by a National Lead Laboratory Accreditation Program (NLLAP) recognized laboratory. EPA has established the NLLAP to recognize laboratories that demonstrate the ability to analyze paint chip, dust, or soil samples for lead. NLLAP provides the public with a list of laboratories that have met EPA requirements and demonstrated the capability to accurately analyze paint chip, dust, or soil samples for lead. A current list of NLLAP-recognized laboratories can be

obtained by calling the National Lead Information Center at 1–800–424–LEAD.

iii. *Train workers to perform lead inspections and risk assessments.* Grant funds may be used for initial, refresher, or any other training and/or third party testing required to obtain certification (as discussed in Unit IV.C.2.ii.) to perform lead-based paint inspections and risk assessments. Grant funds cannot be used to pay for any administrative fees for certification to conduct lead inspections and/or risk assessments.

iv. *Compile and summarize demographic data collected from activities listed in Unit IV.C.2.i–iii.* In order for tribes to qualify for other Federal funds for lead activities, sufficient data needs to be compiled and well organized. It is strongly recommended that tribes develop or use an existing data management system (manual or automated) to collect and maintain the data collected during the project, including laboratory results and data on followup cases for tribal children with elevated blood-lead levels. This information may be essential in determining if tribes have the capacity for a tribal lead program (40 CFR 745.324) and are eligible for other Federal funding for lead activities. (An existing tribal tracking system, Tribal Relational Environmental Numeric Health Database System or TRENHDS, may be viewed or downloaded from *http://www.bluejaydata.com/trenhds/.*) It is recommended that the data include: Tribe or tribal consortium name and location; an identifier that protects the privacy of the child; age of housing in which the child resides; age of the child (in months); gender; sample media (blood, soil, dust, or paint); date of sample collection; method of sample collection (for blood samples indicate whether method was capillary or venous); laboratory analysis method and date; the levels of lead in blood (in micrograms per deciliter (μg/dL)), soil (in micrograms per gram (μg/g)), dust (in micrograms per square foot (μg/ft^2)), and paint (in micrograms per gram (μg/g) or milligrams per centimeter square (mg/cm^2)); the number of homes and/or child-occupied facilities where risk assessments or inspections were conducted; the number of paint, dust, and soil samples collected; and possible exposure routes from other sources (such as hobby materials, pottery, parent occupational exposure, special native foods, medications, etc.) for each tribal child screened.

v. *Quality assurance.* All environmental or health-related measurements or data generation must adequately address the requirements of 40 CFR 31.45 relating to quality assurance/quality control. Information on EPA quality assurance requirements may be downloaded from the EPA Quality Staff web site at *http://www.epa.gov/quality/.* To begin the process of developing the quality assurance documentation, a quality assurance project plan template has been developed that may be helpful to use as a guide. The template may be downloaded from the EPA/OPPT web site at *http://www.epa.gov/lead/new.htm/.* For further guidance on preparation of the quality documentation and specific EPA Regional Office approval requirements, please contact the appropriate EPA Regional Lead Contact listed in this unit.

Region I: (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont), Regional Contact—James M. Bryson, USEPA Region I, One Congress St., Suite 1100 (CPT), Boston, MA 02114–0203. Telephone number: (617) 918–1524.

Region II: (New Jersey, New York, Puerto Rico, and the Virgin Islands), Regional Contact—Lou Bevilacqua, USEPA Region II, MS–225, 2890 Woodbridge Ave., Edison, NJ 08837. Telephone number: (732) 321–6671.

Region III: (Delaware, Maryland, Pennsylvania, Virginia, West Virginia, and the District of Columbia), Regional Contact—Demian Ellis, USEPA Region III (3WC33), 1650 Arch St., Philadelphia, PA 19103–2029. Telephone number: (215) 814–2088.

Region IV: (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee), Regional Contact—Liz Wilde, USEPA Region IV, 61 Forsyth St., SW., Atlanta, GA 30303. Telephone number: (404) 562–8528.

Region V: (Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin), Regional Contact—David Turpin, USEPA Region V (DT–8J), 77 W. Jackson Blvd., Chicago, IL 60604. Telephone number: (312) 886–7836.

Region VI: (Arkansas, Louisiana, New Mexico, Oklahoma, and Texas), Regional Contact — Eva Steele, USEPA Region VI, 1445 Ross Ave., 12th Floor (6MD–RP), Dallas, TX 75202. Telephone number: (214) 665–7211.

Region VII: (Iowa, Kansas, Missouri, and Nebraska), Regional Contact—Crystal Harriel, USEPA Region VII, ARTD/RALI, 901 North 5th, Kansas City, KS 66101. Telephone number: (913) 551–7261.

Region VIII: (Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming), Regional Contact—David Combs, USEPA Region VIII, 999 18th St., Suite 300, Denver, CO 80202. Telephone number: (303) 312–6021.

Region IX: (Arizona, California, Hawaii, Nevada, American Samoa, and Guam), Regional Contact—Mary Aycock, USEPA Region IX (CMD–4), 75 Hawthorne St., San Francisco, CA 94105. Telephone number: (415) 947–4169.

Region X: (Alaska, Idaho, Oregon, and Washington), Regional Contact—Barbara Ross, USEPA Region X, Solid Waste and Toxics Unit (WCM–128), 1200 Sixth Ave., Seattle, WA 98101. Telephone number: (206) 553–1985.

D. Travel to Conferences

Grant funds may be used to support travel expenses and attendance of key tribal lead program personnel at EPA Regional and National Lead conferences.

E. Project Duration

Projects are expected to be completed within 2 years of award of the grant.

F. Ineligible Costs

Examples of ineligible costs under this grant, include the following:

1. Buying real property, such as land or buildings.
2. Lead hazard reduction activities, such as performing interim controls or abatement (as defined in 40 CFR 745.223).
3. Construction activities, such as renovation, remodeling, or building a structure.
4. Office equipment that costs more than 10% of the amount of the grant, such as a copying machine or a color printer.
5. Analysis equipment in excess of 10% of the amount of the grant.
6. Lead-based paint certification fees for individuals and firms.
7. Contractor support in excess of 25% of the amount of the grant award, except where contract services include blood-lead analysis, training, and/or lead-based paint inspections and risk assessments.
8. Duplication of any lead-related activities that have been previously funded by EPA, or other Federal Government sources.
9. Case-management costs, including treatment for tribal children with elevated blood-lead levels (e.g., followup visits by a doctor or chelation therapy).

EPA is extremely interested in knowing what actions tribes plan to follow regarding monitoring, education, and/or treatment for children whose blood-lead levels are determined to be elevated(> 10 μg/dL) while screened under this grant. It is important that the children who are found to have elevated blood-lead levels are treated. A description of specific steps and related information for followup activities must be included in the work plan section of the grant proposal.

Allowable costs are defined through OMB Circular A–87 "Cost Principles for State, Local, and Tribal Governments." Grant awards made under this announcement may be subject to the

Single Audit Act Amendments of 1996, as defined in OMB Circular A–133.

G. Grant Proposal Requirements

Submit one original and three double-sided copies of the grant proposal, including a return mailing address. Grant proposals must be unbound, stapled, or clipped in the upper left-hand corner, on white paper, and with page numbers. The deadline for EPA's receipt of grant proposals is June 28, 2004. If the tribe has conducted, or is currently working on a related project(s), a brief description of those projects, funding sources, primary commitments, and an indication as to whether those commitments were met must be included in the grant proposal. The description must also indicate how the proposed project is different from other funded work conducted by the tribe(s) or unfunded work conducted by another entity (e.g., Indian Health Service, Superfund), and how the proposed project will not duplicate previous or on-going projects. It is important to note that funds cannot be awarded to conduct activities which have been previously funded through any other Federal grant program.

Grant proposals should be clearly marked to indicate any information that is to be considered confidential. EPA will make final confidentiality decisions in accordance with Agency regulations in 40 CFR part 2, subpart B. All initial grant proposals received under this notice are subject to the dispute resolution process defined at 40 CFR 30.63 and part 31, subpart F.

EPA has another grant program for lead known as the Section 404(g) Lead-Based Paint Activities Grant Program. The Section 404(g) program is for States, Territories, the District of Columbia, and tribes to develop and carry out authorized lead programs under section 404 of the Toxic Substances Control Act (TSCA). Guidance on the FY 2005 Section 404(g) program may be downloaded from the EPA/OPPTS web site at *http://www.epa.gov/lead/*. Although both grant programs are for lead-based paint activities, they each have very distinct objectives. The grant program opportunities described in this notice may serve as a precursor to, but not as an equivalent or supplement to, the Section 404(g) lead-based paint grant program. The Section 404(g) lead-based paint grant program involves infrastructure development for the anticipated implementation of a lead-based paint training and certification program and does not include the activities (testing for lead in blood, paint, dust, or soil samples, or the general outreach and education activities) listed in this notice. Tribes may determine from the sample results and data interpretation that they obtain from the grant program described in this notice, that they have a need to develop a lead-based paint grant program and may apply for Section 404(g) grant funds. Alternatively, a tribe may decide that it is not in their best interest to pursue such a training and certification oversight program. Tribes or tribal consortia with an EPA-approved lead-based paint program may become eligible for other Federal funding opportunities for lead activities.

H. Work Plan

To be considered for selection under this grant program, grant proposals must include a completed work plan as described in this unit. Tribes may elect to submit a grant proposal for outreach and/or baseline assessment activities. However, only one grant proposal will be accepted from each tribe or tribal consortia in response to this notice. The work plan must describe the proposed project. The work plan must be 4–6 typed pages in length (excluding appendices). One page is one side of a single-spaced typed page. The pages must be letter size (10 or 12 characters per inch (cpi)) and must have margins that are at least 1 inch. The format for the work plan must be organized and outlined as follows:

Section I. Work Plan for Educational Outreach Grant Proposal

A. Title of Project, Table of Contents, and Summary

B. Outreach (Educational) Activities

This section should include, but not be limited to, the following items/activities: Purpose, goal, and scope of the project; types of lead educational material that will be used and/or reproduced; types, if any, of lead educational materials that will be developed; distribution and delivery plans; and percentage estimate of the number of tribal families who will receive the lead awareness information. The grant proposal must include a statement which describes how the effectiveness of the project will be determined.

C. Project Management

Include a description of staff positions, roles, and responsibilities, a description of experience in or potential to conduct activities described in section B; efforts of partnership and collaboration with other local-health agencies, extent of contractor support, schedule and/or a time line showing the major activities and estimated time frames for initiation and completion, and a budget summary.

D. Budget

Provide a reasonable budget that is clearly identifiable with work plan activities.

E. Appendices

The appendices must be no more than 10 pages total and follow the same paging and spacing description as provided in this outline.

i. Resumes of key personnel (also include title, description, and reference name with phone number for work on previous or current grants or contracts within the last 5 years).

ii. Letters of support from tribal representatives for tribal consortia. For individual tribes, include a letter or resolution from Tribal Council or Chairperson showing support for and commitment to the project. (If it is not possible to obtain a letter/resolution from the Tribal Council or Chairperson to submit with your application, an interim letter of explanation must be included with the application.) The letter/resolution will still be required prior to award of the grant.

iii. Detailed information on other lead-based paint or lead-related activities conducted by the tribe or tribal consortium.

Section II. Work Plan for Baseline Assessment Grant Proposal

A. Title of Project, Table of Contents, and Summary

B. Baseline Assessment Activities

This section should include the purpose, goal, and approach of the project. This section should also include a discussion of the separate phases of the project; the criteria for selecting properties to be inspected and/or to have risk assessments performed and children screened; methods to be used for data collection and quality control; and training and certification of individuals to perform lead-based paint evaluation activities. The grant proposal must include a statement which describes how the effectiveness of the project will be determined.

C. Project Management

Include a description of staff positions, roles, and responsibilities, a description of experience in or potential to conduct activities described in section B.; efforts of partnership and collaboration with other local-health agencies, extent of contractor support, schedule and/or time line showing the major activities and estimated time frames for initiation and completion, and a budget summary.

D. Budget

Provide a reasonable budget that is clearly identifiable with work plan activities.

E. Appendices

The appendices must be no more than 10 pages total and follow the same paging and spacing description as provided in this outline.

i. Resumes of key personnel (also include title, description, and reference name with phone number for work on previous or current grants or contracts with the Federal Government within the last 5 years).

ii. Letters of support from tribal representatives for tribal consortia. For individual tribes, include a letter or

resolution from Tribal Council or Chairperson showing support for and commitment to the project. (If it is not possible to obtain a letter/resolution from the Tribal Council or Chairperson to submit with your application, an interim letter of explanation must be included with the application.) The letter/resolution will still be required prior to award of the grant.

iii. Detailed information on other lead-based paint or lead-related activities (if applicable).

I. Funding

Applicants may receive grants of up to $75,000 for an outreach (education) project, $50,000 for baseline assessment activities, or $125,000 for a combined grant proposal for both outreach (education) and baseline assessment activities. A separate budget breakdown is required to indicate outreach and baseline assessment funds in combined grant proposals.

Final distribution of the funds will be dependent upon the number of qualified applicants, tribal populations served by each grant, and other factors, as deemed appropriate by EPA (i.e., the evaluation criteria as stated in Unit IV.K.). Tribes may use a portion of the grant funds for contractor support for these activities; however, contractor support may not account for more than 25% of the amount of the grant, except where contract services include blood-lead analysis, training, and/or lead-based paint inspections and risk assessments).

J. Post Award Requirements

EPA's quality assurance requirements must be complied with before any environmental or health-related measurements or data are initiated under this grant. These requirements are addressed in 40 CFR 31.45 relating to quality assurance/quality control. Information on EPA quality assurance requirements may be downloaded from the EPA Quality Staff web site at *http://www.epa.gov/quality/*. For further guidance on preparation of the quality documentation, and specific EPA Regional approval requirements, please contact the appropriate EPA Regional Lead Contact listed in Unit IV.C.2.v.

The grantee must provide EPA with written progress reports within 30 days of the end of each quarter and a report at the end of the project period.

K. Evaluation Criteria

EPA will review all proposals for quality, strength, and completeness against the following criteria. The Agency will use the proposals to select projects to be funded under this grant program. EPA reserves the right to reject all proposals and make no awards. The lead outreach (educational) awareness and baseline assessment activities grant proposals will be reviewed and evaluated separately. The maximum rating score for each grant proposal will be 105 points (five bonus points for in-kind services). Based upon the evaluation results, a tribe or tribal consortium that submits grant proposals for both the lead outreach (educational) awareness and baseline assessment may receive a grant for one or both activities.

1. *Lead outreach (educational) grant proposal criteria*—i. *General (20 points).* The overall description of implementing the tribal lead outreach (educational) awareness program in the proposal must address the goals of this notice of funding availability as detailed in Unit IV.A. It must include reasonable and attainable goals and an approach that is clearly detailed. The proposal must describe the method that will be used to determine the effectiveness of the project. The proposal must provide detailed information on all lead-based paint or lead-related outreach/educational activities for which the tribe has received funding from any Federal, State, or local government.

ii. *Outreach activities (40 points).* The grant proposal should fully describe the proposed educational outreach efforts for tribal Indian communities. The messages in the grant proposal should be consistent with EPA/HUD/CDC lead-based paint program policies, guidelines, regulations, and recommendations. The following elements will be specifically evaluated:

- Types of existing lead educational material to be used and/or reproduced (i.e., reports, pamphlets, brochures, video tapes, CD ROMs, etc.); types, if any, of lead awareness (educational) outreach materials that will be developed.
- Method of distribution of materials throughout the tribal population.
- How the messages will be delivered, e.g., lecture, written material distribution, one-on-one interviews.
- Printing, special video taping, advertising (billboards, posters, flyers), collaboration with radio or television, or other methods used to reach the tribal Indian population regarding the outreach effort.
- Percentage estimate of the number of tribal families who will receive the lead awareness information; efforts that will be employed to target hard-to-reach tribal communities to inform families about childhood lead poisoning and screening, if applicable; the number of people/families/medical personnel/etc., who will be reached.
- An indication as to whether the proposed outreach materials and activities are suitable for the target audience (i.e., appropriate language comprehension and cultural identification).

iii. *Project management (30 points).* The grant proposal should describe the staff positions, roles, and responsibilities, and their qualifications. The following elements will also be evaluated: Resumes of key personnel; tribal experience in or potential to conduct activities such as those described in the "Outreach Activities" section; previous experience managing similar projects; and availability of references; access to properly trained staff and facilities to conduct the project; schedule for completing the project; and the extent of activities to be performed by a contractor.

iv. *Budget (10 points plus 5 bonus points).* The evaluation will be based on the extent to which the proposed budget is reasonable, clear, and consistent with the intended use of the funds. Although matching funds are not required, up to five bonus points will be given to grant proposals indicating financial contributions and/or in-kind services provided to the project.

2. *Baseline assessment proposal criteria*—i. *General (20 points).* The overall description of the tribal lead baseline assessment program will be evaluated. The grant proposal must address the goals of this notice as detailed in Unit IV.A. It must include reasonable and attainable goals and an approach that is clearly detailed. The proposal must include a statement which describes how the effectiveness of the project will be determined. The grant proposal must provide detailed information on all lead-based paint or lead-related activities for which the tribe has received funding from any Federal, State, or local government.

ii. *Baseline assessment activities (40 points).*

- *Blood-lead screening activities.* The grant proposal will be evaluated on the description of the sampling, collection, handling, and analysis activities; the data collection and tracking system, quality control measures; the description of the facility/facilities where the blood-lead sampling will occur (i.e., school, library, health department facility, clinic, private building, mobile van, etc.); and the estimated number and a percentage estimate of the number of tribal children to be screened in the project. The evaluation will also be based on the description of the method that will be used to solicit maximum participation of tribal children; the methods, (i.e., printing, video taping, collaboration with radio or television, etc.) to be used to reach the Indian population regarding

the blood-lead screening effort; efforts to be used to ensure patient confidentiality; and a description of how the CLIA standards will be met.

• *Inspection/risk assessment of tribal housing.* The proposal will be evaluated on the description of residential/child occupied properties that will undergo lead-based paint inspection and/or risk assessment; the selection criteria used to identify the properties; the description of methods used to reach tribal population regarding lead paint inspections and/or risk assessment efforts; the description of inspection, risk assessment, and sampling and analysis procedures; the qualifications of inspection personnel; and the description of reporting procedures. All inspections and risk assessments must be conducted according to the work practice standards found in 40 CFR 745.227 or those of an authorized tribal program.

• *Paint, dust, and soil testing.* The grant proposal evaluation will be based on the description of the sampling, collection, handling, and analysis activities; the description of the data that will be collected, tracked, and reported to EPA; the quality control measures implemented, and a description of how NLLAP-recognized laboratories will be used for analysis.

• *Training.* Use of EPA accredited training providers or training providers approved by an EPA authorized State or tribe for risk assessments and inspections and use of inspectors and/or risk assessors certified by EPA or by an EPA authorized State or tribe.

iii. *Project management (30 points).* The grant proposal will be evaluated based on the description of the staff positions, roles and responsibilities, and their qualifications. The following elements will also be evaluated: Resumes of key personnel; tribal experience in or potential to conduct activities such as those described in the "Inspection/Risk Assessment of Tribal Housing," and "Paint, Dust, and Soil Testing" sections; previous experience managing similar projects; and availability of references; access to properly trained staff and facilities to conduct the project; schedule for completing the project; and the extent of activities to be performed by a contractor.

iv. *Budget (10 points plus 5 bonus points).* The evaluation will be based on the extent to which the proposed budget is reasonable, clear, and consistent with the intended use of the funds. Although matching funds are not required, up to five bonus points will be given to grant proposals indicating financial contributions and/or in-kind services provided to the project.

L. Selection Notification and Application Requirements

Once proposals have been reviewed and evaluated, the contact person for the Tribe or Tribal consortium (as identified in the proposal) will receive notification from EPA in writing regarding the outcome of the competition. If proposals are selected, additional forms (such as Standard Form SF 424, Application for Federal Assistance) for grant application will be required to be submitted to EPA. The specific information will be provided in the written notification from EPA. In addition, successful applicants will be required to certify that they have not been debarred or suspended from participation in Federal assistance awards in accordance with 40 CFR part 32. The application forms are available on line at *http://www.epa.gov/ogd/AppKit/application.htm.* These forms should not be submitted with the proposals.

V. Statutory and Executive Order Reviews

Section 10 of TSCA, as supplemented by Public Law 106–74, authorizes EPA to award grants for the purpose of conducting research, development, monitoring, education, training, demonstrations, and studies necessary to carry out the purposes of the Act. Presently, these funds are not eligible for use in a Performance Partnership Agreement. The CFDA number is 66.715 (Childhood Blood-Lead Screening and Lead Awareness Outreach for Indian Tribes). Executive Order 12372, *Intergovernmental Review of Federal Programs,* does not apply to this assistance program since grant proposals will be submitted in lieu of comments on developing this program.

VI. Congressional Review Act

Grant solicitations such as this are considered rules for the purpose of the Congressional Review Act (CRA). The CRA, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 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**. This is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects

Environmental protection, Grants-Indians, Indians, Native Americans, Lead, Lead-Based Paint, Maternal and child health.

Dated: April 20, 2004.

Margaret Schneider,

Acting Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances.

[FR Doc. 04–9622 Filed 4–27–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7654–7; E–Docket ID No. ORD–2004–0003]

Telephone Conference Call of the World Trade Center Expert Technical Review Panel To Continue Evaluation on Issues Relating to Impacts of the Collapse of the World Trade Center Towers

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The World Trade Center Expert Technical Review Panel will hold a telephone conference call to provide for greater input on ongoing efforts to monitor the situation for New York residents and workers impacted by the collapse of the World Trade Center. The individual panel members will help guide the EPA's use of the available exposure and health surveillance databases and registries to characterize any remaining exposures and risks, identify unmet public health needs, and recommend any steps to further minimize the risks associated with the aftermath of the World Trade Center attacks. The panel will meet several times over the course of approximately two years, and these panel meetings will be open to the public, except where the public interest requires otherwise. Information on the panel meeting agendas, documents (except where the public interest requires otherwise), and public registration to attend the meetings will be available from an Internet Web site. EPA has established an official public docket for this action under Docket ID No. ORD–2004–0003. Instructions for the dial-in telephone conference call are in **SUPPLEMENTARY INFORMATION.**

DATES: The telephone conference call of this panel will be held on May 12, 2004,

from 11 a.m. to 1 p.m., eastern daylight savings time.

FOR FURTHER INFORMATION CONTACT: For call information, please see the Web site *http://www.epa.gov/wtc/panel* or contact Sarah Bauer by telephone at (202) 564–3267 or by e-mail at *bauer.sarah@epa.gov*. The meeting agenda will be posted on the Web site and EDOCKET and will also be available in hard copy. For further information only regarding the technical panel, contact Michael Brown at (202) 564–6766 or *brown.michael@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Call Information

The meeting proceedings can be heard live by following these instructions for the dial-in telephone conference call:

1. Dial 1–800–341–3088 and follow the voice prompt.
2. At the voice prompt, enter the Conference Code 1646347 and the # key.
3. You will be connected to the conference.
4. If you are disconnected for any reason, you can dial 1–800–341–3088 and enter Conference Code 1646347 # to continue with the conference or call the Conference Center at 1–800–574–3456 for further assistance.

Playback Instructions

The conference call will be recorded. To listen to the recording:

1. Dial 1–800–756–3819 after 2 p.m. eastern daylight savings time on May 12th.
2. At the voice prompt, press 162137 followed by the # key.
3. The conference will then be played back to you over the phone.

The nine digits on your keypad will allow you to control the playback:

1. Slow Rewind;
2. Increase volume;
3. Slow Forward;
4. Medium Rewind;
5. Pause On/Off;
6. Medium Forward;
7. Fast Rewind;
8. Decrease Volume; and
9. Fast Forward.

II. Background Information

Immediately following the September 11, 2001, terrorist attack on New York City's World Trade Center, many Federal agencies, including the EPA, were called upon to focus their technical and scientific expertise on the national emergency. EPA, other Federal agencies, New York City, and New York State public health and environmental authorities focused on numerous cleanup, dust collection and ambient air monitoring activities to ameliorate and better understand the human health impacts of the disaster. Detailed information concerning the environmental monitoring activities that were conducted as part of this response is available at the EPA Response to 9–11 Web site at *http://www.epa.gov/wtc/*.

In addition to environmental monitoring, EPA efforts also included toxicity testing of the dust on laboratory mice, as well as the development of a human exposure and health risk assessment. This risk assessment document, Exposure and Human Health Evaluation of Airborne Pollution from the World Trade Center Disaster (*http://www.epa.gov/ncea/wtc.htm*), has been subjected to public comment and expert peer review, and is currently undergoing revisions prior to finalization. Numerous additional studies by other Federal and State agencies, universities, and other organizations have documented impacts to both the outdoor and indoor environments, and to human health.

While these monitoring and assessment activities were ongoing, and the cleanup at Ground Zero itself was occurring, EPA began planning for a program to clean and monitor residential apartments. From June 2002 until December 2002, residents impacted by World Trade Center dust and debris in an area of about 1 mile by 1 mile south of Canal Street were eligible to request federally funded cleaning and monitoring for airborne asbestos or only monitoring of their residences. The cleanup continued into the summer of 2003, by which time the EPA had cleaned and monitored 3400 apartments and monitored an additional 800 apartments. Detailed information on this portion of the EPA response is also available at *http://www.epa.gov/wtc/*.

A critical component of understanding long-term human health impacts is the establishment of health registries. The World Trade Center Health Registry is a comprehensive and confidential health survey of those most directly exposed to the contamination resulting from the collapse of the World Trade Center towers. It is intended to give health professionals a better picture of the health consequences of 9/11. It was established by the Agency for Toxic Substances and Disease Registry (ATSDR) and the New York City Department of Health and Mental Hygiene (NYCDHMH), in cooperation with a number of academic institutions, public agencies and community groups. Detailed information about the registry can be obtained from the registry Web site at: *http://www.nyc.gov/html/doh/html/wtc/index.html*.

In order to obtain individual advice on the effectiveness of these programs, unmet needs and data gaps, the EPA has convened a technical panel of experts who have been involved with World Trade Center assessment activities. Dr. Paul Gilman, EPA Science Advisor, serves as Chair of the panel, and Dr. Paul Lioy, Professor of Environmental and Community Medicine at the Environmental and Occupational Health Sciences Institute of the Robert Wood Johnson Medical School-UMDNJ and Rutgers University, serves as Vice Chair. A full list of the panel members and a charge statement and operating principles for the panel are available from the panel Web site listed above. Panel meetings will each be one-day meetings, and they will occur over the course of approximately a two-year period. Panel members will provide individual advice on issues the panel addresses. These meetings will occur in New York City and nearby locations. All of the meetings will be announced on the Web site and by a **Federal Register** Notice, and they will be open to the public for attendance and also to provide brief oral comment. The focus of the phone call is to discuss a draft sampling program to evaluate the incidence of contamination in apartments around the World Trade Center site. Future meetings will address planned activities by EPA regarding monitoring, assessment and health registries. Further information on these meetings can be found at the Web site identified earlier: *http://www.epa.gov/wtc/panel*.

III. How To Get Information on E–DOCKET

EPA has established an official public docket for this action under Docket ID No. ORD–2004–0003. 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 Office of Environmental Information (OEI) Docket in the Headquarters EPA Docket Center, (EPA/DC) EPA West Building, Room B102, 1301 Constitution Avenue, NW., Washington, DC 20460. 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 OEI Docket is (202) 566–1752; facsimile: (202) 566–1753; or e-mail: *ORD.Docket@epa.gov*.

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 identification number.

Dated: April 23, 2004.

William H. Farland,

Chief Scientist, Office of the Science Advisor.

[FR Doc. 04–9718 Filed 4–27–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0128; FRL–7357–5]

Biotechnology Notification; Receipt of Application

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of an Biotechnology Notification from West Virginia University requesting review of a small-scale field test for genetically modified *Cryphonectria parasitica* (Chestnut tree blight fungus). The Agency has determined that the application may be of regional and national significance. Therefore, in accordance with 40 CFR 172.11(a), the Agency is soliciting comments on this application.

DATES: Comments, identified by docket ID number OPP–2004–0128, must be received on or before May 13, 2004.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: William R. Schneider, Biopesticides and Pollution Prevention Division (7511C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: 703–308–8683; e-mail address:*schneider.william@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. This action may, however, be of interest to those persons who are or may be required to conduct small-scale field testing of genetically modified microbial pesticides under the Federal Food, Drug, and Cosmetic Act (FFDCA), or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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 identification (ID) number OPP–2004–0128. 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, 1921 Jefferson Davis Hwy., 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.

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 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.

C. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the

close of the comment period will be marked "late." EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. 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.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at*http://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. Once in the system, select "search," and then key in docket ID number OPP–2004–0128. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by e-mail to*opp-docket@epa.gov*, Attention: Docket ID Number OPP–2004–0128. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: 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–2004–0128.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, Attention: Docket ID Number OPP–2004–0128. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, 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 CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any 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 and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

II. Background

The proposed small-scale field test is for release of*Cryphonectria parasitica* strains that have been genetically modified to be less debilitating to Chestnut trees than the wild type strain that it is designed to displace. The small-scale field release will be on part of three 0.1 acre plots of land in the Monongahela National Forest, near Circleville, West Virginia. The study will last for 3 years from 2004 through 2006. The genetic modification transfers a copy of a hypovirus, that occurs naturally in the cytoplasm of less-virulent chestnut tree blight fungus, into the chromosome of the fungus in order to facilitate the dissemination of the less-virulent fungus as compared to the virulent strain. This small-scale field test will also be conducted under a U.S. Department of Agriculture APHIS permit.

III. What Action Is the Agency Taking?

Following the review of the West Virginia University Biotechnology Notification and any comments and data received in response to this notice, EPA will decide whether to approve this proposed test, or to require an Experimental Use Permit for this test. If this small-scale field test is approved, EPA may require additional conditions under which it is to be conducted.

IV. What Is the Agency's Authority for Taking this Action?

Biotechnology Notifications are required to be submitted to EPA prior to conducting small-scale field testing of certain genetically modified and/or certain nonindigenous microbial pesticides in accordance with subpart C of 40 CFR part 172.

List of Subjects

Environmental protection, Experimental use permits, Biotechnology Notifications.

Dated: April 21, 2004.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 04–9615 Filed 4–27–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0124; FRL–7355–6]

Carboxin; Risk Assessments; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's preliminary risk assessments and related documents for the pesticide seed treatment, carboxin,

and opens a public comment period on these documents. The public also is encouraged to suggest risk management ideas or proposals. EPA is developing a Reregistration Eligibility Decision (RED), for carboxin using a modified, four-phase public participation process. EPA and the U.S. Department of Agriculture (USDA) use this process to involve the public in developing pesticide reregistration and tolerance reassessment decisions. Through these programs, EPA is ensuring that all pesticides meet current health and safety standards.

DATES: Comments, identified by docket indentification (ID) number OPP–2004–0124, must be received on or before June 28, 2004.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Dirk V. Helder, Special Review and Reregistration Division (7508C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–4610; fax number: (703) 308–8041; e-mail address: *helder.dirk@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

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 identification (ID) number OPP–2004–0124. 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, 1921 Jefferson Davis Hwy., 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

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 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. 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.

C. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. 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.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. Once in the system, select "search," and then key in docket ID number OPP–2004–0124. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID Number OPP–2004–0124. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: 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–2004–0124.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, Attention: Docket ID Number OPP–2004–0124. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, 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 CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any 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 and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at your estimate.

5. Provide specific examples to illustrate your concerns.

6. Offer alternatives.

7. Make sure to submit your comments by the comment period deadline identified.

8. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

II. What Action Is the Agency Taking?

EPA is releasing for public comment its human health and environmental fate and effects risk assessments and related documents for the seed treatment carboxin, and encouraging the public to suggest risk management ideas or proposals specifically focusing on effects to seed-eating birds and small mammals. Thus far, the only endangered species identified as potentially at risk is Delmarva fox squirrel. EPA developed the risk assessments and preliminary risk reduction options through a modified version of its public process for making pesticide reregistration eligibility decisions under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and tolerance reassessment decisions under the Federal Food, Drug, and Cosmetic Act (FFDCA), both amended by the Food Quality Protection Act (FQPA) of 1996. Through these programs, EPA is ensuring that all pesticides meet current scientific and regulatory standards.

EPA is applying the principles of public participation to all pesticides undergoing reregistration and tolerance reassessment. In conducting these programs, the Agency is tailoring its public participation process to be commensurate with the level of risk, extent of use, complexity of the issues, and amount of public concern associated with each pesticide. For carboxin, a modified, four-phase process with one 60–day comment period and opportunity for public consultation is appropriate because there are no dietary, drinking water, or worker risks, and there are no registered residential uses. The only potential concern is for risks to seed-eating birds and small mammals, in particular the endangered Delmarva fox squirrel which might consume carboxin-treated seeds.

Carboxin is a systemic fungicide applied to seeds prior to planting for control of various fungi that cause seed and seedling diseases (smut, rot, and blight). Carboxin may be used to prevent the formation of these diseases or may be used to cure existing plant seed diseases. Carboxin is applied both by commercial seed treaters and on-farm applicators. The application rate ranges from 0.01 to 0.4 pounds/active ingredient/acre, based on how much carboxin is put on the seed during treatment and how much of the treated seed is planted in the field. Carboxin is applied to barley, beans, canola, corn, cotton, oats, onions, peanuts, rice, rye, safflower, sorghum, soybeans, triticale, and wheat seeds. Approximately 10% of corn, 15% of cotton, 30% of onions, 90% of peanuts, 5% of rice, and 5% of wheat seeds are treated nationally.

EPA is providing an opportunity, through this notice, for interested parties to provide written comments and input to the Agency on the risk assessments for carboxin. Such comments and input could address, for example, the availability of additional data to further refine the ecological risk assessments, or could address the Agency's risk assessment methodologies

and assumptions as applied to this specific pesticide. In addition, information such as usage patterns, dissipation data, and environmental conditions under which carboxin is used could be helpful. Percentage of seed that normally makes up the fox squirrel diet, feeding and breeding habits, or critical habitat information could help the Agency refine the ecological risk assessment and confirm whether the Delmarva fox squirrel is likely to be exposed to carboxin, or to consume carboxin-treated seeds.

EPA also is providing an opportunity for interested parties to provide written risk management proposals and options for carboxin use. Such comments could address ideas about how to manage risks on specific carboxin use sites or crops across the fox squirrel range including the Delmarva region, New Jersey and Pennsylvania. For example, commenters may choose to discuss the feasibility of lower application rates, or modifications in use, or may suggest alternative measures to reduce exposure for the fox squirrel.

All comments should be submitted using the methods in Unit I. of the **SUPPLEMENTARY INFORMATION**, and must be received by EPA on or before the closing date. Comments will become part of the Agency record for carboxin.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: April 20, 2004.

Debra Edwards,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. 04–9620 Filed 4–27–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

OPP–2004–0104; FRL–7354–2]

Pesticide Product; Registration Approval

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces Agency approval of an application to register the pesticide product ZONIX™ Biofungicide containing an active ingredient not included in any previously registered product pursuant to the provisions of section 3(c)(5) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

FOR FURTHER INFORMATION CONTACT: Denise Greenway, Biopesticides and Pollution Prevention Division (7511C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8263; e-mail address: *greenway.denise@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.**

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 identification (ID) number OPP–2004–0104. 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, 1921 Jefferson Davis Hwy., 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.

In accordance with section 3(c)(2) of FIFRA, a copy of the approved label, the list of data references, the data and other scientific information used to support registration, except for material specifically protected by section 10 of FIFRA, are also available for public inspection. Requests for data must be made in accordance with the provisions of the Freedom of Information Act and must be addressed to the Freedom of Information Office (A–101), 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. The request should: Identify the product name and registration number and specify the data or information desired.

A paper copy of the fact sheet, which provides more detail on this registration, may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Rd., Springfield, VA 22161.

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 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. 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. Once in the system, select "search," then key in the appropriate docket ID number.

II. Did EPA Approve the Application?

The Agency approved the application after considering all required data on risks associated with the proposed use of rhamnolipid biosurfactant, and information on social, economic, and environmental benefits to be derived from use. Specifically, the Agency has considered the nature of the chemical and its pattern of use, application methods and rates, and level and extent of potential exposure. Based on these reviews, the Agency was able to make basic health and safety determinations which show that use of rhamnolipid biosurfactant when used in accordance with widespread and commonly recognized practice, will not generally cause unreasonable adverse effects to the environment.

III. Approved Application

EPA issued a notice, published in the **Federal Register** of May 7, 2003 (68 FR 24456) (FRL–7304–3), which announced that Jeneil Biosurfactant Company, 400 N. Dekora Woods Blvd., Saukville, WI

53080, had submitted an application to register the pesticide product, ZONIX™ Biofungicide, a biochemical fungicide (EPA File Symbol 72431–R), containing the new active ingredient, rhamnolipid biosurfactant. This product was not previously registered.

The application was approved on March 23, 2004, as ZONIX™ Biofungicide (EPA Registration Number 72431–1) for the prevention and control of zoosporic pathogenic fungi in agricultural, horticultural and turf settings.

List of Subjects

Environmental protection, Chemicals, Pesticides and pests.

Dated: April 19, 2004.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs

[FR Doc. 04–9619 Filed 4–27–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0102; FRL–7354–7]

Tetraconazole; Receipt of Application for Emergency Exemption,Solicitation of Public Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received a quarantine exemption request from the Minnesota Department of Agriculture to use the pesticide tetraconazole (CAS No. 112281–77–3) to treat up to 3.5 million acres of soybeans to control soybean rust. The Applicant proposes the use of a new chemical which has not been registered by EPA. EPA is soliciting public comment before making the decision whether or not to grant the exemption.

DATES: Comments, identified by docket ID number OPP–2004–0102, must be received on or before May 13, 2004.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Andrew Ertman, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9367; fax number: (703) 308–5433; e-mail address: *Sec-18-Mailbox@epamail.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 a Federal or State government agency involved in administration of environmental quality programs. Potentially affected entities may include, but are not limited to:

- Federal or State Government entity, (NAICS 9241), e.g., Department of Agriculture, Environment.

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.**

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 identification (ID) number OPP–2004–0102. 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, 1921 Jefferson Davis Hwy., 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.

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 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.

C. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. 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.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. Once in the system, select "search," and then key in docket ID number OPP–2004–0102. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID Number OPP–2004–0102. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: 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–2004–0102.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, Attention: Docket ID Number OPP–2004–0102. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, 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 CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any 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 and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

II. Background

What Action is the Agency Taking?

Under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136p), at the discretion of the Administrator, a Federal or State agency may be exempted from any provision of FIFRA if the Administrator determines that emergency conditions exist which require the exemption. The Minnesota Department of Agriculture has requested the Administrator to issue a specific exemption for the use of tetraconazole on soybeans to control soybean rust. Information in accordance with 40 CFR part 166 was submitted as part of this request.

As part of this request, the Applicant asserts that the introduction of soybean rust to the continental United States has the potential to severely impact soybean production and there are inadequate alternative products available to control a possible outbreak.

The Applicant proposes to make no more than two applications of Eminent 125SL that may be made by ground or air at a rate of 1.6 ounces active ingredient/acre (13 fluid ounces of product per acre), to 3.5 million acres of soybeans during the growing season in Minnesota and 1.4 million gallons of product may be used.

This notice does not constitute a decision by EPA on the application itself. The regulations governing section 18 of FIFRA require publication of a notice of receipt of an application for a specific exemption proposing use of a new chemical (i.e., an active ingredient) which has not been registered by EPA. The notice provides an opportunity for public comment on the application.

The Agency, will review and consider all comments received during the comment period in determining whether to issue the quarantine exemption requested by the Minnesota Department of Agriculture.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: April 14, 2004.

Betty Shackleford,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 04–9291 Filed 4–27–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0018; FRL–7352–2]

Pesticides; Draft Guidance on Labeling Statements on Products Used for Adult Mosquito Control; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Agency seeks public comment on a draft Pesticide Registration (PR) Notice entitled "Labeling Statements on Products Used for Adult Mosquito Control." This draft PR Notice provides guidance to registrants and others concerning EPA's policy on labeling statements for pesticide products used for wide-area applications to control adult mosquitoes. The specific label statements and label organization principles recommended in the draft PR Notice are intended to improve existing labels by clarifying language conveying environmental hazards posed by these products, as well as specific use directions and instructions to the applicators. The Agency believes that adoption of these recommendations will help pesticide users and pesticide enforcement officials to achieve more effective mosquito control and protection of public health, while ensuring that use of these products will not pose unreasonable risks to the environment.

DATES: Comments, identified by docket ID number OPP–2004–0018, must be received on or before July 27, 2004.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Jim Roelofs, Field and External Affairs Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–2964; fax number: (703) 308–1850; e-mail address: *roelofs.jim@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to pesticide registrants, pesticide regulatory officials, mosquito and vector control agencies, pesticide users, and the general public. Although this action may be of particular interest to those persons who have a specific interest in the labeling of pesticide products used for the control of adult mosquitoes, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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 identification (ID) number OPP–2004–0018. 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, 1921 Jefferson Davis Hwy., 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.

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 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.

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C. How and to Whom Do I Submit Comments?

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i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. Once in the system, select "search," and then key in docket ID number OPP–2004–0018. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID Number OPP–2004–0018. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: 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–2004–0018.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, Attention: Docket ID Number OPP–2004–0018. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, 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 CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any 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 and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at your estimate.

5. Provide specific examples to illustrate your concerns.

6. Offer alternatives.

7. Make sure to submit your comments by the comment period deadline identified.

8. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

II. What Action Is the Agency Taking?

A. Background

In recent years, State pesticide regulators and vector control agencies have raised a variety of concerns about the labeling of pesticides used for adult mosquito control. The class of products of most concern have been those used for control of adult mosquitoes through the application of Ultra-Low Volume (ULV) sprays or fogs. Since State agencies enforce pesticide use regulations under cooperative agreements with EPA, and since section 12(a)(2)(G) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) makes it an unlawful act "to use any registered pesticide in a manner inconsistent with its labeling," the interpretation of label requirements is a critical issue for EPA, its regional offices, and State pesticide regulatory agencies, as well as for users.

In 2001, EPA sponsored an Inter-Regional Mosquito Control Conference for EPA and State agency representatives. Although labeling was one of many subjects discussed at the conference, participants felt label improvements were an area that should be addressed. It was agreed that a group representing EPA's Office of Pesticide Programs (OPP), Office of Enforcement and Compliance Assurance (OECA), EPA Regions, and State lead agency volunteers would develop initial, informal proposals for improving mosquito control-product labels, with the focus on adulticides only. The EPA-State workgroup developed a paper which included seven recommendations. In April 2003, the initial recommendations were discussed at a public meeting of the Pesticide Program Dialogue Committee (PPDC). The PPDC is chartered under the Federal Advisory Committee Act to advise EPA on pesticide issues. Its members represent a broad spectrum of interests, including the pesticide industry, grower groups, public health

agencies, academic researchers, and public interest and advocacy organizations. PPDC recommended that EPA develop the initial recommendations into more formal Agency positions.

After considering the comments and suggestions of State agencies, the PPDC and other interested parties, the Agency has decided to make the specific recommendations in the draft PR Notice as a means to achieve improvements in the labeling of adult mosquito control products. The recommendations consist of some specific statements that should appear on all labels for this class of products, some model statements that registrants may adapt to the specific characteristics of their products, and some principles on organizing elements of the label.

B. Summary of the Labeling Recommendations

The recommendations in the draft PR Notice are meant to apply only to products labeled for wide-area application by ground or aerial equipment, typically as ULV sprays or fogs, and not to home and garden use products which may list mosquitoes on the label. Control of mosquito larvae is a wholly different use pattern from adult mosquito control, and thus, products registered as mosquito larvicides are not included in the scope of the draft PR Notice.

The draft PR Notice sets forth seven recommendations for improving labels of adult mosquito control products. In brief form, the recommendations are:

1. Adult mosquito control applications should be limited to trained personnel.
2. Mosquito control directions and precautions should be clearly distinguished from those applicable to any other use allowed on the label.
3. Label precautions and directions should be revised as needed to make hazards to aquatic life as specific as possible, and also to allow the application of these products over a body of water allowable under some circumstances.
4. Users should consult with the State or Tribal lead agency for pesticide regulation to determine if permits or other regulatory requirements exist.
5. Labels should specify a spectrum of spray/fog droplet sizes, and indicate that droplet size should be determined according to the nozzle manufacturer's directions.
6. Precautionary language to protect bees should have a provision to allow mosquito control applications in order to respond to immediate threats to public health.
7. Mosquito adulticide labels should include specific statements on timing and allowable frequency of applications to a specific site.

C. What Questions/Issues Should You Consider?

Commenters are free to raise any issue, but the following question is of particular interest to the Agency, and comments on it are invited.

As presented in the draft PR Notice, recommendations 6 and 7 both propose to allow applications that might otherwise be disallowed by the label, if there is a threat to public health that warrants overriding either bee precautions or timing and frequency limitations. How and by whom should such a determination be made?

D. PR Notices are Guidance Documents

PR Notices are intended to provide guidance to EPA personnel and decisionmakers and to pesticide registrants. PR Notices are not binding on either EPA or pesticide registrants, and EPA may depart from the guidance where circumstances warrant and without prior notice. Likewise, pesticide registrants may assert that the guidance is not appropriate generally or not applicable to a specific pesticide or situation.

E. Relationship to Interim Clean Water Act Guidance

On July 11, 2003, EPA issued Interim Guidance regarding the application of pesticides and the requirement to obtain a National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act. The Interim Guidance stated that the following applications of pesticides do not require NPDES permits if the pesticides are applied consistent with all relevant requirements of FIFRA:

1. The application of pesticides directly to waters of the United States in order to control pests.
2. The application of pesticides to control pests that are present over waters of the United States that results in a portion of the pesticides being deposited to waters of the United States.

EPA solicited public comments on the Interim Guidance, and the Agency is currently reviewing the comments received and anticipates taking final action on the Interim Guidance later this year. See the **Federal Register** of August 13, 2003 (68 FR 48385) (FRL–7542–9)).

EPA believes that the recommended label language contained in Recommendation No. 3 of the draft PR Notice would be consistent with the Interim Guidance. If EPA decides to modify the Interim Guidance in any way when it takes final action on the guidance, the Agency will take steps to ensure that the conclusions reached in the final Pesticide Registration Notice are consistent with the final guidance on NPDES permitting requirements for pesticide applications.

List of Subjects

Environmental protection, Administrative practice and procedure, Pesticides and pests, Water.

Dated: April 21, 2004.

James Jones,

Director, Office of Pesticide Programs.

[FR Doc. 04–9621 Filed 4–27–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRC–7654–6]

Notice of Proposed Administrative Settlement Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, as Amended by the Superfund Amendments and Reauthorization Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice, request for public comments.

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), notice is hereby given of a proposed Administrative Order on Consent ("AOC, Region 9 Docket No. 2004–0014") pursuant to section 122(h) of CERCLA concerning the A–American Environmental Removal Site (the "Site"), located in Alhambra, California. The respondent to the AOC is William Anderson ("Anderson"). The AOC provides Anderson with a covenant not to sue and contribution protection for the removal action at the Site. To date, EPA has incurred approximately $599,844.04 in response costs related to the Site. Anderson is reimbursing $15,000.00 of the incurred response costs to EPA, consistent with EPA's determination of Anderson's ability to pay. For thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to the proposed AOC. The Agency's response to any comments will be available for public inspection at IPA's Region IX offices, located at 75 Hawthorne Street, San Francisco, California 94105.

DATES: Comments must be submitted on or before May 28, 2004.

ADDRESSES: The proposed Agreement may be obtained from Judith Winchell, Environmental Protection Specialist, telephone (415) 972–3124. Comments regarding the proposed Agreement should be addressed to Judith Winchell (SFD–7) at EPA, Region IX, 75 Hawthorne Street, San Francisco, California 94105, and should reference the A–American Environmental Removal Site, Alhambra, California and USEPA Docket No. 2004–0014.

FOR FURTHER INFORMATION CONTACT: J. Andrew Helmlinger, Office of Regional Counsel, telephone (415) 972–3904, USEPA Region IX, 75 Hawthorne Street, San Francisco, California 94105.

Dated: April 19, 2004.

J. Andrew Helmlinger,

Office Regional Counsel, Region 9.

[FR Doc. 04–9576 Filed 4–27–04; 8:45 am]

BILLING CODE 6560–50–M

ENVIRONMENTAL PROTECTION AGENCY

[OPPT–2004–0088; FRL–7355–9]

Approval of Test Marketing Exemption for a Certain New Chemical

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's approval of an application for test marketing exemption (TME) under section 5(h)(1) of the Toxic Substances Control Act (TSCA) and 40 CFR 720.38. EPA has designated this application as TME–03–0005. The test marketing conditions are described in the TME application and in this notice.

DATES: Approval of this TME is effective April 12, 2004.

FOR FURTHER INFORMATION CONTACT: *For general information contact*: Colby Lintner, Regulatory Coordinator, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov.*

For technical information contact: Miriam Wiggins-Lewis, Chemical Control Division (CCD) (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–9373; e-mail address: *Wigginslewis.Miriam@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed in particular to the chemical manufacturer and/or importer who submitted the TME to EPA. This action may, however, be of interest to the public in general. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT.**

B. How Can I 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 OPPT–2004–0088. 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 EPA Docket Center, Rm. B102-Reading Room, EPA West, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The EPA Docket Center Reading Room telephone number is (202) 566–1744 and the telephone number for the OPPT Docket, which is located in EPA Docket Center, is (202) 566–0280.

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 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. 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. Once in the system, select "search," then key in the appropriate docket ID number.

II. What is the Agency's Authority for Taking this Action?

Section 5(h)(1) of TSCA and 40 CFR 720.38 authorizes EPA to exempt persons from premanufacture notification (PMN) requirements and permit them to manufacture or import new chemical substances for test marketing purposes, if the Agency finds that the manufacture, processing, distribution in commerce, use, and disposal of the substances for test marketing purposes will not present an unreasonable risk of injury to health or the environment. EPA may impose restrictions on test marketing activities and may modify or revoke a test marketing exemption upon receipt of new information which casts significant doubt on its finding that the test marketing activity will not present an unreasonable risk of injury.

III. What Action is the Agency Taking?

EPA approves the above-referenced TME. EPA has determined that test marketing the new chemical substance, under the conditions set out in the TME application and in this notice, will not present any unreasonable risk of injury to health or the environment.

IV. What Restrictions Apply to this TME?

The test market time period, production volume, number of customers, and use must not exceed specifications in the application and this notice. All other conditions and restrictions described in the application and in this notice must also be met.

TME–03–0005

Date of Receipt: July 31, 2003.

Notice of Receipt: August 15, 2003 (68 FR 48918) (FRL–7323–6).

Applicant: Gardere Wynn Sewell, LLP.

Chemical: Alkanes, $C_8 - C_{12}$ branched.

Use: Component of inks and paints, cleaning solvents, and as a carrier for insecticides and used as a heating oil.

Production Volume: 2,500,000 kilograms.

Number of Customers: Ten.

Test Marketing Period: 275 days, commencing on first day of commercial manufacture.

The following additional restrictions apply to this TME. A bill of lading accompanying each shipment must state that the use of the substance is restricted to that approved in the TME. In addition, the applicant shall maintain the following records until 5 years after the date they are created, and shall make them available for inspection or

copying in accordance with section 11 of TSCA:

1. Records of the quantity of the TME substance produced and the date of manufacture.

2. Records of dates of the shipments to each customer and the quantities supplied in each shipment.

3. Copies of the bill of lading that accompanies each shipment of the TME substance.

4. To address inhalation concerns, employees exposed to the TME substance's vapor must wear a respirator with an assigned protection factor (APF) of 25.

V. What was EPA's Risk Assessment for this TME?

EPA identified concerns for inhalation exposure based on analogs. However, during processing and use, vapor or mist exposure to workers will be prevented by us of a gas/vapor respirator with an APF of 25. Therefore, the test market activities will not present an unreasonable risk of injury to health. EPA identified no significant environmental concerns for the test market substance based on no releases to water.

VI. Can EPA Change Its Decision on this TME in the Future?

Yes. The Agency reserves the right to rescind approval or modify the conditions and restrictions of an exemption should any new information that comes to its attention cast significant doubt on its finding that the test marketing activities will not present any unreasonable risk of injury to human health or the environment.

List of Subjects

Environmental protection, Test marketing exemptions.

Dated: April 12, 2004.

Miriam Wiggins-Lewis,

Acting Chief, New Chemicals Prenotice Management Branch, Office of Pollution Prevention and Toxics.

[FR Doc. 04–9315 Filed 4–27–04 8:45 am]

BILLING CODE 6560–50–S

EXPORT-IMPORT BANK OF THE UNITED STATES

Sunshine Act Meeting

ACTION: Notice of a Partially Open Meeting of the Board of Directors of the Export-Import Bank of the United States.

TIME AND PLACE: Tuesday, April 27, 2004 at 2 p.m. The meeting will be held at Ex-Im Bank in Room 1143, 811 Vermont Avenue, NW., Washington, DC 20571.

OPEN AGENDA ITEMS: (1) Medical Equipment Initiative; (2) Co-Guarantee Pilot Program with the Small Business Administration.

PUBLIC PARTICIPATION: The meeting will be open to public participation for Items No. 1–3 only.

FOR FURTHER INFORMATION CONTACT: Office of the Secretary, 811 Vermont Avenue, NW., Washington, DC 20571 (Tele. No. 202–565–3957).

Peter B. Saba,

General Counsel.

[FR Doc. 04–9758 Filed 4–26–04; 2:17 pm]

BILLING CODE 6690–01–M

FEDERAL COMMUNICATIONS COMMISSION

[MB Docket No. 04–144; DA 04–957]

Piscataway Board of Education and King's Temple Ministries, Inc.

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document designates the application of Piscataway Board of Education for renewal of license of WVPH(FM), Piscataway, New Jersey, and the mutually exclusive application of King's Temple Ministries, Inc. for authority to construct a new NCE FM station on Channel 212 in Plainfield, New Jersey, for an expedited hearing limited solely to the issue of sharing time.

DATES: Petitions by persons desiring to participate as a party in the hearing may be filed not later than May 28, 2004. *See* **SUPPLEMENTARY INFORMATION** section for dates that named parties should file appearances.

ADDRESSES: Please file documents with the Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, Room 3–B443, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: James Shook, Special Counsel, Investigations and Hearings Division, Enforcement Bureau at (202) 418–1448; Helen McLean, Attorney-Advisor, Audio Division, Media Bureau at (202) 418–2738; or Nina Shafran, Deputy Chief, Audio Division, Media Bureau at (202) 418–2781.

SUPPLEMENTARY INFORMATION: This is a summary of the Hearing Designation Order, DA 04–957, released April 9, 2004. The full text of the Hearing Designation Order is available for inspection and copying during normal business hours in the FCC Reference Information Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the Commission's copy contractor, Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Alternative formats are available to persons with disabilities by contacting Martha Contee at (202) 418–0260 or TTY (202) 418–2555.

Synopsis of the Order

1. Pursuant to 47 CFR 73.561(b), new noncommercial educational FM station applicants can propose to share time in response to renewal applications from noncommercial educational licensees that do not operate their stations at least 12 hours per day each day of the year. Pursuant to 47 CFR 73.561(b)(2), the Commission is required to order an expedited hearing on the issue of sharing time if the parties are unable to reach an agreement on sharing time, and if no qualifications issues arise regarding the renewal or new station applicant. The designation for an expedited hearing is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from negotiating a time sharing agreement.

2. The staff has granted conditionally the WVPH license renewal application and the application to construct a new station in Plainfield. The grants are subject to the conditions that (1) either (a) the parties negotiate and jointly file with the Commission a time sharing agreement, or (b) the hearing ordered in this document, at a time and place to be specified in a subsequent Order, is concluded, and a copy of the resulting written time sharing arrangement is provided to the Chief of the Commission's Audio Division, Media Bureau; and (2) the authorizations of Piscataway Board of Education and King's Temple Ministries, Inc. are modified in accordance with the terms and conditions of either the negotiated time sharing agreement or the time sharing arrangement imposed as a result of the hearing.

3. A time sharing arrangement, whether negotiated by the parties or determined in the hearing, shall become effective as of the date on which King's Temple Ministries, Inc. files an application for a license to cover its construction permit and begins program tests, and shall become part of the terms of each station's license by attachment thereto.

4. Pursuant to 47 CFR 1.221(b), the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send copies of this Order, by certified mail, return receipt requested, to the parties through counsel. To avail themselves of the opportunity to be heard, Piscataway Board of Education and King's Temple Ministries, Inc., pursuant to 47 CFR 1.221(c), in person or by their respective attorneys, must within twenty (20) days of the mailing of the Order, file in triplicate a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Piscataway Board of Education and King's Temple Ministries, Inc., pursuant to 47 CFR 73.3594, shall give notice of the hearing within the time and in the manner prescribed in 47 CFR 73.3594, and shall advise the Commission of the publication of such notice as required by 47 CFR 73.3594(g).

Federal Communications Commission.

Peter H. Doyle,

Chief, Audio Division, Media Bureau.

[FR Doc. 04–9640 Filed 4–27–04; 8:45 am]

BILLING CODE 6712–01–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.: 011852–006.

Title: Maritime Security Discussion Agreement.

Parties: American President Lines, Ltd.; APL Co. Pte Ltd.; Australia-New Zealand Direct Line; China Shipping Container Lines, Co., Ltd.; Canada Maritime; CMA–CGM S.A.; Contship Container Lines; COSCO Container Lines Company, Ltd.; CP Ships (UK) Limited; Evergreen Marine Corp.; Hanjin Shipping Company, Ltd.; Hapag Lloyd Container Linie GmbH; Kawasaki Kisen Kaisha Ltd.; A.P. Moller-Maersk A/S, trading under the name of Maersk Sealand; Mitsui O.S.K. Lines, Ltd.; Nippon Yusen Kaisha; Yang Ming Marine Transport Corp.; Safmarine Container Line, NV; Zim Israel Navigation Co., Ltd.; Alabama State Port Authority; APM Terminals North America, Inc.; Ceres Terminals, Inc.; Cooper/T. Smith Stevedoring Co., Inc.; Eagle Marine Services Ltd.; Global Terminal & Container Services, Inc.; Howland Hook Container Terminal, Inc.; Husky Terminal & Stevedoring, Inc.; International Shipping Agency; International Transportation Service, Inc.; Italia di Navigazione, LLC; Lambert's Point Docks Inc.; Long Beach Container Terminal, Inc.; Lykes Lines Limited, LLC; Maersk Pacific Ltd.; Maher Terminals, Inc.; Marine Terminals Corp.; Maryland Port Administration; Massachusetts Port Authority (MASSPORT); Metropolitan Stevedore Co.; P&O Ports North American, Inc.; Port of Tacoma; South Carolina State Ports Authority; Stevedoring Services of America, Inc.; TMM Lines Limited, LLC; Trans Bay Container Terminal, Inc. TraPac Terminals; Universal Maritime Service Corp.; and Virginia International Terminals.

Synopsis: The amendment delegates to agreement counsel the authority to sign bridging agreements on the members' behalf.

Agreement No.: 201143–003.

Title: West Coast MTO Discussion Agreement.

Parties: APM Terminals Pacific; California United Terminals, Inc.; Eagle Marine Services, Ltd.; Husky Terminals, Inc.; International Transportation Service, Inc.; Long Beach Container Terminal, Inc.; Marine Terminals Corp.; Metropolitan Stevedore Company; Pasha Stevedoring & Terminals, L.P.; SSA Marine; Trans Bay Container Terminal, Inc.; Trans Pacific Container Service Corporation; and Yusen Terminals, Inc.

Synopsis: The amendment delegates to agreement counsel the authority to sign bridging agreements on the members' behalf.

By Order of the Federal Maritime Commission.

Dated: April 23, 2004.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 04–9634 Filed 4–27–04; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center 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 May 21, 2004.

A. Federal Reserve Bank of Cleveland (Nadine W. Wallman, Assistant Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101–2566:

1. North Valley Bancshares, Inc., Zanesville, Ohio; to become a bank holding company by acquiring 100 percent of the voting shares of North Valley Bank, Zanesville, Ohio.

In connection with this application, North Valley Bank, Zanesville, Ohio, also has applied to merge with North Valley Interim Bank, Zanesville, Ohio.

Board of Governors of the Federal Reserve System, April 22, 2004.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 04–9574 Filed 4–27–04; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL TRADE COMMISSION

[File No. 032–3209]

MTS, Inc., d/b/a Tower Records/Books/Video, and Tower Direct LLC, d/b/a TowerRecords.com; Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of Federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis To Aid Public Comment describes both the allegations in the draft complaint that accompanies the consent agreement and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before May 21, 2004.

ADDRESSES: Comments should refer to "MTS, Inc., d/b/a Tower Records/Books/Video, *et al.*, File No. 032 3209," to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H–159, 600 Pennsylvania Avenue, NW., Washington, DC 20580. Comments containing confidential material must be filed in paper form, as explained in the **SUPPLEMENTARY INFORMATION** section. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. Comments filed in electronic form (except comments containing any confidential material) should be sent to the following e-mail box: *consentagreement@ftc.gov*.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC Web site, to the extent practicable, at *http://www.ftc.gov*. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm*.

FOR FURTHER INFORMATION CONTACT: Laura Mazzarella or Jessica Rich, FTC, Bureau of Consumer Protection, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–3224.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and Section 2.34 of the Commission's Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis To Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home page (for April 21, 2004), on the World Wide Web, at *http://www.ftc.gov/os/2004/04/index.htm*. A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. Written comments must be submitted on or before May 21, 2004. Comments should refer to "MTS, Inc., d/b/a Tower Records/Books/Video, *et al.*, File No. 032 3209," to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H–159, 600 Pennsylvania Avenue, NW., Washington, DC 20580. If the comment contains any material for which confidential treatment is requested, it must be filed in paper (rather than electronic) form, and the first page of the document must be clearly labeled "Confidential." [1] The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. Comments filed in electronic form should be sent to the following e-mail box: *consentagreement@ftc.gov*.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC Web site, to the extent practicable, at *http://www.ftc.gov*. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm*.

[1] Commission Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c).

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted a consent agreement, subject to final approval, from MTS, Inc., and Tower Direct, LLC ("Tower"). Tower sells music and video recordings, books, and other entertainment products through retail stores and its Web site, *TowerRecords.com*.

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement and take other appropriate action or make final the agreement's proposed order.

This matter concerns alleged representations about the security of personal information collected online through *TowerRecords.com*, Tower's online store. According to the Commission's complaint, Tower offers its online customers an order status page that allows customers to confirm their orders and view their order information. In December 2002, Tower redesigned the "check out" portion of its Web site, including the order status page. As alleged in the Commission's complaint, the redesigned version of the order status page contained a security flaw that allowed any user of the site that entered a valid order number to view the personal identifying information and order history of the Tower customer who placed the order, including name, email address, billing address, shipping address, telephone number, and items ordered since 1996.

The complaint charges that Tower falsely represented that it implemented reasonable and appropriate measures to protect the privacy and confidentiality of personal information. In particular, the complaint alleges that Tower failed

to implement procedures that were reasonable and appropriate to detect and prevent vulnerabilities in its Web site, including reasonable and appropriate procedures for writing and revising Web-application code.

The proposed order applies to Tower's collection and storage of personal information from or about consumers in connection with its online business. It contains provisions designed to prevent Tower from future engagement in practices similar to those alleged in the complaint. The proposed order is substantially similar to the orders obtained by the Commission in the cases of *Eli Lilly, Inc.*, FTC Docket No. C–4047 (May 8, 2002); *Microsoft Corp.*, FTC Docket No. C–4069 (Dec. 20, 2002); and *Guess, Inc.*, FTC Docket No. C–4091 (July 30, 2003).

Part I of the proposed order prohibits Tower, in connection with the online advertising, marketing, promotion, offering for sale, or sale of any product or service, from misrepresenting the extent to which it maintains and protects the privacy, confidentiality, or security of any personal information collected from or about consumers.

Part II of the proposed order requires Tower to establish and maintain a comprehensive information security program in writing that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. The security program must contain administrative, technical, and physical safeguards appropriate to Tower's size and complexity, the nature and scope of its activities, and the sensitivity of the personal information collected from or about consumers. Specifically, the order requires Tower to:

- Designate an employee or employees to coordinate and be accountable for the information security program;
- Identify material internal and external risks to the security, confidentiality, and integrity of customer information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assess the sufficiency of any safeguards in place to control these risks. At a minimum, this risk assessment must include consideration of risks in each area of relevant operation.
- Design and implement reasonable safeguards to control the risks identified through risk assessment, and regularly test or monitor the effectiveness of the safeguards' key controls, systems, and procedures.
- Evaluate and adjust its information security program in light of the results of testing and monitoring, any material changes to its operations or business arrangements, or any other circumstances that Tower knows or has reason to know may have material impact on its information security program.

Part III of the proposed order requires that Tower obtain within one year, and on a biannual basis thereafter for ten (10) years, an assessment and report from a qualified, objective, independent third-party professional, certifying that: (1) Tower has in place a security program that provides protections that meet or exceed the protections required by Part II of this order; and (2) Tower's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of consumers' personal information has been protected.

Parts IV through VII of the proposed order are reporting and compliance provisions. Part IV requires Tower to retain documents relating to compliance. For most records, the order requires that the documents be retained for a five-year period. For the assessments and supporting documents, Tower must retain the documents for three years after the date that each assessment is prepared. Part V requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part VI ensures notification to the FTC of changes in corporate status. Part VII mandates that Tower submit compliance reports to the FTC. Part VIII is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 04–9639 Filed 4–27–04; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration on Aging

Agency Information Collection Activities; Proposed Collection; Comment Request; Extension of a Currently Approved information Collection

AGENCY: Administration on Aging, HHS.

ACTION: Notice.

SUMMARY: The Administration on Aging (AoA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection requirements relating to Performance Progress Reports for Title IV grantees.

DATES: Submit written or electronic comments on the collection of information by June 28, 2004.

ADDRESSES: Submit electronic comments on the collection of information to: *greg.case@aoa.hhs.gov.* Submit written comments on the collection of information to Greg Case, Administration on Aging, Washington, DC 20201 or by fax at (202) 357–3469.

FOR FURTHER INFORMATION CONTACT: Greg Case at (202) 357–3442 or *greg.case@aoa.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency request or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, AoA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, AoA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of AoA's functions, including whether the information will have practical utility; (2) the accuracy of AoA'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.

AoA plans to submit to the Office of Management and Budget for approval, an extension, with no revisions, of a semi-annual reporting form and instructions pursuant to requirements in Title IV of the Older Americans Act. AoA estimates the burden of this collection of information as follows: *Frequency:* Semi-annually. *Respondents:* States, public agencies, private nonprofit agencies, institutions of higher education, and organizations including tribal organizations. *Estimated Number of Responses:* 300. *Total Estimated Burden Hours:* 12,000.

Dated: April 3, 2004.

Josefina G. Carbonell,

Assistant Secretary for Aging.

[FR Doc. 04–9594 Filed 4–27–04; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration on Aging

Agency Information Collection Activities; Proposed Collection; Comment Request; Extension of Supplemental Form to the Financial Status Report for All AoA Title III Grantees

AGENCY: Administration on Aging, HHS.

ACTION: Notice.

SUMMARY: The Administration on Aging (AoA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection requirements relating to the Supplemental form to the Financial Status Report for all AoA Title III Grantees.

DATES: Submit written or electronic comments on the collection of information by June 28, 2004.

ADDRESSES: Submit electronic comments on the collection of information to: *Margaret.Tolson@aoa.gov.*

Submit written comments on the collection of information to Administration on Aging, Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: Margaret Tolson, Director of Grants Management, Administration on Aging, Washington, DC 20201.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency request or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, AoA is publishing notice of the proposed collection of information set forth in this document. With respect to the following collection of information, AoA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of AoA's functions, including whether the information will have practical utility; (2) the accuracy of AoA'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.

The Supplemental form to the Financial Status Report for all AoA Title III Grantees provides an understanding of how projects funded by the Older Americans Act are being administered by grantees, in conformance with legislative requirements, pertinent Federal regulations and other applicable instructions and guidelines issued by Administration on Aging (AoA). This information will be used for Federal oversight of Title III Projects. AoA estimates the burden of this collection of information as follows: 56 State Agencies on Aging respond semiannually which should be an average burden of 1 hour per State agency per submission.

Dated: April 23, 2004.

Josefina G. Carbonell,

Assistant Secretary for Aging.

[FR Doc. 04–9595 Filed 4–27–04; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Implementation of the National Violent Death Reporting System, Program Announcement Number 04061

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following meeting:

Name: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Implementation of the National Violent Death Reporting System, Program Announcement Number 04061.

Times and Dates: 8:30 a.m.–8:50 a.m., May 17, 2004 (Open), 8:50 a.m.–4:00 p.m., May 17, 2004 (Closed).

Place: Marriott Atlanta Century Center, 2000 Century Boulevard NE, Atlanta, GA 30345, Telephone 404.325.0000.

Status: Portions of the meeting will be closed to the public in accordance with provisions set forth in Section 552b(c) (4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters to be Discussed: The meeting will include the review, discussion, and evaluation of applications received in response to Program Announcement Number 04061.

FOR FURTHER INFORMATION CONTACT: James Belloni, Deputy Director, National Center for Injury Prevention and Control, Office of the Director, Office of Program Management, CDC, 4770 Buford Highway, NE, MS–K62, Atlanta, GA 30341, Telephone 770.488.4538.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register**

notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: April 21, 2004.

Bill Atkinson,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention (CDC).

[FR Doc. 04–9584 Filed 4–27–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004D–0146]

Draft Guidance for Industry: Validation of Analytical Procedures for Type C Medicated Feeds

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry (#135) entitled "Validation of Analytical Procedures for Type C Medicated Feeds." This draft guidance represents the agency's current thinking on the characteristics that should be considered during the validation of non-microbiological analytical procedures for the analysis of drugs in Type C medicated feeds included as part of original and supplemental new animal drug applications (NADAs) and abbreviated new animal drug applications (ANADAs) for Type A medicated articles submitted to the FDA. This draft guidance is the first in a series of three guidances that will discuss assay methods for Type C medicated feeds.

DATES: Submit written or electronic comments on the draft guidance by July 12, 2004, to ensure their adequate consideration in preparation of the final document. General comments on agency guidance documents are welcome at any time.

ADDRESSES: Submit written requests for single copies of the draft guidance to the Communications Staff (HFV–12), Center for Veterinary Medicine (CVM), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855.

Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document. 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 on the draft guidance via the Internet at *http://www.fda.gov/dockets/ecomments.* Comments should be identified with the full title of the draft guidance and the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Mary G. Leadbetter, Center for Veterinary Medicine (HFV–141), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–6964, e-mail: *mleadbet@cvm.fda.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

This draft guidance document provides assistance and recommendations to industry on how to consider the various validation characteristics for each analytical procedure used in medicated feed assays submitted as part of original and supplemental NADAs and ANADAs.

II. Paperwork Reduction Act of 1995

According to the Paperwork Reduction Act of 1995, a collection of information must display a valid OMB control number. The existing valid OMB control numbers for this information collection are 0910–0032 and 0910–0154. This draft guidance contains no new collections of information.

III. Significance of Guidance

This draft Level 1 guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). This draft guidance, when finalized, will represent the agency's current thinking on the topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternate method may be used as long as it satisfies the requirements of applicable statutes and regulations.

IV. Comments

This draft guidance is being distributed for comment purposes only and is not intended for implementation at this time. Interested persons may submit written comments to the Division of Dockets Management (see **ADDRESSES**) regarding this draft guidance document. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments should be identified with the docket number found in brackets in the heading of this document. A copy of the document and received comments are available for public examination in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

V. Electronic Access

Copies of the draft guidance document entitled "Validation of Analytical Procedures for Type C Medicated Feeds" may be obtained from the CVM Home Page (*http://www.fda.gov/cvm*) and from the Division of Dockets Management Web site (*http://www.fda.gov/ohrms/dockets/default.htm*).

Dated: April 19, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–9566 Filed 4–27–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of an Exclusive License: Interleukin-2 Stimulated T Lymphocyte Cell Death for the Treatment of Autoimmune Diseases, Allergic Responses, and Graft Rejection

AGENCY: National Institutes of Health, Public Health Service, DHHS.

ACTION: Notice.

SUMMARY: This notice, in accordance with 35 U.S.C. 209(c)(1) and 37 CFR 404.7(a)(1)(i), announces that the National Institutes of Health, Department of Health and Human Services, is contemplating the grant of an exclusive license to practice the inventions embodied in U.S. Patent No. 6,083,503, entitled "Interleukin-2 stimulated T lymphocyte cell death for the treatment of autoimmune diseases, allergic responses, and graft rejection;" U.S. Patent No. 5,989,546, entitled "Interleukin-2 stimulated T lymphocyte cell death for the treatment of allergic responses;" and U.S. Patent No. 5,935,575, entitled "Interleukin-4 stimulated T lymphocyte cell death for the treatment of allergic disorders" to Kasha Corporation, having a place of business in Rockville, Maryland. The patent rights in these inventions have been assigned to the United States of America.

The prospective exclusive license territory will be worldwide and the field of use may be limited to therapeutics for the treatment of autoimmune diseases.

DATES: Only written comments and/or application for a license which are received by the NIH Office of Technology Transfer on or before June 28, 2004 will be considered.

ADDRESSES: Requests for copies of the patent and/or patent applications, inquiries, comments and other materials relating to the contemplated exclusive license should be directed to: Mojdeh Bahar, J.D., Technology Licensing Specialist, Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, MD 20852–3804; Telephone: (301) 435–2950; Facsimile: (301) 402–0220; E-mail: *baharm@od.nih.gov*.

SUPPLEMENTARY INFORMATION: The technology claimed in the aforementioned patents is a method for the treatment or prevention of autoimmune diseases, allergic or atopic disorders, and graft rejections. The instant method comprises inducing the death by apoptosis of a subpopulation of T lymphocytes that is capable of causing such diseases, while leaving the majority of other T lymphocytes unaffected. Cell death is achieved by cycles comprising challenging via immunization these T cells with antigenic substance at short time intervals, or by immunization followed by administering interleukin-2 (IL–2) when these T cells are expressing high levels of IL–2 receptor so as to cause these T cells to undergo apoptosis upon re-immunization with the antigenic peptide or protein.

The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless within sixty (60) days from the date of this published notice, the NIH receives written evidence and argument that establish that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Applications for a license in the field of use filed in response to this notice will be treated as objections to the grant of the contemplated exclusive license. Comments and objections submitted to this notice will not be made available for public inspection and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

Dated: April 21, 2004.

Steven M. Ferguson,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 04–9568 Filed 4–27–04; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Notice of Public Meeting

AGENCY: National Institutes of Health, DHHS.

ACTION: Notice of public meeting.

SUMMARY: The National Institutes of Health (NIH) is announcing a public meeting to enable invited individuals, organizations, and other stakeholders to comment on the use of the government march-in authorities under 35 U.S.C. 203 for Norvir® (ritonavir) manufactured by Abbott Laboratories using inventive technologies developed with NIH funds.

Time and Date: The public meeting will be held on May 25, 2004 from 9 a.m. to 12 p.m.

Place: The public meeting will be held in the first-floor conference room, Building 50 (at the corner of Center and South Drives), National Institutes of Health, 9000 Rockville Pike, Bethesda, MD 20892. Parking will be limited and there may be delays entering the NIH campus due to increased security. We recommend arriving by Metro, if possible. NIH is accessible from the Metro's red line at the Medical Center/NIH stop.

FOR FURTHER INFORMATION CONTACT: Mary Martinez, Office of Technology Transfer, Office of the Director, National Institutes of Health, 6011 Executive Blvd, Suite 325, Rockville, MD 20852, e-mail: *martinm1@mail.nih.gov*

Registration and Participation: No registration is required to attend the public meeting. Seating will be on a first-come, first-serve basis.

Participation as a presenter is by invitation only. The agency will notify each invited speaker of the time allotted to the participant and the approximate time the participant's comments are scheduled to begin.

If you need special accommodations due to disability, please inform Mary Martinez, the contact person listed in this document.

Dated: April 22, 2004.

Mark L. Rohrbaugh,

Director, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 04–9569 Filed 4–27–04; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Draft Revised Recovery Plan for the Sihek or Guam Micronesian Kingfisher (Halcyon cinnamomina cinnamomina)

AGENCY: U.S. Fish and Wildlife Service, Interior.

ACTION: Notice of document availability for review and comment.

SUMMARY: The U.S. Fish and Wildlife Service ("we"), announces the availability of the Draft Revised Recovery Plan for the Sihek or Guam Micronesian Kingfisher (*Halcyon cinnamomina cinnamomina*) for public review and comment.

DATES: Comments on the draft revised recovery plan must be received on or before June 28, 2004.

ADDRESSES: Copies of the draft revised recovery plan are available for inspection, by appointment, during normal business hours at the following location: U.S. Fish and Wildlife Service, Pacific Islands Fish and Wildlife Office, 300 Ala Moana Boulevard, Room 3–122, Honolulu, Hawaii 96850 (phone: (808) 792–9400). Requests for copies of the draft revised recovery plan and written comments and materials regarding this plan should be addressed to the Field Supervisor, Ecological Services, at the above Honolulu address. An electronic copy of the draft revised recovery plan is also available at: *http://endangered.fws.gov/recovery/index.html#plans*.

FOR FURTHER INFORMATION CONTACT: Fred Amidon, Fish and Wildlife Biologist, at the above Honolulu address.

SUPPLEMENTARY INFORMATION:

Background

Recovery of endangered or threatened animals and plants is a primary goal of our endangered species program and the Endangered Species Act (Act) 16 U.S.C. 1531 *et seq.*). Recovery means improvement of the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act. Recovery plans describe actions considered necessary for the conservation of the species, establish criteria for downlisting or delisting listed species, and estimate time and cost for implementing the measures needed for recovery.

The Act requires the development of recovery plans for listed species unless such a plan would not promote the conservation of a particular species. Section 4(f) of the Act requires that public notice and an opportunity for

public review and comment be provided during recovery plan development. We will consider all information presented during the public comment period prior to approval of each new or revised recovery plan. Substantive technical comments may result in changes to the recovery plan. Substantive comments regarding recovery plan implementation may not necessarily result in changes to the recovery plan, but will be forwarded to appropriate Federal or other entities so that they can take these comments into account during the course of implementing recovery actions. Individual responses to comments will not be provided.

The sihek is federally listed as endangered (49 FR 33881) and is also listed as endangered by the Territory of Guam. Sihek are forest kingfishers endemic to the island of Guam in the Mariana Archipelago. Sihek were last observed on Guam in 1988 and are now believed to be extirpated from the wild. Currently, sihek are represented by a captive population of 60 individuals in 11 zoological institutions. Prior to their extirpation from the island, sihek utilized a wide variety of forest habitats. Mature, closed canopy forests with large, standing dead trees that provide appropriate nest sites for the cavity-nesting sihek are important for reproductive activities. Diverse vegetative structure that provides a variety of invertebrate and vertebrate prey as well as an open understory or edge with exposed perches for foraging is also an important component of sihek habitat.

Habitat degradation and loss, human persecution, contaminants, and introduced species such as disease organisms, cats (*Felis cattus*), rats (*Rattus* spp.), black drongos (*Dicrurus macrocercus*), monitor lizards (*Varanus indicus*), and brown treesnakes (*Boiga irregularis*) have all been suggested as factors in the population decline of this subspecies. However, predation by the brown treesnake is believed to have been the overriding factor in the extirpation of sihek. Factors that continue to prevent the recovery of the sihek include poor reproductive success, high mortality in the captive population, and the continued presence of brown treesnakes on Guam. Recovery actions in this draft revised plan are designed to address threats to the sihek in order to achieve the recovery objectives of downlisting to threatened status and eventual delisting.

To prevent the extinction of the sihek, the highest priority recovery tasks are to increase the size of the captive population, control brown treesnakes on Guam, and reestablish sihek in the wild on Guam. Increasing the captive population will be accomplished by establishing a captive propagation program for sihek on Guam, increasing reproductive success, and decreasing juvenile and adult mortality. Reintroduction to Guam requires a thorough reintroduction program and extensive predator control efforts, especially brown treesnake control. Once sihek have been reestablished in the wild, expanding predator control efforts to additional areas, habitat protection and restoration, and monitoring for additional threats to the subspecies would receive increased focus.

The goal of this plan is to reestablish sihek in at least 2 stable or increasing subpopulations of 1,000 adults each, 1 in northern Guam and 1 in southern Guam, in conjunction with habitat protection and predator control measures, as well as long-term monitoring to ensure the effectiveness of management actions.

Public Comments Solicited

We solicit written comments on the draft revised recovery plan described. All comments received by the date specified above will be considered in developing a final revised recovery plan.

Authority: The authority for this action is section 4(f) of the Endangered Species Act, 16 U.S.C. 1533(f).

Dated: March 5, 2004.

David J. Wesley,

Regional Director, Region 1, U.S. Fish and Wildlife Service.

[FR Doc. 04–9585 Filed 4–27–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AZ–910–077–XP–241A]

State of Arizona Resource Advisory Council Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Arizona Resource Advisory Council Meeting notice.

SUMMARY: This notice announces a meeting and tour of the Arizona Resource Advisory Council (RAC).

The business meeting will be held on May 26, 2004, at the Best Western Plaza Inn located at 110 W. Rex Allen Drive in Wilcox, Arizona. It will begin at 9 a.m. and conclude at 4 p.m. The agenda items to be covered include: Review of the February 18, 2004 meeting minutes; BLM State Director's Update on Statewide Issues; Presentations on Land Use Planning Process, Land Tenure Adjustment—Focusing on Land Exchanges and Land Dispositions, and Arizona's Fire Land Use Plan Amendment for Fire, Fuels and Air Quality Management; Update on the Borderland Task Force and Border Issues, and Review of the statewide Citizen Wilderness Proposals and how they are being addressed in the land use planning efforts underway; RAC Questions on Written Reports from BLM Field Managers; Field Office Rangeland Resource Team Proposals; Reports by the Standards and Guidelines, Recreation, Off-Highway Vehicle Use, Public Relations, Land Use Planning and Tenure, and Wild Horse and Burro Working Groups; Reports from RAC members; and Discussion of future meetings. A public comment period will be provided at 11 a.m. on May 26, 2004, for any interested publics who wish to address the Council.

On May 27, 2004, the RAC will tour the Muleshoe Ranch Cooperative Management Area, a 55,000-acre ranch jointly owned and managed by The Nature Conservancy, the U.S. Forest Service, and the Bureau of Land Management, from 8 a.m. until 12 p.m.

FOR FURTHER INFORMATION CONTACT: Deborah Stevens, Bureau of Land Management, Arizona State Office, 222 North Central Avenue, Phoenix, Arizona 85004–2203, (602) 417–9215.

Elaine Y. Zielinski,

Arizona State Director.

[FR Doc. 04–9586 Filed 4–27–04; 8:45 am]

BILLING CODE 4310–32–M

DEPARTMENT OF THE INTERIOR

Minerals Management Service (MMS)

Availability of Revised Outer Continental Shelf Leasing Map

AGENCY: Minerals Management Service, Interior.

SUMMARY: Notice is hereby given that effective with this publication, the following NAD 27-based Outer Continental Shelf Leasing Map last revised on the date indicated, is on file and available for information only, in the Gulf of Mexico OCS Regional Office, New Orleans, Louisiana. In accordance with Title 43, Code of Federal Regulations, this map is the basic record for the description of mineral and oil and gas lease sales in the geographic area it represents.

Outer Continental Shelf Leasing Map in the Central Gulf of Mexico Planning Area

Description—LA7A Grand Isle Area, South Addition.
Date—February 17, 2004.

This revision corrects an error on Leasing Map LA7A, Grand Isle Area, South Addition, dated November 1, 2000. The grid label Y = −21177.170′ is corrected as follows: Y = −21077.170′

FOR FURTHER INFORMATION CONTACT: Copies of Leasing Maps and Official Protraction Diagrams (OPDs) are $2.00 each. These may be purchased from the Public Information Unit, Information Services Section, Gulf of Mexico OCS Region, Minerals Management Service, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394, Telephone (504) 736–2519 or (800) 200–GULF.

Leasing Maps and OPDs may be obtained in two digital formats: .gra files for use in ARC/INFO and .pdf files for viewing and printing in Acrobat. Copies are also available for download at *http://www.gomr.mms.gov/homepg/lsesale/mapdiag.html.*

Dated: March 25, 2004.

Thomas A. Readinger,

Associate Director for Offshore Minerals Management.

[FR Doc. 04–9637 Filed 4–27–04; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Lower Santa Ynez River Fish Management Plan and Cachuma Project Biological Opinion for Southern Steelhead Trout, Santa Barbara County, California

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of availability of the Final Environmental Impact Statement/Environmental Impact Report (EIS/EIR).

SUMMARY: In accordance with the National Environmental Policy Act of 1969, the Bureau of Reclamation (Reclamation) has prepared a Final EIS/EIR for the "Lower Santa Ynez River Fish Management Plan (Plan) and Cachuma Project Biological Opinion (Opinion) for Southern Steelhead Trout." The actions evaluated include various flow and non-flow measures to be implemented by Reclamation and the Cachuma Project Member Units to protect and enhance habitat for the endangered southern steelhead trout along the Santa Ynez River downstream of Bradbury Dam.

Notice of the Draft EIS/EIR was published in the **Federal Register** on July 24, 2003 (68 FR 43748). The written comment period ended September 30, 2003. The Final EIS/EIR contains responses to all comments received and changes made to the text of the Draft EIS/EIR as a result of those comments.

DATES: Reclamation will not make a decision on the proposed action until 30 days after release of the Final EIS/EIR. After the 30-day waiting period, Reclamation will complete a Record of Decision (ROD). The ROD will state the action that will be implemented and will discuss all factors leading to the decision.

ADDRESSES: Copies of the Final EIS/EIR for the Plan and Opinion are available at the Bureau of Reclamation, South-Central California Area Field Office, 1243 N Street, Fresno, California, 93721; or at the Cachuma Operation and Maintenance Board Office, 3301 Laurel Canyon Road, Santa Barbara, California, 93105, from 7:30 a.m. to 4:30 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: David Young, Bureau of Reclamation, South-Central California Area Office, telephoned 559–487–5127.

SUPPLEMENTARY INFORMATION: The Cachuma Project consists of Bradbury Dam, Cachuma Lake, and various water conveyance facilities. The dam impounds water along the Santa Ynez River in northern Santa Barbara County. Water is provided to the Cachuma Project Member Units for irrigation, domestic, and municipal and industrial water uses. The current Member Units consist of the City of Santa Barbara, Goleta Water District, Montecito Water District, Carpinteria Valley Water District, and the Santa Ynez River Water Conservation District—Improvement District #1. Reclamation owns all project facilities and operates Bradbury Dam. Operation and maintenance of the Cachuma Project facilities, other than Bradbury Dam, was transferred in 1956 to the Member Units who formed Cachuma Operation and Maintenance Board (COMB) to carry out these responsibilities.

In August 1997, the National Marine Fisheries Service (NMFS) designated the anadromous steelhead (*Oncorhynchus mykiss*) of the Southern Evolutionarily Significant Unit (ESU), which includes the lower Santa Ynez River below Bradbury Dam, as an endangered species under the Federal Endangered Species Act. In April 1999, Reclamation requested initiation of consultation with NMFS regarding ongoing operations of the Cachuma Project under the provisions of Section 7 of the Federal Endangered Species Act. Reclamation submitted a Biological Assessment (BA) to NMFS in 1999, describing the proposed operation of the Cachuma Project, as well as measures designed to improve the availability and quality of habitat for the steelhead in the lower river. NMFS issued a final Opinion in September 2000. The Opinion concluded that the proposed actions described in the BA would not jeopardize the continued existence of the anadromous steelhead of the Southern ESU, nor destroy or adversely modify critical habitat. The Opinion included an incidental take statement with mandatory terms and conditions to minimize "take" of the southern steelhead.

Prior to, and concurrent with, the endangered species consultation, Reclamation and the Cachuma Member Units prepared a Fish Management Plan (FMP) for the lower Santa Ynez River. The FMP management actions include (1) creating new habitat and improving existing habitat in the lower river and tributaries; (2) improving access to spawning and rearing habitats in the lower river and tributaries; and (3) increasing public awareness and support for beneficial actions on private lands. The FMP identifies specific reaches of the mainstem and tributaries for habitat protection and improvement. The highest priority has been assigned to lower Hilton Creek, which is located on Reclamation property, and the mainstem of the river between Bradbury Dam and Highway 154. A high priority is also assigned to enhancing habitats on the following tributaries which have favorable flows and habitat conditions for aquatic resources: Quiota, El Jaro, and Salsipuedes creeks.

The overall purposes of the management actions are two-fold: (1) Ensure that operation of the Cachuma Project is consistent with the Federal Endangered Species Act regarding effects on the southern steelhead; and (2) improve conditions for native fish, particularly the endangered southern steelhead, in the Santa Ynez River watershed below Bradbury Dam.

Reclamation and Cachuma COMB have prepared the Final EIS/EIR to evaluate the incidental adverse impacts of the proposed management actions and projects to improve fish habitat conditions on the Santa Ynez River below Bradbury Dam in northern Santa Barbara County. These impacts include temporary construction-related disturbances to riparian and aquatic habitat during fish habitat restoration work in the river and tributaries; impacts to oak trees and recreational facilities at Cachuma Lake due to

surcharging the reservoir to store additional water for downstream releases for fish; and others described in the Final EIS/EIR.

Our practice is to make comments, including names and home addresses of respondents, available for public review. Individual respondents may request that we withhold their home address from public disclosure, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold a respondent's identity from public disclosure, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. 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 disclosure in their entirety.

Dated: April 6, 2004.

Susan L. Ramos,

Assistant Regional Director, Mid-Pacific Region.

[FR Doc. 04–9638 Filed 4–27–04; 8:45 am]

BILLING CODE 4310–MN–P

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 701–TA–441 and 731–TA–1081 (Preliminary)]

Silicon Metal From Brazil and South Africa

AGENCY: International Trade Commission.

ACTION: Notice of withdrawal of petition in countervailing duty and antidumping investigations.

SUMMARY: On April 16, 2004, the Department of Commerce and the Commission received a letter from petitioners in the subject investigations (Globe Metallurgical Inc., Beverly, OH; the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, I.U.E.–C.W.A., AFL–CIO, C.L.C., Local 693; and the United Steelworkers of America, AFL–CIO, Local 9436) withdrawing their petition. Commerce has not initiated investigations as provided for in sections 702(c) and 732(c) of the Tariff Act of 1930 (19 U.S.C. 1671a(c) and 1673a(c)). Accordingly, the Commission gives notice that its countervailing duty and antidumping investigations concerning silicon metal from Brazil and South Africa (investigations No. 701–TA–441 (Preliminary) and 731–TA–1081 (Preliminary)) are discontinued.

EFFECTIVE DATE: April 16, 2004.

FOR FURTHER INFORMATION CONTACT: Larry Reavis (202–205–3185), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

By order of the Commission.

Issued: April 23, 2004.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–9613 Filed 4–27–04; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: May 7, 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. 701–TA–438 and 731–TA–1076 (Preliminary) (Live Swine from Canada)—briefing and vote. (The Commission is currently scheduled to transmit its determination to the Secretary of Commerce on or before May 10, 2004; Commissioners' opinions are currently scheduled to be transmitted to the Secretary of Commerce on or before May 17, 2004.)
5. Inv. Nos. 701–TA–439–440 and 731–TA–1077–1080 (Preliminary) (Polyethylene Terephthalate Resin from India, Indonesia, Taiwan, and Thailand)—briefing and vote. (The Commission is currently scheduled to transmit its determination to the Secretary of Commerce on or before May 10, 2004; Commissioners' opinions are currently scheduled to be transmitted to the Secretary of Commerce on or before May 17, 2004.)

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.

By order of the Commission.

Issued: April 26, 2004.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–9689 Filed 4–26–04; 9:28 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[AAG/A Order No. 006–2004]

Privacy Act of 1974; System of Records

AGENCY: Department of Justice.

ACTION: Notice of modified system of records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974 (5 U.S.C. 552a), the United States Marshals Service (USMS), Department of Justice, is issuing public notice of its proposal to modify the system of records entitled "U.S. Marshals Service Prisoner Processing and Population Management/Prisoner Tracking System (PPM/PTS), JUSTICE/USM–005." This system of records was last published in the **Federal Register** on November 8, 1999 (64 FR 60836). Title 5 U.S.C. 552a(e)(4) and (11) provide that the public be given a 30-day period in which to comment on routine uses. The Office of Management and Budget (OMB), which has oversight responsibility under the Act, requires a 40-day period in which to review the system modifications. The public, OMB and Congress are invited to comment on the modifications to this system.

DATES: The proposed changes will be effective June 7, 2004, unless comments are received that result in a contrary determination.

ADDRESSES: Submit written comments to the Department of Justice (DOJ), ATTN: Mary E. Cahill, Management and Planning Staff, Justice Management Division, Washington, DC 20530 (Room 1400, NPB).

FOR FURTHER INFORMATION CONTACT: Mary E. Cahill at (202) 307–1823.

SUPPLEMENTARY INFORMATION: Modifications to the USMS PPM/PTS system of records expands the category of individuals covered by the system, corrects the office address for the primary system, describes additional

locations of certain records in the system, corrects the Internet location of addresses for USMS district offices, clarifies the location of certain medical records, clarifies existing routine uses, adds certain routine uses, and updates the retrieval, safeguards and retention and disposal sections.

In accordance with 5 U.S.C. 552a(r), the Department has provided a report on the modified system to OMB and the Congress. A description of this system is reprinted below.

Dated: April 21, 2004.

Paul R. Corts,

Assistant Attorney General for Administration.

JUSTICE/USM–005

SYSTEM NAME:

U.S. Marshals Service Prisoner Processing and Population Management/Prisoner Tracking System (PPM/PTS).

SECURITY CLASSIFICATION:

Limited Official Use.

SYSTEM LOCATION:

Primary System: Prisoner Services Division, U.S. Marshals Service, 11th Floor, CS–4, Washington, DC 20530–1000.

Decentralized Segments: Each district office of the U.S. Marshals Service (USMS) maintains only files on prisoners taken into custody of the U.S. Marshal for the respective district. The addresses of USMS district offices are on the Internet at (*http://www.usmarshals.gov*).

Centralized Segment: The Contractor with whom the USMS has contracted to establish and manage a nationwide integrated health care delivery system and to process and pay medical claims will maintain a single site for appropriate paper documents (*e.g.*, invoices) and automated files online related to these activities (*e.g.*, names and addresses of hospitals, physicians and other health care providers and support service systems).

Medical Records: Records generated by community physicians, hospitals, and ancillary support service systems developed by the Contractor as participants in the Preferred Provider Network (PPN) to deliver health care services for USMS prisoners are maintained by the respective offices of these licensed providers. Addresses of these licensed providers may be obtained by contacting the USMS Office of Interagency Medical Services (OIMS), Prisoner Services Division at the address above.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Prisoners taken into custody of the U.S. Marshal and providers of prisoner health care services under the USMS Managed Health Care Contract.

CATEGORIES OF RECORDS IN THE SYSTEM:

Any and all information necessary to complete administrative processes, safekeeping, health care, and disposition of individual Federal prisoners who are in custody pending criminal proceedings, together with any law enforcement related records generated during such custody. Records include a compilation of basic information on each prisoner taken into custody of the U.S. Marshal covering identifying data, the reason for U.S. Marshal custody (*e.g.*, Federal indictment, complaint, or writ), the court disposition of charges, dates of custody, and institutions to which committed or housed. Also included are Form USM–129, Prisoner Custody, Detention and Disposition Record (formerly DJ–100); prisoner photograph; personal history statement; fingerprint card; identification record; detainer notice; speedy trial notice; prisoner remand or order to deliver prisoner, and receipt for U.S. prisoner; property receipt; court records including writs, bail/bond release information, judgment and commitment and other court orders; prisoner alert notice; prisoner complaints or serious incident reports (and related investigatory information) filed by either the prisoner or by officials or by other individuals at the institution where the prisoner is housed and covering a wide range of potentially serious issues, *e.g.*, medical treatment of prisoners, and attempted escapes or alleged prisoner misconduct or criminal activity; designation requests to Bureau of Prisons (BOP) and BOP responses; information identifiable to informants, protected witnesses, and confidential sources; access codes and data entry codes and message routing symbols used to communicate with law enforcement officials regarding the custody and safekeeping of prisoners; and prisoner transportation requests to the Prisoner Transportation Division (and any related records) which may include sensitive security data. Medical records included in this system consist of nurses' notes of medical problems, diagnosis, treatment recommended; names of health care providers at the housing unit, social workers, attorneys, family members and USMS contact personnel; special issue or treatment notices; names and addresses of community treatment facilities, physicians and other community health care providers and support service systems, dates of service, provider tax identification numbers; medical care given, cost of care, and billing records. Medical records generated by health care providers may be included in this system of records, as necessary for continuity of care/appropriate care or infectious disease control.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

18 U.S.C. 3149, 3193, 3604, 3621, 4002, 4006, 4086, 4285; 28 U.S.C. 509, 510, 568, 569; 5 U.S.C. 301; 44 U.S.C. 3101; and 28 CFR 0.111.

PURPOSE(S):

The Prisoner Processing and Population Management/Prisoner Tracking System (PPM/PTS) is maintained to cover law enforcement and security related records which are generated in the local USMS district offices in connection with the processing, safekeeping, and disposition of Federal prisoners who are in custody pending criminal proceedings. Medical records included in this system assist consultation and coordination between the USMS district office, the housing unit, treatment facility, health care provider, transportation facility, and other Federal agencies, *e.g.*, BOP, to ensure that prisoners in custody of the U.S. Marshal are given proper treatment. Through USMS nursing staff, districts are assisted in determining medical treatment necessary while the prisoner is in custody of the U.S. Marshal and in ensuring the prisoner's medical clearance for travel.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

Relevant records or information may be disclosed under subsection (b)(3) of the Privacy Act as follows:

1. To other Federal, State, local or foreign law enforcement agencies, contract detention or medical facilities and health care providers (1) who provide temporary custody or housing or care of prisoners, or who otherwise require information (a) to protect the safety and/or health of the prisoners, the public, and of law enforcement officials or (b) to otherwise ensure fair and proper treatment of prisoners during custody and transfer of custody or (2) who may also assist the USMS in pursuing any necessary inquiry/investigation of complaints, alleged misconduct or criminal activity. For example, relevant records or information may be disclosed to secure the safe and efficient transfer of prisoners to other jurisdictions, to court appearances, or to the designated

institution for service of sentence; to ensure that appropriate credit for time in custody is given; that appropriate medical treatment is provided; that all rights of the prisoner, whether statutory, humanitarian, or otherwise, are provided and protected; and to elicit information from which to initiate an inquiry/investigation and/or respond to prisoner complaints and reports of alleged misconduct or criminal activity; or, conversely, to enable those entities to respond to, or provide information relating to, such prisoner complaints or reports of misconduct or criminal activity.

2. Where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law—criminal, civil, or regulatory in nature—the relevant records may be referred to the appropriate Federal, State, local, foreign, or tribal law enforcement authority or other appropriate agency charged with the responsibility of investigating or prosecuting such a violation or enforcing or implementing such law.

3. To Federal, state or local public health agencies for infectious disease control.

4. In an appropriate proceeding before a court, or administrative or adjudicative body, when the Department of Justice determines that the records are arguably relevant to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator holds the records to be relevant to the proceeding.

5. To an actual or potential party to litigation or the party's authorized representative for the purpose of negotiation or discussion on such matters as settlement, plea bargaining, or in informal discovery proceedings.

6. To the news media and the public pursuant to 28 CFR 50.2 unless it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

7. To a Member of Congress or staff acting upon the Member's behalf when the Member or staff requests the information on behalf of and at the request of the individual who is the subject of the record.

8. To the National Archives and Records Administration (NARA) in records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

9. To the extent that it is appropriate, relevant and necessary to enable the Contractor and/or subcontractor(s) to ensure continuity of care/appropriate health care for USMS prisoners, to process and pay medical claims, and to carry out program performance evaluation responsibilities.

10. To appropriate officials and employees of a Federal agency or entity which requires information relevant to a decision concerning the hiring, appointment, or retention of an employee; the issuance, renewal, suspension, or revocation of a security clearance; the execution of a security or suitability investigation; the letting of a contract, or the issuance of a grant or benefit.

11. To Federal, State, local, tribal, or foreign licensing agencies or associations which require information concerning the suitability or eligibility of an individual for a license or permit.

12. A record may be disclosed to designated officers and employees of State or local (including the District of Columbia), or tribal law enforcement or detention agencies in connection with the hiring or continued employment of an employee or contractor, where the employee or contractor would occupy or occupies a position of public trust as a law enforcement officer or detention officer having direct contact with the public or with prisoners or detainees, to the extent that the information is relevant and necessary to the recipient agency's decision.

13. To contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for the Federal Government, when necessary to accomplish an agency function related to this system of records.

14. The Department of Justice may disclose relevant and necessary information to a former employee of the Department for purposes of: responding to an official inquiry by a Federal, state, or local government entity or professional licensing authority, in accordance with applicable Department regulations; or facilitating communications with a former employee that may be necessary for personnel-related or other official purposes where the Department requires information and/or consultation assistance from the former employee regarding a matter within that person's former area of responsibility.

POLICIES AND PROCEDURES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Information is stored in standard file cabinets. Duplicate copies of certain paper and electronic records are stored on magnetic discs.

RETRIEVABILITY:

Information is retrieved by name and/or number of prisoner, and/or health care provider. Records retrieved by name or number of health care provider will consist of the provider's address and, by name and number of prisoners treated, claim number, dates of service, nature of service, amount billed, USMS amount allowed, amount saved, and percentage saved.

SAFEGUARDS:

Paper records are stored in locked files. Access to computerized data is restricted through user identification and discrete password functions. In addition, USMS district and headquarters offices are secured behind locked doors around the clock and access is restricted to USMS personnel with official identification.

All USMS contractors must have personnel security clearances commensurate with the highest level of information processed by the system, in this case Limited Official Use. Encryption technology shall be applied to passwords and symmetric or private asymmetric keys, activities of a system administrator or for system maintenance, and information stored on laptop computers. All information technology systems within a component are subject to the certification and accreditation process.

RETENTION AND DISPOSAL:

General prisoner records are kept in active files until a prisoner has been transferred from the custody of USMS. After a prisoner leaves USMS custody, the file is closed, and at the end of the year, closed files are separated from active files. Closed files are maintained for one year after separation, then are transferred to a Federal Records Center, and are destroyed after 10 years, or sooner, if ordered by the Court. This does not apply to records maintained by the Contractor, which are discussed below.

The Contractor will maintain all appropriate paper documents (*i.e.*, invoices, etc.) and automated online files for the duration of the contract performance. Computer storage media containing Limited Official Use information will be overwritten or degaussed prior to release of the storage media outside the USMS. At the end of the contract, the contractor shall turn over all paper documents and an automated file of the database offline to the USMS within two weeks of contract expiration. All paper documents and

automated files of the database will be maintained in accordance with the General Records Schedule 6, Item 1a (Accountable Officers' Files), as published by NARA, unless a longer retention period is necessary because of pending administrative or judicial proceedings.

The retention and disposal procedures for this system of records are in accordance with the NARA disposition authority for the USMS which is NI 527–99–1, or the General Records Schedule as appropriate.

SYSTEM MANAGER(S) AND ADDRESS:

Assistant Director, Prisoner Services Division, United States Marshals Service, 11th Floor, CS–4, Washington, DC 20530–1000.

NOTIFICATION PROCEDURE:

Same as "Record access procedures."

RECORD ACCESS PROCEDURES:

Requests for access must be in writing and should be addressed to the System Manager named above, Attention: FOI/PA Officer. The envelope and letter should be clearly marked "Privacy Act Access Request." The request should include a general description of the records sought and must include the requesters's full name, current address, and date and place of birth. The request must be signed, dated, and either notarized or submitted under penalty of perjury. Some information may be exempt from access provisions as described in the section entitled "Exemptions Claimed for the System." An individual who is the subject of a record in this system may access those records that are not exempt from disclosure. A determination whether a record may be accessed will be made at the time a request is received.

CONTESTING RECORD PROCEDURES:

Individuals desiring to contest or amend information maintained in the system should direct their request to the system manager listed above, Attention: FOI/PA Officer, stating clearly and concisely the identifying information required above in "Record access procedures", what information is being contested, the reasons for contesting it, and the proposed amendment to the information sought. Some information may be exempt from contesting record procedures as described in the section entitled "Exemptions Claimed for the System." An individual who is the subject of a record in this system may amend those records that are not exempt. A determination whether a record may be amended will be made at the time a request is received.

RECORD SOURCE CATEGORIES:

Information is received from the prisoner, the courts, Federal, State, local, tribal and foreign law enforcement agencies, and medical care professionals.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

The Attorney General has exempted this system from subsections (c)(3) and (4), (d), (e)(1), (2), (3), (e)(5) and (e)(8) and (g) of the Privacy Act pursuant to 5 U.S.C. 552a(j)(2). Rules have been promulgated in accordance with the requirements of 5 U.S.C. 553(b), (c) and (e) and have been published in the **Federal Register**. The rules are codified at 28 CFR 16.101(q) and (r).

[FR Doc. 04–9647 Filed 4–27–04; 8:45 am]

BILLING CODE 4410–04–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application No. D–11184]

Proposed Amendment to Prohibited Transaction Exemption (PTE) 75–1, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of proposed amendment to PTE 75–1, Part II and Part V.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed amendment to PTE 75–1, Part II and Part V. PTE 75–1, Part II, permits the purchase or sale of a security in a principal transaction between an employee benefit plan and a broker-dealer, reporting dealer, or a bank. PTE 75–1, Part V, permits an extension of credit to a plan by a broker-dealer in connection with the purchase or sale of securities. The proposed amendment would affect participants, beneficiaries and fiduciaries of employee benefit plans, and broker-dealers, reporting dealers and banks entering into the described transactions.

DATES: Written comments and requests for a public hearing must be received by the Department on or before June 14, 2004.

EFFECTIVE DATE: If adopted, the proposed amendments would be effective as of the date of publication of the final amendments in the **Federal Register**.

ADDRESSES: All written comments and requests for a public hearing (preferably three copies) should be addressed to the U.S. Department of Labor, Office of Exemption Determinations, Employee Benefits Security Administration, Room N–5649, 200 Constitution Avenue NW., Washington DC 20210 (attention PTE 75–1 Amendment). Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or fax. Any such comments should be sent by e-mail to *lloyd.karen@dol.gov* or by fax to 202–219–0204 by the end of the scheduled comment period. All comments received will be available for public inspection at the Public Documents Room, Employee Benefits Security Administration, Room N–1513, 200 Constitution Ave. NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Karen E. Lloyd, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, Room N–5649, 200 Constitution Avenue NW., Washington DC 20210, 202–693–8540. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION: Notice is hereby given of the pendency before the Department of a proposed amendment to PTE 75–1, Part II and Part V (40 FR 50845, October 31, 1975). PTE 75–1, Part II and Part V, provide exemptions from certain of the restrictions of section 406 of ERISA, and from certain taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1) of the Code. The Department is proposing this amendment to PTE 75–1 on its own motion, pursuant to section 408(a) of ERISA and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990).[1]

Executive Order 12866 Statement

Under Executive Order 12866, the Department must determine whether the regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f), the order defines a "significant regulatory action" as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million

[1] Section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996) generally transferred the authority of the Secretary of the Treasury to issue exemptions under section 4975(c)(2) of the Code to the Secretary of Labor.

In the discussion of the exemption, references to specific provisions of the Act should be read to refer as well to the corresponding provisions of section 4975 of the Code.

or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

This proposed amendment has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined that this proposed amendment is not a "significant regulatory action" under Executive Order 12866, section 3(f). Accordingly, it does not require an assessment of potential costs and benefits under section 6(a)(3) of that order.

Paperwork Reduction Act

The information collection request (ICR) included in the existing PTE 75–1 is currently approved under Office of Management and Budget (OMB) control number 1210–0092 (through January 31, 2004). The proposed amendment does not modify the information collection provisions of the exemption. Therefore, the Department has not submitted an ICR to OMB in connection with this Notice of Proposed Amendment to PTE 75–1.

Background

Section 406(a) of ERISA generally prohibits the sale of any property (including securities), the lending of money or other extension of credit, and the furnishing of goods or services, between an employee benefit plan and a "party in interest." The term "party in interest" is defined in ERISA section 3(14) to include (as relevant herein) fiduciaries, persons providing services to the plan, and certain persons and entities related to them. Section 406(b) of ERISA prohibits a fiduciary of a plan from dealing with the assets of the plan in his own interest, from acting on both sides of a transaction involving the plan, and from receiving any consideration from any party dealing with the plan in connection with a transaction involving plan assets. Such transactions that involve plans described in section 4975(e)(1) of the Code are generally subject to the taxes imposed by section 4975(a) and (b) of the Code.

PTE 75–1 provides an exemption from certain of the restrictions of section 406 of ERISA and the taxes imposed by section 4975(a) and (b) of the Code for certain classes of transactions between employee benefit plans and securities broker-dealers, reporting dealers and banks. The exemption was granted in 1975 pursuant to applications made by the Securities Industry Association, the National Association of Securities Dealers and others. The record created as part of the exemption proceeding established that the securities industry is important in facilitating the raising of capital and in maintaining market liquidity, particularly for institutional investors. In the absence of the exemption, plans could encounter disruption of their normal selling and purchasing activities which, in turn, could increase costs to plans and possibly lead to harm to the plans, their participants and beneficiaries.

Description of Existing Relief

Part I of PTE 75–1 provides relief for agency transactions and services;[2] Part II for principal transactions; Part III for underwritings; Part IV for market-making; and Part V for extension of credit.

PTE 75–1, Part II

Part II of PTE 75–1 provides relief from the restrictions of 406(a) of ERISA and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, for the purchase or sale of a security between an employee benefit plan and a broker-dealer registered under the Securities Exchange Act of 1934 (the 1934 Act), a reporting dealer who makes primary markets in securities of the U.S. Government or of any agency thereof and reports daily to the Federal Reserve Bank of New York its positions with respect to Government securities and borrowings thereon, or a bank supervised by the United States or a State.[3]

The exemption further provides relief from the restrictions of section 406(b) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(E) and (F) of the Code, for the purchase or sale by a plan of securities issued by an open-end investment company registered under the Investment Company Act of 1940, provided that a fiduciary with respect to the plan is not a principal underwriter for, or affiliated with, such investment company within the meaning of sections 2(a)(29) and 2(a)(3) of the Investment Company Act of 1940.

The conditions of PTE 75–1, Part II, require that, in the case of a broker-dealer, it customarily purchases and sells securities for its own account in the ordinary course of its business as a broker-dealer. Reporting dealers and banks must customarily purchase and sell Government securities for their own accounts in the ordinary course of their businesses, and the purchase or sale between the plan and such reporting dealer or bank must be a purchase or sale of Government securities.

All transactions must be at least as favorable to the plan as an arm's length transaction with an unrelated party would be, and must not be, at the time of the transaction, a prohibited transaction within the meaning of section 503(b) of the Code.

Except with respect to the transactions described above involving shares of securities issued by open-end investment companies registered under the Investment Company Act of 1940, the broker-dealer, reporting dealer or bank may not be a fiduciary with respect to the plan, and the broker-dealer, reporting dealer or bank may be a party in interest or disqualified person with respect to the plan solely by reason of section 3(14)(B) of the Act or section 4975(e)(2)(B) of the Code or a relationship to a person described in those sections. For purposes of this condition, a broker-dealer, reporting dealer or bank is not deemed to be a fiduciary with respect to a plan solely by reason of providing securities custodial services for a plan. Lastly, the exemption for principal transactions also contains certain recordkeeping requirements.

PTE 75–1, Part V

Part V of PTE 75–1 provides relief from the restrictions of section 406 of ERISA and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1) of the Code, for any extension of credit to a plan by a broker or dealer registered under the 1934 Act.[4] The broker-dealer extending credit may not be a fiduciary with respect to any assets of the plan, unless no interest or other consideration is received by such

[2] Part I(a) expired on May 1, 1978. It ultimately was replaced by PTE 86–128 (51 FR 41686, Nov. 18, 1986).

[3] The exemption defines the terms "broker-dealer," "reporting dealer" and "bank" to include such entities and any affiliate thereof, and "affiliate" is defined as in 29 CFR 2510.3–21(e) and 26 CFR 54.4975–9(e).

[4] The exemption defines the terms "broker" and "dealer" to include such entities and any affiliate thereof, and affiliate is defined as in 29 CFR 2510.3–21(e) and 26 CFR 54.4975–9(e).

fiduciary or any affiliate in connection with the extension of credit.

The extension of credit must be extended in connection with the purchase or sale or securities, must be lawful under the 1934 Act, and may not be a prohibited transaction within the meaning of section 503(b) of the Code. Lastly, the exemption for extensions of credit also contains certain recordkeeping requirements.

Description of Proposed Amendment

The Department first intends to clarify the exemption for purchases or sales of investment company securities currently contained in PTE 75–1, Part II(d). In order to provide more clarity, the Department proposes to reposition the following language found in section (d) of Part II of the exemption:

> Neither the restrictions of this paragraph nor (if the other conditions of this exemption are met) the restrictions of section 406(b) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(E) and (F) of the Code, shall apply to the purchase or sale by the plan of securities issued by an open-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), provided that a fiduciary with respect to the plan is not a principal underwriter for, or affiliated with, such investment company within the meaning of sections 2(a)(29) and 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(29) and 80a–2(a)(3)).

The Department proposes to include the relief provided by this provision in a new paragraph (2) of the exemption for principal transactions, which specifically describes the relief provided by Part II of PTE 75–1. The Department has amended the language of this section to clarify that the fiduciary referenced therein is the fiduciary who makes the decision on behalf of the plan to enter into the transaction. The Department seeks public comments regarding the current utility of the exemption provided in the new paragraph (2).

The Department proposes to further amend the language of condition (d) which states, in relevant part, that:

> Such broker-dealer, reporting dealer or bank is not a fiduciary with respect to the plan, and such broker-dealer, reporting dealer or bank is a party in interest or disqualified person with respect to the plan solely by reason of section 3(14)(B) of the Act or section 4975(e)(2)(B) of the Code or a relationship to a person described in such sections. For purposes of this paragraph, a broker-dealer, reporting dealer, or bank shall not be deemed to be a fiduciary with respect to a plan solely by reason of providing securities custodial services for a plan.

The Department recognizes that, due to the consolidation in the financial services industry, this condition may now unduly restrict the ability of plans to engage in securities transactions. Thus, for example, the exemption may not be available to a bank or broker-dealer that was only a service provider with respect to the assets involved in the transaction, but exercised discretionary authority over a collective investment fund in which other assets of the plan were invested. In more recently granted exemptions, the Department has more narrowly focused the exclusion from relief on fiduciaries who have discretionary authority or control with respect to the investment of the plan assets involved in the transaction or who render investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to the investment of those assets.[5]

In addition, the current condition may result in difficulties for employee benefit plans with bank trustees, if such bank serves as a directed trustee with respect to all of a plan's assets, even if the trustee has no investment discretion and no responsibility for directing the purchase and sale of securities on behalf of the plan. In such cases, PTE 75–1, Part II, may not be available to the plan for the purchase of securities from, or the sale of securities to, the bank trustee or any broker-dealer affiliate of the bank, notwithstanding that the plan fiduciary directing the trade is independent of the bank trustee.

In response to the requests to amend this condition, and in recognition of the importance to plans of obtaining these financial services and products from broker-dealers, reporting dealers and banks, the Department proposes to amend condition (d) of PTE 75–1, Part II. As amended, the exemption would permit plans to engage in transactions with broker-dealers, reporting dealers, banks and their affiliates except where the broker-dealer, reporting dealer, bank or an affiliate has or exercises any discretionary authority or control (except as a directed trustee) with respect to the investment of plan assets involved in the transaction, or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to the investment of those assets.[6]

For the reasons explained above, the Department likewise proposes to amend condition (a)(2) of PTE 75–1, Part V, which requires that the party in interest or disqualified person providing the extension of credit to the plan:

> [i]s not a fiduciary with respect to any assets of such plan, unless no interest or other consideration is received by such fiduciary or any affiliate thereof in connection with such extension of credit.

Under the proposed amendment, section (a)(2) would state that the party in interest or disqualified person extending credit to the plan:

> does not have or exercise any discretionary authority or control (except as a directed trustee) with respect to the investment of the plan assets involved in the transaction, nor does it render investment advice (within the meaning of 29 CFR section 2510.3–21(c)) with respect to those assets, unless no interest or other consideration is received by the party in interest or disqualified person or any affiliate thereof in connection with such extension of credit.

As noted above, this amendment would be consistent with more recent exemptions granted by the Department.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption granted under section 408(a) of the Act and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan to which the exemption is applicable from certain other provisions of the Act and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the plan's participants and beneficiaries and in a prudent fashion in accordance with subsection (a)(1)(B) of section 404 of the Act; nor does it affect the requirement of section 401(a) of the Code that a plan must operate for the exclusive benefit of employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of ERISA and section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) If granted, the proposed amendment is applicable to a particular

[5] *See e.g.*, PTE 94–20 (59 FR 8022, February 17, 1994); PTE 98–54 (63 FR 63503, November 13, 1998).

[6] Nothing herein should be construed to imply that a directed trustee is not a fiduciary under the Act. *See* 29 U.S.C. 1103(a)(1). A plan may expressly provide that a trustee is subject to the direction of a named fiduciary who is not a trustee, in which case the trustee shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to the Act.

transaction only if the transaction satisfies the conditions specified in the exemption; and

(4) The proposed amendment, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and the Code, including statutory and other exemptions and transitional rules. Furthermore, the fact that a transaction is the subject of an exemption is not dispositive of whether the transaction would have been a prohibited transaction in the absence of such exemption.

Written Comments and Hearing Requests

The Department invites all interested persons to submit written comments or requests for a public hearing on the proposed amendment to the address and within the time period set forth above. All comments received will be made a part of the record. Comments and requests for a hearing should state the reasons for the writer's interest in the proposed amendment. Comments received will be available for public inspection at the above address.

Proposed Amendment

Under section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990), the Department proposes to amend PTE 75–1 as set forth below:

I. PTE 75–1, Part II, is amended in its entirety to read as follows:

(1) The restrictions of section 406(a) of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975(a) and (b) of the Internal Revenue Code of 1986 (the Code), by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to any purchase or sale of a security between an employee benefit plan and a broker-dealer registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), a reporting dealer who makes primary markets in securities of the United States Government or of any agency of the United States Government ("Government securities") and reports daily to the Federal Reserve Bank of New York its positions with respect to Government securities and borrowings thereon, or a bank supervised by the United States or a State, and

(2) The restrictions of section 406(a) and 406(b) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code, shall not apply to the purchase or sale by a plan of securities issued by an open-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), provided that no fiduciary with respect to the plan who makes the decision on behalf of the plan to enter into the transaction is a principal underwriter for, or affiliated with, such investment company within the meaning of sections 2(a)(29) and 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(29) and 80a–2(a)(3)).

The exemptions set forth in (1) and (2) above are subject to the following conditions:

(a) In the case of such broker-dealer, it customarily purchases and sells securities for its own account in the ordinary course of its business as a broker-dealer.

(b) In the case of such reporting dealer or bank, it customarily purchases and sells Government securities for its own account in the ordinary course of its business and such purchase or sale between the plan and such reporting dealer or bank is a purchase or sale of Government securities.

(c) Such transaction is at least as favorable to the plan as an arm's length transaction with an unrelated party would be, and it was not, at the time of such transaction, a prohibited transaction within the meaning of section 503(b) of the Code.

(d) Except with respect to transactions described in section (2) above, neither the broker-dealer, reporting dealer, bank, nor any affiliate thereof has or exercises any discretionary authority or control (except as a directed trustee) with respect to the investment of the plan assets involved in the transaction, or renders investment advice (within the meaning of 29 CFR section 2510.3–21(c)) with respect to those assets.

(e) The plan maintains or causes to be maintained for a period of six years from the date of such transaction such records as are necessary to enable the persons described in paragraph (f) of this exemption to determine whether the conditions of this exemption have been met, except that—

(1) Such broker-dealer, reporting dealer, or bank shall not be subject to the civil penalty which may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or are not available for examination as required by paragraph (f) below; and

(2) A prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the plan fiduciaries, such records are lost or destroyed prior to the end of such six-year period.

(f) Notwithstanding anything to the contrary in subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (e) are unconditionally available for examination during normal business hours by duly authorized employees of (1) the Department of Labor, (2) the Internal Revenue Service, (3) plan participants and beneficiaries, (4) any employer of plan participants and beneficiaries, and (5) any employee organization any of whose members are covered by such plan. For purposes of this exemption, the terms "broker-dealer," "reporting dealer" and "bank" shall include such persons and any affiliates thereof, and the term "affiliate" shall be defined in the same manner as that term is defined in 29 CFR 2510.3–21(e) and 26 CFR 54.4975–9(e).

II. PTE 75–1, Part V, is amended in its entirety to read as follows:

The restrictions of section 406 of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975(a) and (b) of the Internal Revenue Code of 1986 (the Code), by reason of section 4975(c)(1) of the Code, shall not apply to any extension of credit to an employee benefit plan by a party in interest or a disqualified person with respect to the plan, provided that the following conditions are met:

(a) The party in interest or disqualified person—

(1) is a broker or dealer registered under the Securities Exchange Act of 1934; and

(2) does not have or exercise any discretionary authority or control (except as a directed trustee) with respect to the investment of the plan assets involved in the transaction, nor does it render investment advice (within the meaning of 29 CFR section 2510.3–21(c)) with respect to those assets, unless no interest or other consideration is received by the party in interest or disqualified person or any affiliate thereof in connection with such extension of credit.

(b) Such extension of credit—

(1) Is in connection with the purchase or sale of securities;

(2) Is lawful under the Securities Exchange Act of 1934 and any rules and regulations promulgated thereunder; and

(3) Is not a prohibited transaction within the meaning of section 503(b) of the Code.

(c) The plan maintains or causes to be maintained for a period of six years from the date of such transaction such

records as are necessary to enable the persons described in paragraph (d) of this exemption to determine whether the conditions of this exemption have been met, except that—

(1) if such party in interest or disqualified person is not a fiduciary with respect to any assets of the plan, such party in interest or disqualified person shall not be subject to the civil penalty which may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or are not available for examination as required by paragraph (d) below; and

(2) a prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the plan fiduciaries, such records are lost or destroyed prior to the end of such six-year period.

(d) Notwithstanding anything to the contrary in subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (c) are unconditionally available for examination during normal business hours by duly authorized employees of (1) the Department of Labor, (2) the Internal Revenue Service, (3) plan participants and beneficiaries, (4) any employer of plan participants and beneficiaries, and (5) any employee organization any of whose members are covered by such plan. For purposes of this exemption, the terms "party in interest" and "disqualified person" shall include such party in interest or disqualified person and any affiliates thereof, and the term "affiliate" shall be defined in the same manner as that term is defined in 29 CFR 2510.3–21(e) and 26 CFR 54.4975–9(e).

Signed at Washington, DC this 22nd day of April, 2004.

Ivan L. Strasfeld,

Director, Office of Exemption Determinations, Employee Benefits Security Administration.

[FR Doc. 04–9632 Filed 4–27–04; 8:45 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Prohibited Transaction Exemption 2004–07; Application Number D–10659]

Class Exemption for the Acquisition and Sale of Trust REIT Shares by Individual Account Plans Sponsored by Trust REITS

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Grant of class exemption.

SUMMARY: This document contains a final class exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and from certain taxes imposed by the Internal Revenue Code of 1986 (the Code). The exemption permits the acquisition, holding and sale of certain publicly traded shares of beneficial interest in a real estate investment trust (REIT), that is structured under state law as a business trust (Trust REIT), by individual account plans sponsored by the Trust REIT or its affiliates. The exemption affects participants and beneficiaries of employee benefit plans involved in such transactions, as well as the REITs and their affiliates that sponsor such plans.

FOR FURTHER INFORMATION CONTACT: Andrea W. Selvaggio, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, Washington, DC 20210 (202) 693–8540 (not a toll-free number).

SUPPLEMENTARY INFORMATION: On June 3, 2003, the Department published a notice in the **Federal Register** (68 FR 33185) of the pendency of a proposed class exemption from the restrictions of sections 406(a), 406(b)(1) and (b)(2), and 407(a) of the Act and from the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code. Relief for the transactions was requested in an application (Application No. D–10659) submitted by the National Association of Real Estate Investment Trusts (NAREIT or the Applicant) pursuant to section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR part 2570, Subpart B (55 FR 32836, August 10, 1990).[1]

The notice of pendency gave interested persons an opportunity to comment or request a public hearing on the proposal. The Department received two public comments. Upon consideration of the comments received, the Department has determined to grant the proposed class exemption, subject to certain modifications. These modifications and the comments are discussed below.

[1] Section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), generally transferred the authority of the Secretary of the Treasury to issue exemptions under section 4975(c)(2) of the Code to the Secretary of Labor. For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

Executive Order 12866

Under Executive Order 12866, the Department must determine whether the regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f), the order defines a "significant regulatory action" as an action that is likely to result in a rule: (1) Having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

This class exemption has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined that this exemption is not a "significant regulatory action" under Executive Order 12866, section 3(f). Accordingly, it does not require an assessment of potential costs and benefits under section 6(a)(3) of that order.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501) (PRA), the Department submitted the information collection request (ICR) included in the Notice of a Proposed Class Exemption for the Acquisition and Sale of Trust REIT Shares by Individual Account Plans Sponsored by Trust REITs [referred to for the purposes of the ICR as Disclosures for Transactions with Trust REIT Shares] to the Office of Management and Budget (OMB) for review and clearance at the time the Notice of a Proposed Rulemaking (NPRM) was published in the **Federal Register** (June 3, 2003, 68 FR 33185). OMB approved the Notice under OMB control number 1210–0124. The approval will expire on July 31, 2006.

The Department solicited comments concerning the ICR in connection with the NPRM. The Department received one comment that provided updated information on the number of REITs and the number of Trust REITs described in

the PRA section of the proposed exemption. Specifically, because of consolidation in the industry, rather than the 228 publicly traded REITs discussed in the proposal, there are now 173 such REITs. Likewise, the number of Trust REITs has decreased by one, from 52 to 51. At the suggestion of the commenter, the Department has changed the data used in the preliminary discussion about REITs under PRA 95. The Department notes, however, that the respective changes do not materially affect the hour or cost burdens as originally calculated under the NPRM. The Department considers its original cost and hour burden estimates for this ICR to be appropriate at this time. However, the Department will continue to monitor the number of Trust REITs subject to the exemption's information collection provisions in future years.

Discussion of the Comments Received

The comments received by the Department were generally supportive of the issuance of a class exemption to permit certain transactions involving Trust REITs shares. However, the commenters requested specific modifications to the proposal in the following areas:

(1) *Permit the purchase of employer securities pursuant to a plan provision requiring that cash contributions by the employer be used to purchase Trust REIT shares*—The Applicant and the other commenter requested that the exemption permit the purchase, by the Plan, of Trust REIT shares in instances where the terms of the Plan require that the employer's cash contributions be used to acquire Trust REIT shares. The commenters explained that some employers prefer to contribute cash because contributing treasury shares would dilute the value of the shares. NAREIT articulated the concern as follows: "the trustee is directed, and arguably is not acting in a fiduciary capacity. Consequently, the portion of the proposed exemption for fiduciary investment in Qualifying REIT Shares is probably not applicable."

Contrary to NAREIT's analysis of the directed trustee's fiduciary status, the Department notes that a directed trustee is a fiduciary under the Act.[2] That fact, however, is not determinative as to whether the requested relief is warranted.

After considering the comment, the Department has decided to modify the final exemption as requested by the commenters. The exemption will cover the purchase of Trust REIT shares in accordance with the terms of the Plan that require employer contributions be used to purchase Trust REIT shares. In such instances, the Trust REIT shares may be purchased on the Primary Exchange or by netting within the Plan. In following plan provisions that require the trustee invest employer cash contributions in Trust REIT shares, the Department notes that the trustee must discharge his duties consistent with the fiduciary responsibility provisions of ERISA.

For prospective relief, shares may not be subject to a lockup. The Applicant has explained that, on a prospective basis, the Independent Fiduciary will immediately allocate Qualifying REIT Shares contributed by the employer or purchased with employer cash contributions to the individual participants' Accounts. Therefore, each participant will have discretionary authority to direct the trustee to sell such shares.[3]

(2) *Paired Share Arrangement*—The other commenter requested that the class exemption be modified to cover a "paired share REIT." According to the commenter, in its paired share arrangement, a share of corporate stock and a share of beneficial interest in the Trust REIT trade together on an exchange as a single security. The commenter's paired shares trade on the New York Stock Exchange. The commenter was concerned that this paired share arrangement might be viewed as a trading restriction that would cause the Trust REIT shares to fail to satisfy the definition of Qualifying REIT Shares under section III(j) of the proposed exemption. After considering the comment, the Department has determined to amend the definition of Qualifying REIT Shares to include Trust REIT shares that are part of a paired share arrangement, provided that the Trust REIT shares would otherwise satisfy the requirements of the exemption and the corporate stock with which it is paired is a "qualifying employer security" as defined in section 407(d)(5) of the Act.

(3) *Number of Trust REITs*—The Applicant also informed the Department that, as of June 30, 2003, there are a total of 173 publicly traded REITs in the United States, and 51 publicly traded business trust REITs.

Description of the Exemption

The exemption consists of three sections. Section I provides conditional exemptive relief for the acquisition, holding, and sale of Qualifying Trust REIT Shares by individual account plans sponsored by the Trust REITs. Section II(a) describes the conditions for retroactive relief for transactions occurring up to six years prior to the date that the notice granting the final exemption is published in the **Federal Register** and for 60 days thereafter. Section II(b) provides prospective relief for transactions that meet certain additional conditions that are described below. Finally, section III contains definitions for certain terms used in the exemption.

The exemption is generally similar to an individual exemption previously granted by the Department, Crown American, PTE 97–64 (62 FR 66690 (12/19/97)). Among the conditions of the individual exemption was a 25 percent cap on the percentage of trust REIT shares held in an account. Unlike the individual exemption, the Department believed that for purposes of the proposed class exemption it would not be practical to develop a single percentage limitation that would apply to investment in Qualifying REIT Shares by all individual account plans maintained by the Trust REITs or their Employer Affiliates, in view of the variety of REITs that would be subject to the proposal and the different types of real estate activities engaged in by such entities. In this regard, the Department notes that section 404(a) of the Act requires, among other things, that a fiduciary discharge his duties with respect to a plan solely in the interest of the plan's participants and beneficiaries and in a prudent fashion. Section 404(a)(1)(C) further requires that a fiduciary diversify the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so. Section 404(a)(2) provides that, in the case of an eligible individual account plan, the diversification requirement of section 404(a)(1)(C) and the prudence requirement (only to the extent that it requires diversification) of section 404(a)(1)(B) are not violated by the acquisition or holding of qualifying employer real property or qualifying employer securities. To the extent that the Qualifying REIT Shares do not

[2] Under ERISA section 403(a)(1), a plan may expressly provide that a trustee is subject to the direction of a named fiduciary who is not a trustee, in which case the trustee shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to the Act. 29 U.S.C. 1103(a)(1).

[3] 29 CFR 2550.404c–1(d)(2)(ii)(E)(4)(i) provides that in order for the limitation on liability of plan fiduciaries under 404(c) of the Act to apply, the securities must be qualifying employer securities (as defined in 407(d)(5) of the Act). The Applicant sought this exemption to address its concern that Trust REIT shares might not meet the definition of qualifying employer securities.

constitute stock for purposes of section 407(d)(5) of the Act, the exception contained in section 404(a)(2) from the diversification requirements of the Act would not apply to a Plan's investment in Qualifying REIT Shares. Accordingly, it is the responsibility of a fiduciary of each Plan intending to take advantage of the relief provided by this exemption to determine the appropriate level of investment in Qualifying REIT Shares, based on the particular facts and circumstances, consistent with its responsibilities under section 404 of the Act.

The Department continues to believe that the scope of the class exemption is consistent with the Applicant's request for relief based on the Applicant's belief that Trust REIT shares were qualifying employer securities subject to sections 407 and 408(e) of the Act.

Retroactive Relief

The exemption set forth in section I(a) provides retroactive relief from the restrictions of sections 406(a), 406(b)(1) and (b)(2), and 407(a) of the Act and from the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code for: (1) The purchase or sale of Qualifying REIT Shares where the decision to purchase or sell the securities was made by a participant, or by a fiduciary that was independent of the Trust REIT and its affiliates; (2) the contribution of Qualifying REIT Shares to the Plan by an employer or the purchase of Qualifying REIT Shares pursuant to a plan provision requiring that employer contributions of cash be used to purchase Qualifying REIT Shares; and (3) the holding of Qualifying REIT Shares; provided that the conditions of the exemption were met at the time of the transaction.

The conditions applicable to the retroactive exemption are set forth in Section II(a) described below. Section II(a)(1) provides retroactive relief where participants exercised their discretion to purchase Trust REIT shares for their own account so long as they were permitted to give instructions to sell such shares at least quarterly. Section II(a)(2) provides relief with respect to shares purchased by an independent fiduciary, including shares purchased pursuant to a plan provision requiring that cash contributions by the employer be used to purchase Trust REIT shares. The purchase of Trust REIT shares, by an independent fiduciary pursuant to plan provisions, or the contribution of Trust REIT shares by the employer, where such shares are subject to a lockup, *i.e.*, a restriction on when the shares could be sold, is covered retroactively, but not prospectively.

The exemption requires that the participant (section II(a)(1)(B)), or a fiduciary independent of the Trust REITs (Section II(a)(2)(C)) had the authority to vote, tender and exercise similar ownership rights with respect to shares controlled by them.

Section II(a)(3) requires that Trust REIT shares be purchased and sold at the prevailing market price on the Primary Exchange on which these shares were traded. In this regard, section III(h) provides that the term "Primary Exchange" means the New York Stock Exchange (NYSE), the American Stock Exchange (AMEX), or the National Association of Securities Dealers Automated Quotation System National Market (NASDAQ National Market).

Under the final exemption, the Department has expanded the scope of section II(a)(4) (netting transactions) to include, not only transactions between Accounts, but also transactions between an Account and the independent fiduciary purchasing Qualifying REIT Shares with employer cash contributions. This change was made to permit the independent fiduciary to use netting transactions where it is purchasing employer securities with employer cash contributions pursuant to a plan provision requiring such purchases. Where investment decisions are implemented through the netting of purchases and sales within the Plan, the transactions must be valued at the closing market price for that day on the Primary Exchange on which the shares are traded. The Department cautions that, in order for transactions to satisfy this condition, such trades must be done in an objective and a mechanical fashion, so that neither the buyer nor the seller is favored in the transaction.

Section II(a)(5) provides that the covered transactions must meet an arm's-length test. Under this test, at the time of the transaction, the terms of the transaction must be at least as favorable to the Plan or the Account as the terms generally available between unrelated parties.

Pursuant to section II(a)(6) where Trust REIT shares are contributed to, or purchased by, the Plan from the Trust REIT, such shares must be conveyed to the Plan at or below market price and no commissions or other fees may be charged.

Pursuant to section II(a)(7), a participant's purchase or sale of Trust REIT shares is not covered by the exemption if the participant was subject to undue influence with respect to the investment decision to acquire or sell Trust REIT shares.

Prospective Relief

The exemption set forth in section I(b) provides prospective relief from the restrictions of sections 406(a), 406(b)(1) and (b)(2), and 407(a) of the Act and from the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code for: (1) The purchase or sale of Qualifying REIT Shares by a participant, or (2) by an Independent Fiduciary; (3) the contribution of Qualifying REIT Shares to the Plan by an employer or the purchase of Qualifying REIT Shares pursuant to a plan provision requiring that employer contributions of cash be used to purchase Qualifying REIT Shares; and (4) the holding of Qualifying REIT Shares; provided that the conditions of the exemption were met at the time of the transaction.

The conditions applicable to the prospective exemption are set forth in section II(b) described below. Section II(b)(1)(A) provides that participants must be able to sell Trust REIT shares purchased by them or contributed to their account at least monthly. As a result, no shares may be subject to a lockup. Section II(b)(1)(B) provides that participants must be able to vote, tender and exercise similar rights with respect to the shares over which the participants have investment discretion.

Section II(b)(2) provides that an Independent Fiduciary must have investment discretion to purchase Qualifying REIT Shares, unless such shares are purchased pursuant to a plan provision requiring that employer cash contributions be used to purchase Qualifying REIT Shares. Shares purchased pursuant to such a plan provision must be transferred to the participants' Accounts. Section III(e) of the exemption defines the term "Independent Fiduciary" as a trustee or investment manager who had equity capital of at least $1 million and has assets under management of over $50 million. This fiduciary must be independent of the Trust REIT, the Employer Affiliate, and any of their affiliates. In this regard, the Trust REIT, the Employer Affiliate, or any of their affiliates, may not own any interest in the Independent Fiduciary and the Independent Fiduciary may not own more than 5 percent of the Trust REIT, the Employer Affiliate, or any of their affiliates. The Independent Fiduciary must acknowledge in writing that it is a fiduciary and that it has the appropriate technical training or expertise to perform the services

contemplated by this exemption. The Independent Fiduciary may not receive more than one percent (1%) of its current gross income for Federal tax purposes, (as measured by the prior year's taxable income) from the Trust REIT, the Employer Affiliate and their affiliates. Lastly, while serving as an Independent Fiduciary and for 6 months after it ceases to serve in this capacity, the Independent Fiduciary may not acquire property from, sell property to, or borrow any funds from the Trust REIT, the Employer Affiliate, or any affiliates thereof.

Section II(b)(3) provides that, where participants have discretionary authority to purchase or sell Qualifying REIT Shares, neither the Trust REIT, an Employer Affiliate, the Independent Fiduciary, nor any affiliates thereof, has any discretion or authority over such investment decisions, renders any investment advice with respect to these assets, nor exerts any undue influence over the decisions of the participants to acquire or sell Qualifying REIT Shares.

Pursuant to section II(b)(4), prior to or immediately after the initial investment in Qualifying REIT Shares, copies of the most recent prospectus, quarterly report and annual report concerning the REITs, must be provided to the person who is directing the investment. Updates of these documents must also be provided as published.

To help ensure that participants are not subject to pressure to invest in, or to continue to hold, employer securities, the confidentiality of their investment and voting decisions with respect to all such shares are protected under section II(b)(5) of the exemption. In this regard, section II(b)(5)(A) requires the appointment of a fiduciary that is responsible for confidentiality. Pursuant to section II(b)(5)(B), the Plan must provide participants, in writing, the procedures established to protect confidentiality of information relating to the purchase, holding, and sale of Qualifying REIT Shares and the exercise of voting, tender and other similar rights with respect to such shares. Further, should any situation arise where the fiduciary determines that there is a potential for undue influence upon participants and beneficiaries with respect to the exercise of shareholder rights, section II(b)(5)(C) requires that the Plan appoint an independent fiduciary (who may, but need not be, the Independent Fiduciary (as defined in section III(e)) to carry out activities related to this particular situation.[4] For example, tender offers, mergers and acquisitions are likely to generate the need for an independent fiduciary to provide additional safeguards for participant confidentiality.[5]

Where Qualifying REIT Shares are purchased or sold on the Primary Exchange, Section II(b)(6) provides that such shares must be purchased for cash at their market price at the time of the transaction. It further provides that the broker executing the transactions must be independent of the Trust REIT, an Employer Affiliate, the Independent Fiduciary and any affiliates thereof. The Applicant requested, and the Department agreed, to modify the final exemption to provide that the broker executing the transactions covered by this exemption need not be independent of the Independent Fiduciary if that broker does not charge a commission on these purchases and sales.

Section II(b)(7) provides that transactions within the Plan between Accounts and between an Account and the Independent Fiduciary purchasing Qualifying REIT Shares with employer cash contributions are permitted in order to save brokerage costs. Where investment decisions are implemented through the netting of purchases and sales within the Plan, the transactions must be valued at the closing market price for that day on the Primary Exchange on which the shares are traded. Such transactions must take place on the business day on which the instruction is received, or on the next business day, using that day's closing price, if the instruction is received after noon, or such later deadline as designated by the trustee or the named fiduciary.

Pursuant to section II(b)(8) the covered transactions must meet an arm's-length test. Under this test, at the time of the transaction, the terms of the transaction must be at least as favorable to the Plan or the Account as the terms generally available between unrelated parties.

Section II(b)(9) provides that where Qualifying REIT Shares are purchased from the Trust REIT, contributed by the Plan Sponsor, or purchased by the Plan with employer contributions, such shares must be conveyed to the Plan at or below market price and no commissions or other fees may be charged.

Under section II(b)(10) certain information must be disclosed to the participant or the Independent Fiduciary prior to the initial covered transaction that occurs 60 days after publication of the final exemption in the **Federal Register.** The disclosures must describe, among other things, any fees or transaction costs, the role, if any, of the Trust REIT as a principal in the transaction, and the exchange or market system where Qualifying REIT Shares are traded. Finally, the participant or Independent Fiduciary must be informed that copies of the proposed and final exemption are available upon request.

Section II(b)(11) of the exemption contains a condition requiring the Trust REIT or its Employer Affiliates on a prospective basis to maintain, for a period of six years from the date of each covered transaction, subject to limited exceptions, the records necessary to enable certain persons to determine whether the applicable conditions of the exemption have been met. Such persons include any duly authorized employee or representative of the Department or the Internal Revenue Service, any plan fiduciary, any participant or beneficiary of the Plan whose Account is invested in Qualifying REIT Shares, any employer of employees covered by the Plan, and any employee organizations whose members are covered by the Plan. All records must be unconditionally available at their customary location for examination during normal business hours by the above-described persons. However, the Trust REIT or its Employer Affiliates may refuse to disclose to a person, other than a duly authorized employee or representative of the Department or the Internal Revenue Service, commercial or financial information that is privileged or confidential.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act which require, among other things, that a fiduciary discharge his duties respecting the plan solely in the interests of the participants and beneficiaries of the plan and in a prudent fashion in accordance with

[4] This requirement was modeled after the regulations on "independent exercise of control" under section 404(c) of the Act. 29 CFR 2550.404c–1(d)(2)(ii)(E)(4)(viii) and (ix).

[5] In the preamble to the 404(c) regulations cited above, the Department stated that it agreed with the commentators that "situations where the potential for undue employer influence may exist include tender offers, exchange offers and contested board elections." 57 FR 46906, 46927 (October 13, 1992).

section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) In accordance with section 408(a) of the Act and section 4975(c)(2) of the Code, and based on the entire record, the Department finds that the exemption is administratively feasible, in the interests of plans and their participants and beneficiaries and protective of the rights of the participants and beneficiaries of the plans;

(3) The class exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the class exemption; and

(4) The exemption is supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

Exemption

Accordingly, the following exemption is granted under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, Subpart B (55 FR 32836, 32847 August 10, 1990).

Section I. Covered Transactions

(a) For the period from six years prior to April 28, 2004, to June 28, 2004, the restrictions of sections 406(a), 406(b)(1), 406(b)(2), and 407(a) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the following transactions, if the relevant conditions set forth in section II(a) below are met at the time of the transaction:

(1) The purchase or sale of Qualifying REIT Shares (as defined in section III(j)) on behalf of an Account (as defined in section III(a)) at the direction of the participant;

(2) The purchase or sale of Qualifying REIT Shares on behalf of the Plan (as defined in section III(f)) at the direction of an independent fiduciary (as defined in section II(a)(2));

(3) The contribution in-kind of Qualifying REIT Shares to a Plan by an employer, or the purchase of Qualifying REIT Shares pursuant to a plan provision requiring that employer contributions of cash be used to purchase Qualifying REIT Shares; and

(4) The holding of the Qualifying REIT Shares by the Plan.

(b) Effective after June 28, 2004, the restrictions of sections 406(a), 406(b)(1), 406(b)(2), and 407(a) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the following transactions, if the relevant conditions set forth in section II(b) below are met at the time of the transaction:

(1) The purchase or sale of Qualifying REIT Shares on behalf of an Account in a Plan at the direction of the participant;

(2) The purchase or sale of Qualifying REIT Shares on behalf of the Plan at the direction of the Independent Fiduciary (as defined in section III(e));

(3) The contribution in-kind of Qualifying REIT Shares to a Plan by an employer, or the purchase of Qualifying REIT Shares pursuant to a plan provision requiring that employer contributions of cash be used to purchase Qualifying REIT Shares; and

(4) The holding of the Qualifying REIT Shares by the Plan.

Section II. Conditions

(a) Retroactive Conditions

(1) The participant has discretionary authority to direct the trustee to:

(A) Sell the Qualifying REIT Shares purchased by the participant for his own Account no less frequently than quarterly; and

(B) Vote, tender and exercise similar rights with respect to those Qualifying REIT Shares in the Account over which the participant has discretion; or

(2) An independent fiduciary has discretionary authority to purchase, hold or sell the Qualifying REIT Shares, or such fiduciary is acting in accordance with a plan provision that requires employer cash contributions be used to purchase Qualifying REIT Shares, and such independent fiduciary:

(A) Is a trustee, named fiduciary or investment manager with respect to the Qualifying REIT Shares;

(B) is neither the Trust REIT (as defined in section III(i)) an Employer Affiliate (as defined in section III(d)) nor an affiliate thereof; and

(C) has the discretionary authority to exercise the voting, tender and similar rights with respect to those Qualifying REIT Shares for which it has investment discretion. Notwithstanding the foregoing, this paragraph (2)(C) shall be deemed met if another fiduciary that is independent of the Trust REIT had the right to exercise the voting, tender and similar rights with respect to the Trust REIT shares.

(3) Purchases and sales of Qualifying REIT Shares by the Plan are executed:

(A) For cash;

(B) on the Primary Exchange (as defined in section III(h)) or directly with the Trust REIT; and

(C) at the market price for the Trust REIT shares on the Primary Exchange at the time of the transaction.

(4) Notwithstanding paragraph (3) above, the exemption shall apply to purchases and sales of Qualifying REIT Shares within the Plan between Accounts and between an Account and the independent fiduciary purchasing Qualifying REIT Shares with employer cash contributions, in order to avoid brokerage commissions and other transaction costs, provided that each transaction is executed at the closing price for the Trust REIT shares on the Primary Exchange on the date of the transaction.

(5) At the time the transaction is entered into, the terms of the transaction are at least as favorable to the Plan or the Account as the terms generally available in comparable arm's-length transactions between unrelated parties.

(6) Qualifying REIT Shares contributed to, or purchased by, the Plan from the Trust REIT:

(A) Are conveyed to the Plan at or below the market price for the Trust REIT shares on the Primary Exchange at the time of the transaction; and

(B) are conveyed to the Plan without the payment of any commission or other fee in connection with the transaction.

(7) Where a participant has discretionary authority to purchase or sell Qualifying REIT Shares, neither the Trust REIT, an Employer Affiliate, the independent fiduciary, nor any affiliate thereof exerts any undue influence over the decisions of the participant to acquire or sell Qualifying REIT Shares.

(b) Prospective Conditions

(1) The participant has discretionary authority to direct the trustee:

(A) To sell Qualifying REIT Shares purchased by, or contributed to, his Account no less frequently than monthly; and

(B) to vote, tender and exercise similar rights with respect to those Qualifying REIT Shares in the Account over which the participant has discretion; or

(2) An Independent Fiduciary, as defined in section III(e), has discretionary authority to purchase, hold or sell the Qualifying REIT Shares, or such fiduciary is acting in accordance with a plan provision that requires employer cash contributions be used to purchase Qualifying REIT Shares for transfer to the participants' Accounts. The Independent Fiduciary has the discretionary authority to exercise the

voting, tender and similar rights with respect to the Qualifying REIT Shares, unless the participant has discretionary authority to direct the trustee with respect to such matters. Notwithstanding the foregoing, this paragraph (2) shall be deemed met if another fiduciary that is independent of the Trust REIT, the Employer Affiliate and any affiliates thereof; has the right to exercise the voting, tender and similar rights with respect to the Qualifying Trust REIT Shares.

(3) Where a participant has discretionary authority to purchase, hold or sell Qualifying REIT Shares, neither the Trust REIT, an Employer Affiliate, the Independent Fiduciary, nor any affiliate thereof:

(A) Has discretionary authority or control with respect to the investment of the Plan assets involved in the transaction;

(B) renders any investment advice [within the meaning of 29 CFR 2510.3–21(c)] with respect to those assets; or

(C) exerts any undue influence over the decisions of the participants to acquire, hold or sell Qualifying REIT Shares.

(4) Prior to or immediately after an initial investment in Qualifying REIT Shares, either the Trust REIT, or an agent or affiliate thereof provides the person who is directing the investment (*i.e.* the participant or the Independent Fiduciary) with the most recent prospectus, quarterly report, and annual report concerning the Trust REIT, and thereafter, either the Trust REIT, or an agent or affiliate thereof, provides such participants and/or Independent Fiduciary with updated prospectuses, quarterly statements and annual reports as published.

(5) Information relating to the purchase, holding, and sale of Qualifying REIT Shares, and the exercise of voting, tender and similar rights with respect to such Qualifying REIT Shares by participants is maintained in accordance with procedures designed to safeguard the confidentiality of such information except to the extent necessary to comply with Federal or state laws not preempted by ERISA. To safeguard confidentiality, the Plan shall:

(A) Designate a fiduciary responsible for safeguarding confidentiality;

(B) provide participants, when they become eligible to participate in the Plan, with a statement describing the procedures established to provide for the confidentiality of information relating to the purchase, holding and sale of Trust REIT shares, and the exercise of voting, tender and similar rights, by participants and beneficiaries and the name, address and telephone number of the fiduciary responsible for monitoring compliance with the procedures; and

(C) appoint, if the fiduciary responsible for safeguarding participant confidentiality determines that a situation involves a potential for undue employer influence upon participants and beneficiaries with regard to the direct or indirect exercise of shareholder rights, an independent fiduciary (who may, but need not be, the Independent Fiduciary), to take appropriate action to protect the confidentiality of the participants' and beneficiaries' votes. For purposes of this subparagraph (C), a fiduciary is not independent if the fiduciary is affiliated with the Trust REIT, an Employer Affiliate, or any affiliate thereof.

(6) All purchases and sales of Qualifying REIT Shares by the Plan are executed:

(A) For cash;

(B) On the Primary Exchange (as defined in section III(h)) by a broker that is independent of the Trust REIT, the Employer Affiliate, the Independent Fiduciary and any affiliate thereof, or directly with the Trust REIT. Notwithstanding the above, the Independent Fiduciary or its affiliate may execute these transactions if no commission is charged; and

(C) at the market price for the Trust REIT shares on the Primary Exchange at the time of the transaction.

(7) Notwithstanding paragraph (6) above, the exemption shall apply to purchases and sales of Qualifying REIT Shares within the Plan between Accounts and between an Account and the Independent Fiduciary purchasing Qualifying REIT Shares with employer cash contributions, in order to avoid brokerage commissions and other transaction costs, provided that the transaction is executed at the closing price for the Trust REIT shares on the Primary Exchange on the date of the transaction. All such transactions will take place at the closing price on the business day on which the instruction is received, or at the closing price on the next business day if the instruction is received after noon or such later deadline as designated by the trustee or named fiduciary.

(8) At the time the transaction is entered into, the terms of the transaction are at least as favorable to the Plan or the Account as the terms generally available in comparable arm's-length transactions between unrelated parties.

(9) Qualifying REIT Shares that are contributed to, or purchased by, the Plan from the Trust REIT and Qualifying REIT Shares purchased by the Plan with employer cash contributions:

(A) Are conveyed to the Plan at or below the market price for the Trust REIT shares on the Primary Exchange at the time of the transaction;

(B) Can be immediately sold on the Primary Exchange; and

(C) Are conveyed to the Plan without the payment of any commission or other fee in connection with the transaction.

(10) Prior to a participant, Plan Sponsor (as defined in section III(g)) or an Independent Fiduciary engaging in an initial transaction under this exemption, after June 28, 2004, the Trust REIT or its Employer Affiliate provides the following disclosures to the person who exercises discretionary authority with respect to the Qualifying REIT Shares (*i.e.*, the participant or the Independent Fiduciary). The disclosure must contain the following information regarding the transactions and a supplemental disclosure must be made to the person directing the covered investments if material changes occur subsequent to the initial disclosure. This disclosure must include:

(A) Disclosure of any fees for brokerage services or transaction costs that will be incurred as a result of the transactions;

(B) Disclosure of the role of the Trust REIT, if any, as a principal in the transactions;

(C) The exchange or market system where the Qualifying REIT Shares are traded; and

(D) A statement that a copy of the proposed and final exemption shall be provided to participants and the Independent Fiduciary upon request.

(11) The Trust REIT or its Employer Affiliates for a period of six years maintains the records necessary to enable the persons described below in paragraph (12) to determine whether the conditions of this exemption have been met, except that:

(A) If the records necessary to enable the persons described in paragraph (12) to determine whether the conditions of the exemption have been met are lost or destroyed, due to circumstances beyond the control of the Trust REIT or its Employer Affiliates, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(B) No party in interest other than the Trust REIT or its Employer Affiliates shall be subject to the taxes imposed by section 4975(a) and (b) of the Code if the records are not maintained or are not available for examination as required by paragraph (12) below.

(12) (A) Except as provided below in paragraph (12)(B) and notwithstanding

any provisions of section 504(a)(2) and (b) of the Act, the records referred to in paragraph (11) are unconditionally available at their customary location for examination during normal business hours by—

(i) Any duly authorized employee or representative of the Department or the Internal Revenue Service,

(ii) Any fiduciary of the Plan or any duly authorized employee or representative of such fiduciary,

(iii) Any employer of participants and beneficiaries and any employee organization whose members are covered by the Plan, or any authorized employee or representative of these entities; or

(iv) Any participant or beneficiary of the Plan whose Account is invested in Qualifying REIT Shares or the duly authorized employee or representative of such participant or beneficiary;

(B) None of the persons described in paragraph (12)(A)(ii)–(iv) shall be authorized to examine trade secrets of the Trust REIT, or an Employer Affiliate or commercial or financial information which is privileged or confidential.

Section III. Definitions

For purposes of this exemption,

(a) Account—The term "Account" means the individual account of a participant in a defined contribution pension plan in which benefits are based solely upon the amount contributed to the participant's account, and any income, expenses, gains or losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

(b) Affiliate—The term "affiliate" of a person means:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with such person;

(2) Any officer, director, employee, or relative (as defined in section 3(15) of the Act) of such person or partner in such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(c) *Control*—The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(d) *Employer Affiliate*—The term "Employer Affiliate" means any corporation, limited liability company (LLC), or partnership 50 percent or more owned by a Trust REIT.

(e) *Independent Fiduciary*—The term "Independent Fiduciary" means a person who:

(1) Is a trustee or an investment manager (as defined in 3(38) of the Act) who had equity capital of at least $1 million as of the last day of its most recent fiscal year and has client assets under management or control of over $50 million;

(2) Is not an affiliate of the Trust REIT, the Employer Affiliate or an affiliate thereof;

(3) Is not a corporation, partnership or trust in which the Trust REIT, its Employer Affiliate or an affiliate thereof has a one percent or more ownership interest or is a partner;

(4) Does not have more than a five percent ownership interest in the Trust REIT, its Employer Affiliate or an affiliate thereof;

(5) Has acknowledged in writing that:

(i) It is a fiduciary; and

(ii) It has appropriate technical training or experience to perform the services contemplated by the exemption;

(6) For purposes of this definition, no organization or individual may serve as Independent Fiduciary for any fiscal year in which the gross income received by such organization or individual (or partnership or corporation of which such organization or individual is an officer, director, or 10 percent or more partner or shareholder) from the Trust REIT, its Employer Affiliate and affiliates thereof, (including amounts received for services as an independent fiduciary under any prohibited transaction exemption granted by the Department) exceeds one percent of such fiduciary's gross income for federal tax purposes in its prior tax year; and

(7) In addition, no organization or individual which is an Independent Fiduciary and no partnership or corporation of which such organization or individual is an officer, director or 10 percent or more partner or shareholder may acquire any property from, sell any property to or borrow any funds from the Trust REIT, its Employer Affiliate or their affiliates, during the period that such organization or individual serves as an Independent Fiduciary and continuing for a period of six months after such organization or individual ceases to be an Independent Fiduciary or negotiates any such transaction during the period that such organization or individual serves as an Independent Fiduciary.

(f) *Plan*—The term "Plan" means an individual account plan sponsored by the issuer of Qualifying REIT Shares or an Employer Affiliate thereof.

(g) *Plan Sponsor*—The term "Plan Sponsor" means the Trust REIT or the Employer Affiliate that is the employer of the employees covered by the Plan.

(h) *Primary Exchange*—The term "Primary Exchange" means the national securities exchange or market system on which the Trust REIT shares are primarily traded, and which is either the New York Stock Exchange, the American Stock Exchange, or the National Association of Securities Dealers Automated Quotation System National Market.

(i) *Trust REIT*—The term "Trust REIT" means a "real estate investment trust" within the meaning of section 856 of the Code that is organized as a trust under applicable law.

(j) *Qualifying REIT Shares*—The term "Qualifying REIT Shares" means shares of beneficial interest in a Trust REIT that:

(1) Are publicly traded (as defined in section III(k); and

(2) Have no trading restrictions other than those necessary to qualify for REIT status or otherwise to satisfy securities law or applicable exchange or market system trading rules. Notwithstanding the above, the term "Qualifying REIT Shares" includes a Trust REIT share that otherwise meets the conditions of this exemption but trades only as a unit consisting of a Trust REIT share and a share of corporate stock (a paired share arrangement), provided that the corporate stock with which it trades is a qualifying employer security as defined in ERISA section 407(d)(5).

(k) *Publicly Traded*—The term "publicly traded," for purposes of this exemption, means Trust REIT shares of beneficial interest which are traded on the New York Stock Exchange, the American Stock Exchange, or the National Association of Securities Dealers Automated Quotation System National Market System.

(l) *Participant*—The term "participant" includes beneficiaries.

Signed at Washington, DC, this 22nd day of April, 2004.

Ivan L. Strasfeld,

Director, Office of Exemption, Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 04–9631 Filed 4–27–04; 8:45 am]

BILLING CODE 4520–29–P

DEPARTMENT OF LABOR

Employment and Training Administration

Job Corps: Final Finding of No Significant Impact (FONSI) for the Proposed Job Corps Center Located on Scott Hamilton Drive in Little Rock, AR

AGENCY: Employment and Training Administration, Labor.

ACTION: Final Finding of No Significant Impact (FONSI) for the proposed Job Corps Center to be located on Scott Hamilton Drive in Little Rock, Arkansas.

SUMMARY: Pursuant to the Council on Environmental Quality Regulations (40 CFR part 1500–08) implementing procedural provisions of the National Environmental Policy Act (NEPA), the Department of Labor, Employment and Training Administration, Office of Job Corps gives final notice of the proposed construction of a new Job Corps Center at Scott Hamilton Drive in Little Rock, Arkansas, and that this construction will not have a significant adverse impact on the environment. In accordance with 29 CFR 11.11(d) and 40 CFR 1501.4(e)(2), a preliminary FONSI for the new Job Corps Center was published in the February 13, 2004 **Federal Register** (69 FR 7261–7262). No comments were received regarding the preliminary FONSI.

ETA has reviewed the conclusion of the environmental assessment (EA), and agrees with the finding of no significant impact. This notice serves as the Final Finding of No Significant Impact for the new Job Corps Center at Scott Hamilton Drive in Little Rock, Arkansas. The preliminary FONSI and the EA are adopted in final with no change.

EFFECTIVE DATE: These findings are effective as of April 28, 2004.

FOR FURTHER INFORMATION CONTACT: Michael O'Malley, Employment and Training Administration, Department of Labor, 200 Constitution Avenue NW., Room N–4460, Washington, DC, 20210; (202) 693–3108 (this is not a toll-free number).

Dated this 15th day of April, 2004.

Richard C. Trigg,

National Director of Job Corps.

[FR Doc. 04–9570 Filed 4–27–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

National Advisory Committee on Ergonomics; Notice of Meeting

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice.

SUMMARY: The National Advisory Committee on Ergonomics (NACE) is part of the Secretary's comprehensive approach for reducing ergonomics-related injuries and illnesses in the workplace. The committee was convened for the first time on January 22, 2003. This notice schedules the fifth NACE meeting. The public is encouraged to attend.

DATES: The Committee workgroups will meet on Tuesday, May 11, 2004, from 1 p.m. until approximately 5 p.m. The full committee will meet on Wednesday, May 12, 2004, from 8:30 a.m. until approximately 5 p.m.

ADDRESSES: The committee will meet at the Holiday Inn on the Hill, 415 New Jersey Avenue., NW, Washington, DC 20001; Telephone: (202) 638–1616. Submit comments, views, or statements in response to this notice to MaryAnn Garrahan, Director, Office of Technical Programs and Coordination Activities, OSHA, U.S. Department of Labor, Room N–3655, 200 Constitution Avenue, NW., Washington, DC 20210. Phone: (202) 693–2144; Fax: (202) 693–1644.

FOR FURTHER INFORMATION CONTACT: OSHA, Office of Communications, Room N–3647, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; Telephone: (202) 693–1999.

SUPPLEMENTARY INFORMATION: NACE was chartered for a two-year term on November 27, 2002, to provide advice and recommendations on ergonomic guidelines, research, and outreach and assistance. The committee has met on January 22, 2003, May 6–7, 2003, and January 27–28, 2004 in Washington, DC, and on September 23–24, 2003 in Arlington, VA. This notice announces the fifth meeting of the committee, which will take place in Washington, DC, on May 11–12, 2004.

I. Meeting Agenda

The Committee's working groups on Research, Guidelines, and Outreach and Assistance will meet on the afternoon of May 11. The working groups will report back to the full Committee on May 12th and lead discussions about their respective topics. On the morning of May 12, representatives of OSHA, will address the committee.

II. Public Participation

Written data, views, or comments for consideration by NACE on the various agenda items listed above may be submitted, preferably with copies for the NACE members, to MaryAnn Garrahan at the address listed above. Submissions received by May 4, 2004, will be provided to the committee members for consideration. Requests to make oral presentations to the committee may be granted if time permits. Anyone wishing to make an oral presentation to the committee should notify MaryAnn Garrahan at the address noted above. The request should state the amount of time desired, the capacity in which the person will appear, and a brief outline of the content of the presentation. Persons who request an oral presentation may be allowed to speak, as time permits, at the discretion of the Chair of the Advisory committee.

Persons with disabilities requiring special accommodations should contact Veneta Chatmon (Phone: (202) 693–1912; Fax (202) 693–1635) by April 30, 2004.

A transcript of the meeting will be available for inspection and copying in the OSHA Technical Data Center, Room N–2625 (see **ADDRESSES** section above) Phone: (202) 693–2350. Transcripts of NACE meetings will also be available online on OSHA's Web site at *http://www.osha.gov/SLTC/ergonomics/nat_advis_comm.html.*

Authority: This notice was prepared under the direction of John L. Henshaw, Assistant Secretary for Occupational Safety and Health. It is issued under the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2), GSA's FACA Regulations (41 CFR part 102–3), and DLMS 3 Chapter 1600.

Signed at Washington, DC, this 22nd day of April, 2004.

John L. Henshaw,

Assistant Secretary.

[FR Doc. 04–9571 Filed 4–27–04; 8:45 am]

BILLING CODE 4510–26–P

MORRIS K. UDALL SCHOLARSHIP AND EXCELLENCE IN NATIONAL ENVIRONMENTAL POLICY FOUNDATION

Notice of Federal Advisory Committee Meeting

Authority: 5 U.S.C. Appendix; 20 U.S.C. 5601–5609.

AGENCY: U.S. Institute for Environmental Conflict Resolution, Morris K. Udall Foundation

ACTION: Notice of meeting.

SUMMARY: The National Environmental Conflict Resolution (ECR) Advisory Committee, of the U.S. Institute for Environmental Conflict Resolution, will conduct a public meeting on Thursday and Friday, May 13–14, 2004, at the Doubletree Hotel at Reid Park, 445 S. Alvernon Way, Tucson, Arizona 85711. The meeting will occur from 8 a.m. to approximately 5 p.m. on May 13, and from 8 a.m. to approximately 11:30 a.m. on May 14.

Members of the public may attend the meeting in person. Seating is limited and is available on a first-come, first-served basis. During this meeting, the

Committee will discuss: Reports of subcommittees on NEPA section 101, best practices, and affected communities; and planning for future Committee work.

Members of the public may make oral comments at the meeting or submit written comments. In general, each individual or group making an oral presentation will be limited to five minutes, and total oral comment time will be limited to one-half hour each day. Written comments may be submitted by mail or by e-mail to *gargus@ecr.gov*. Written comments received in the Institute office far-enough in advance of a meeting may be provided to the Committee prior to the meeting; comments received too near the meeting date to allow for distribution will normally be provided to the Committee at the meeting. Comments submitted during or after the meeting will be accepted but may not be provided to the Committee until after that meeting.

FOR FURTHER INFORMATION CONTACT: Any member of the public who desires further information concerning the meeting or wishes to submit oral or written comments should contact Tina Gargus, Special Projects Coordinator, U.S. Institute for Environmental Conflict Resolution, 130 S. Scott Avenue, Tucson, AZ 85701; phone (520) 670–5299, fax (520) 670–5530, or e-mail at *gargus@ecr.gov*. Requests to make oral comments must be in writing (or by e-mail) to Ms. Gargus and be received no later than 5 p.m. Mountain Standard Time on Thursday, May 6, 2003. Copies of the draft meeting agenda may be obtained from Ms. Gargus at the address, phone and e-mail address listed above.

Dated: April 22, 2004.

Christopher L. Helms,

Executive Director, Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation, and Federal Register Liaison Officer.

[FR Doc. 04–9587 Filed 4–27–04; 8:45 am]

BILLING CODE 6820–FN–U

NUCLEAR REGULATORY COMMISSION

Documents Containing Reporting or Recordkeeping Requirements: Office of Management and Budget (OMB) Review

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of OMB review of information collection and solicitation of public comment.

SUMMARY: The NRC has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)

1. *Type of submission, new, revision, or extension:* Revision.

2. *The title of the information collection:* 10 CFR Part 9, "Public Records."

3. *The form number if applicable:* N/A.

4. *How often the collection is required:* On occasion.

5. *Who will be required or asked to report:* Submitters of information containing trade secrets or confidential commercial or financial information who have been notified that the NRC has made an initial determination that the information should be disclosed.

6. *The estimated number of annual responses:* 10.

7. *The estimated number of annual respondents:* 10.

8. *An estimate of the total number of hours needed annually to complete the requirement or request:* 100 hours (10 hours per response).

9. *An indication of whether Section 3507(d), Pub. L. 104–13 applies:* Applicable.

10. *Abstract:* 10 CFR Part 9 is being revised to provide a submitter of information who has designated that information to be trade secrets or confidential commercial and financial information, the right to be notified prior to the NRC disclosing that information, and given the opportunity to object to the disclosure and to provide a written statement that specifies all grounds why the information is a trade secret or commercial or financial information that is privileged or confidential. Section 9.28(b) would provide that if the submitter objects to the disclosure, he must provide within15 days a written statement that specifies all grounds why the information is a trade secret or commercial or financial information that is privileged or confidential. This provision implements a requirement of Executive Order 12600, Predisclosure Notification Procedures for Confidential Commercial Information (52 FR 23781), issued June 23, 1987.

Submit, by May 28, 2004, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the burden estimate accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

A copy of the submittal may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room 0–1–F21, Rockville, MD 20852. The proposed rule indicated in "The title of the information collection" is or has been published in the **Federal Register** within several days of the publication date of this *Federal Register* notice. The OMB clearance package and rule are available at the NRC worldwide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/* for 60 days after the signature date of this notice and are also available at the rule forum site, *http://ruleforum.llnl.gov*.

Comments and questions should be directed to the OMB reviewer by May 28, 2004: OMB Desk Officer, Notice of Information and Regulatory Affairs (3150–0043), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be submitted by telephone at (202) 395–3087.

The NRC Clearance Officer is Brenda Jo. Shelton, 301–415–7233.

Dated at Rockville, Maryland, this 15th day of April, 2004.

For the U.S. Nuclear Regulatory Commission.

Brenda Jo. Shelton,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. E4–954 Filed 4–27–04; 8:45 a.m.]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: The NRC has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it

displays a currently valid OMB control number.

Information pertaining to the requirement to be submitted:

1. *Type of submission, new, revision, of extension:* Revision.

2. *The title of the information collection:* Policy Statement for the "Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement," Maintenance of Existing Agreement State Programs, Request for Information through the Integrated Materials Performance Evaluation Program (IMPEP) Questionnaire, and Agreement State Participation in IMPEP.

3. *The form number if applicable:* Not applicable.

4. *How often the collection is required:* There are four activities that occur under this collection: information collection activities required by the IMPEP questionnaire in preparation for an IMPEP review conducted no less frequently than every four years; while the following activities are all collected on an annual basis—policy statement addressing requirements for new Agreement States; participation by Agreement States in the IMPEP reviews; and annual requirements for Agreement States to maintain their programs.

5. *Who will be required or asked to report:* 33 Agreement States who have signed Section 274b Agreements with NRC.

6. *An estimate of the number of annual responses:* For States interested in becoming an Agreement State: approximately one State per year. For Agreement State participation in IMPEP reviews: 11 (9 State, 1 NRC Region and 1 Follow-up Review per year). For maintenance of existing Agreement State programs: 33 States. For Agreement State response to IMPEP questionnaires: 9 States. The total number of annual responses is 54.

7. *The estimated number of annual respondents:* 33.

8. *The number of hours needed annually to complete the requirement or request:* For States interested in becoming an Agreement State: Approximately 4,300 hours. For Agreement State participation in 11 IMPEP reviews (9 State, 1 NRC Region and 1 Follow-up Review): 396 hours (an average of 36 hours per review). For maintenance of existing Agreement State programs: 252,000 hours (an average of approximately 7,636 hours per State for 33 Agreement States). For Agreement State response to 9 IMPEP questionnaires annually: 477 hours (an average of 53 hours per program). The total number of hours expended annually is 257,173 hours.

9. *An indication of whether section 3507(d), Pub. L. 104–13 applies:* Not applicable.

10. *Abstract:* States wishing to become an Agreement State are requested to provide certain information to the NRC as specified by the Commission's Policy Statement, "Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement." Agreement States need to ensure that the Radiation Control Program under the Agreement remains adequate and compatible with the requirements of Section 274 of the Atomic Energy Act (Act) and must maintain certain information. NRC conducts periodic evaluations through IMPEP to ensure that these programs are compatible with the NRC's, meet the applicable parts of the Act, and are adequate to protect public health and safety.

A copy of the final supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1 F21, Rockville, Maryland 20852. OMB clearance requests are available at the NRC World Wide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions should be directed to the OMB reviewer listed below by May 28, 2004. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date. OMB Desk Officer, Office of Information and Regulatory Affairs (3150–0183), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be submitted by telephone at (202) 395–3087.

The NRC Clearance Officer is Brenda Jo. Shelton, (301) 415–7233.

Dated in Rockville, Maryland, this 22nd day of April, 2004.

For the Nuclear Regulatory Commission.

Brenda Jo. Shelton,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. E4–957 Filed 4–27–04; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF NUCLEAR REGULATORY COMMISSION

[Docket No. 050–206, 050–361, and 050–362]

Notice of Availability of Environmental Assessment and Finding of No Significant Impact for an Exemption From Certain Control and Tracking Requirements In 10 CFR Part 20 Appendix G Section III.E for the San Onofre Nuclear Generating Station in San Diego County, CA

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is considering the issuance of an exemption from certain control and tracking requirements in 10 CFR part 20 for the San Onofre Nuclear Generating Station (SONGS). The SONGS site consists of two operating reactors and a permanently shutdown nuclear reactor facility located in San Diego County, California. Inherent to the decommissioning process, large volumes of slightly contaminated rubble and debris are generated and require disposal. On January 26, 2004, Southern California Edison (the licensee) requested an exemption from the requirements in 10 CFR part 20, appendix G section III.E to investigate and file a report to the NRC if shipments of low-level radioactive waste are not acknowledged by the intended recipient within 20 days after transfer to the shipper. This exemption would extend the time period that can elapse during shipments of low-level radioactive waste before the licensee is required to investigate and file a report to the NRC from 20 days to 35 days. The exemption request is based on a statistical analysis of the historical data of low-level radioactive waste shipment times from the licensee's site to the disposal site using rail or combination truck/rail shipping methods. The NRC staff has prepared an environmental assessment (EA) in support of this action, in accordance with the requirements of 10 CFR part 51. The conclusion of the EA is a Finding of No Significant Impact (FONSI) for the proposed action.

II. EA Summary

The proposed action would grant an exemption to extend the 20-day investigation and reporting requirements for shipments of low-level radioactive waste to 35 days. Since 1999, the licensee has made over 150 shipments of low-level radioactive waste as part of the decommissioning efforts at the facility. MHF Logistical Solutions (MHF) is the rail broker company used by the licensee to perform these shipments. MHF

Logistical Solutions has a tracking system that monitors the progress of the shipments from their originating point at SONGS until they arrive to their final destination at Envirocare in Clive, Utah. The shipments are made by either rail or combination truck/rail. According to the licensee, the transportation time alone by either rail or combination truck/rail took over 16 days on average, with one shipment taking 57 days to arrive at Envirocare.

In addition to this time, administrative procedures at Envirocare and mail delivery could add up to 11 additional days. Based on historical data and estimates of the remaining waste at SONGS Unit 1, the licensee could have to perform over 100 investigations and reports to the NRC during the next five years if the 20-day shipping criteria is maintained. The licensee affirms that the low-level radioactive waste shipments will always be tracked throughout transportation until they arrive at their intended destination. The licensee believes that the need to investigate, trace, and report to the NRC on the shipment of low-level radioactive waste packages not reaching their destination within 20 days does not serve the underlying purpose of the rule and it is not necessary. As a result, the licensee states that granting this exemption will not result in an undue hazard to life or property.

The NRC has examined the licensee's proposed exemption request and concluded that it is procedural and administrative in nature. There are no significant radiological environmental impacts associated with this exemption, and it will not result in significant nonradiological environmental impacts.

III. Finding of No Significant Impact

NRC has prepared the EA (summarized above) in support of the licensee's application for an exemption request. 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.

IV. Further Information

The EA and the documents related to this proposed action, including the request for the exemption, are available for inspection at the NRC Public Electronic Reading Room at the following address: *http://www.nrc.gov/reading-rm/pdr.html.* The ADAMS accession number for the licensee's exemption request letter dated January 26, 2004 is ML040330945. The ADAMS accession number for the EA is ML040780782. Persons who do not have access to ADAMS, or who encounter problems in accessing the documents located in ADAMS, should contact the NRC Public Document Room (PDR) reference staff by telephone at 1–800–397–4209 or 301–415–4737. They can also be reached via e-mail at *pdr@nrc.gov.* Documents may also be examined, and/or copied for a fee, at the NRC PDR, located at One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. Any questions with respect to this action should be referred to Mr. William C. Huffman, Division of Waste Management and Environmental Protection, Office of Nuclear Material Safety and Safeguards. He can be reached at (301) 415–1141.

For the Nuclear Regulatory Commission.

Dated in Rockville, Maryland, this 21st day of April, 2004.

Daniel M. Gillen,

Deputy Director, Decommissioning Directorate, Division of Waste Management and Environmental Protection, Office of Nuclear Material Safety and Safeguards.

[FR Doc. E4–955 Filed 4–27–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards Subcommittee Meeting on Planning and Procedures; Notice of Meeting

The ACRS Subcommittee on Planning and Procedures will hold a meeting on May 5, 2004, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance, with the exception of a portion that may be closed pursuant to 5 U.S.C. 552b(c)(2) and (6) to discuss organizational and personnel matters that relate solely to the internal personnel rules and practices of the ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy.

The agenda for the subject meeting shall be as follows:

Wednesday, May 5, 2004—8:30 a.m.–10:30 a.m.

The Subcommittee will discuss proposed ACRS activities and related matters. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official, Mr. Sam Duraiswamy (telephone: 301–415–7364) between 7:30 a.m. and 4:15 p.m. (e.t.) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Electronic recordings will be permitted only during those portions of the meeting that are open to the public.

Further information regarding this meeting can be obtained by contacting the Designated Federal Official between 7:30 a.m. and 4:15 p.m. (e.t.). Persons planning to attend this meeting are urged to contact the above named individual at least two working days prior to the meeting to be advised of any potential changes in the agenda.

Dated: April 20, 2004.

Medhat El-Zeftawy,

Acting Associate Director for Technical Support, ACRS/ACNW.

[FR Doc. E4–952 Filed 4–27–04; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF MANAGEMENT AND BUDGET

Revised Information Quality Bulletin on Peer Review

AGENCY: Office of Management and Budget, Executive Office of the President.

ACTION: Notice and request for comments.

SUMMARY: The Office of Management and Budget (OMB), in consultation with the Office of Science and Technology Policy (OSTP), is re-proposing its new guidance designed to realize the benefits of meaningful peer review of the most important science disseminated by the Federal Government. This Notice requests comment on the revised Bulletin, now entitled "Revised Information Quality Bulletin on Peer Review." OMB originally requested comment on its "Proposed Bulletin on Peer Review and Information Quality," published in the **Federal Register** on September 15, 2003. We received 187 comments during the public comment period, listened to discussion at a public workshop at the National Academy of Sciences (NAS), and carried out an interagency review. This process led to a substantially revised Bulletin, which incorporates many of the diverse perspectives and suggestions voiced during the comment period. The public comments are posted at: *http://www.whitehouse.gov/omb/inforeg/2003iq/iq_list.html.* A summary of the public and agency comments, including responses by OMB and OSTP, is

available at *http://www.whitehouse.gov/omb/inforeg/infopoltech.html#iq.*

The revised Bulletin incorporates a number of changes:

- Providing in the preamble, a more extensive discussion of why government-wide peer review guidance is needed;
- Providing more discretion to federal agencies in determining what type of peer review mechanism is appropriate for specific information products;
- Providing exemptions for time-sensitive medical, public health and safety information and other compelling circumstances;
- Indicating in a savings clause that the guidance does not create any new rights for litigation against federal agencies;
- Defining a more transparent process for public participation in peer review planning; and
- Requiring the most rigorous form of peer review only for highly influential scientific assessments.

This Bulletin is part of an ongoing effort to improve the quality, objectivity, utility, and integrity of information disseminated by the Federal Government to the public. This Bulletin would be issued under the authority of section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658); 44 U.S.C. 3504(d)(1), 3506(a)(1)(B); Executive Order No. 12866, as amended. Part I of the **SUPPLEMENTARY INFORMATION** below provides the Preamble to the Bulletin. Part II provides the text of the proposed bulletin.

DATES: Interested parties should submit comments to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, at the address shown below on or before May 28, 2004.

John D. Graham,

Administrator, Office of Information and Regulatory Affairs.

SUPPLEMENTARY INFORMATION:

Introduction

On September 15, 2003, OIRA published a draft Peer Review Bulletin for public comment. We received 187 comments during the public comment period, participated in a public workshop at the National Academy of Sciences (NAS), and undertook an interagency review process. This process led to a substantially revised Bulletin, which incorporates many of the diverse perspectives and suggestions voiced during the comment period.

As almost all commenters recognized, peer review is an important way to enhance the quality of information. When done in an open, rigorous manner, independent peer review improves both the quality of scientific information and the public's confidence in the integrity of science.

Under this Bulletin, agencies must undertake a peer review of influential scientific information before they disseminate the information to the public. Different types of peer review are appropriate for different types of information products, and agencies are granted under this Bulletin appropriate discretion to weigh the benefits and costs of using a particular peer review mechanism for a particular information product. This Bulletin leaves the selection of a peer review mechanism for influential scientific information to the agency's discretion. Based on public and agency comments, we also exempted various types of information products from the requirements of this Bulletin, including time-sensitive medical, health, and safety determinations, in order to ensure that peer review does not unduly delay the release of time-sensitive findings.

This Bulletin also imposes minimum requirements for the peer review of highly influential scientific assessments, which are a subset of influential scientific information. A scientific assessment is an evaluation of a body of scientific or technical knowledge which typically synthesizes multiple factual inputs, data, models, assumptions, and/or applies best professional judgment to bridge uncertainties in the available information. Although the proposed Bulletin imposed heightened peer review requirements on a broader array of information products, we agree with some commenters that, in order to ensure that the Bulletin is not too costly or rigid, more intensive peer review should be restricted to the more important information disseminated by the Federal Government.

Even for this category of highly influential scientific assessments, the revised Bulletin leaves broad discretion to the agency formulating the peer review plan. In general, an agency conducting a peer review of a highly influential scientific assessment must ensure that the peer review process is transparent by making available to the public a written charge to the peer reviewers, the peer reviewers' report, and the agency's response to the peer reviewers' report. The agency selecting peer reviewers must ensure that the reviewers possess the necessary expertise. In addition, the agency must address reviewers' potential conflicts of interest (including those stemming from ties to regulated businesses) and independence from the agency. In response to comments, this revised Bulletin encourages agencies to consider using the panel selection criteria employed by the NAS. The use of a transparent process, coupled with the selection of objective and independent peer reviewers, should improve the quality of government science while promoting public confidence in the integrity of the government's scientific products.

Peer Review

Peer review is one of the important procedures used in science to ensure that the quality of published information meets the standards of the scientific community. It is a form of deliberation involving an exchange of judgments about the appropriateness of methods and the strength of the author's inferences.[1] Peer review occurs when a draft product is reviewed for quality by specialists who were not involved in producing the draft.

The peer reviewer's report is an evaluation or critique that is used by the authors of the draft to improve the product. Peer review typically evaluates the clarity of hypotheses, the validity of the research design, the quality of the data collection procedures, the robustness of the methods employed, the appropriateness of the methods for the hypotheses being tested, the extent to which the conclusions follow from the analysis, and the strengths and limitations of the overall product.

Peer review has diverse purposes. Editors of scientific journals use reviewer comments to help determine whether a draft scientific article is of sufficient quality, importance, and interest to a field of study to justify publication. Research funding organizations often use peer review to evaluate research proposals. In addition, some federal agencies make use of peer review to obtain evaluations of draft information products that contain important scientific determinations.

Peer review should not be confused with public comment and other stakeholder processes. The selection of participants in a peer review is based on expertise, independence, and the absence of conflict of interest. Furthermore, notice-and-comment procedures for agency rulemaking do not provide an adequate substitute for peer review, as disinterested experts—especially those most knowledgeable in a field—often do not file public comments with federal agencies.

[1] Carnegie Commission on Science, Technology, and Government, *Risk and the Environment: Improving Regulatory Decision Making*, Carnegie Commission, New York, 1993: 75.

The critique provided by a peer review often suggests ways to clarify assumptions, findings, and conclusions. For instance, peer reviews can filter out biases and identify oversights, omissions, and inconsistencies.[2] Peer review also may encourage authors to more fully acknowledge limitations and uncertainties. In some cases, reviewers might recommend major changes to the draft, such as refinement of hypotheses, reconsideration of research design, modifications of data collection or analysis methods, or alternative conclusions. However, peer review does not always lead to specific modifications in the draft product. In some cases, a draft is in excellent shape prior to being submitted for review. In others, the authors do not concur with changes suggested by one or more reviewers.

Peer review may take a variety of forms, depending upon the nature and importance of the product. For example, the reviewers may represent one scientific discipline or a variety of disciplines; the number of reviewers may range from a few to more than a dozen; the names of each reviewer may be disclosed publicly or may remain anonymous (*e.g.*, to encourage candor); the reviewers may be blinded to the authors of the report or the names of the authors may be disclosed to the reviewers; the reviewers may prepare individual reports or a panel of reviewers may be constituted to produce a collaborative report; panels may do their work electronically or they may meet together in person to discuss and prepare their evaluations; and reviewers may be compensated for their work or they may donate their time as a contribution to science or public service.

For large, complex reports, different reviewers may be assigned to different chapters or topics. Such reports may be reviewed in stages, sometimes with blinded, confidential reviews that precede a public process of panel review. As part of peer review, there may be opportunity for written and/or oral public comments on the draft product.

The results of peer review are often only one of the criteria used to make decisions about journal publication, grant funding, and information dissemination. For instance, the editors of scientific journals (rather than the peer reviewers) make final decisions about a manuscript's appropriateness for publication based on a variety of considerations. In research-funding decisions, the reports of peer reviewers often play an important role, but the final decisions about funding are often made by accountable officials based on a variety of considerations. Similarly, when a government agency sponsors peer review of its own draft documents, the peer review reports are an important factor in information dissemination decisions, but are rarely the sole consideration. Agencies are not expected to cede their discretion with regard to dissemination or use of information to peer reviewers; accountable agency officials must make the final decisions.

The Need for Stronger Peer Review Policies

There are a multiplicity of science advisory procedures used at federal agencies and across the wide variety of scientific products prepared by agencies.[3] In response to congressional inquiry, the U.S. General Accounting Office documented the variability in both the definition and implementation of peer review across agencies.[4] The Carnegie Commission on Science, Technology and Government[5] has highlighted the importance of "internal" scientific advice (within the agency) and "external" advice (through scientific advisory boards and other mechanisms).

A wide variety of authorities have argued that peer review practices at federal agencies need to be strengthened.[6] Other arguments focus on specific types of scientific products (*e.g.*, assessments of health, safety and environmental hazards).[7] Indeed, the Congressional/Presidential Commission on Risk Assessment and Risk Management suggests that "peer review of economic and social science information should have as high a priority as peer review of health, ecological, and engineering information."[8]

Some agencies have formal peer review policies, while others do not. Even agencies that have such policies do not always follow them prior to the release of important scientific products.

Prior to the development of this Bulletin, there were no government-wide standards concerning when peer review is required and, if required, what type of peer review processes are appropriate. No formal interagency mechanism existed to foster cross-agency sharing of experiences with peer review practices and policies. Despite the importance of peer review for the credibility of agency scientific products, the public lacks a consistent way to determine when an important scientific information product is being developed by an agency, the type of peer review planned for that product, or whether there will be an opportunity to provide comments and data to the reviewers.

This Bulletin establishes minimum standards for when peer review is required for scientific information and the types of peer review that should be considered by agencies in different circumstances. It also establishes a transparent process for public disclosure of peer review planning, including the establishment of an agenda that describes the peer review process that the agency has chosen for each of its forthcoming influential scientific information products.

Legal Authority for the Bulletin

This Bulletin is issued under the Information Quality Act and OMB's general authorities to oversee the quality of agency information, analyses, and regulatory actions. In the Information Quality Act, Congress directed OMB to issue guidelines to "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility and integrity

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[2] William W. Lawrance, *Madern Science and Human Values*, Oxford University Press, New Yark, NY 1985: 85.

[3] Sheila Jasanaff, *The Fifth Branch: Science Advisars as Palicy Makers*, Harvard University Press, Bostan, 1990.

[4] U.S. General Accounting Office, *Federal Research: Peer Review Practices at Federal Agencies Vary*, GAO/RCED–99–99, Washingtan, DC, 1999.

[5] Carnegie Commissian on Science, Technalagy, and Government, *Risk and the Enviranment: Impraving Regulatary Decision Making*, Carnegie Cammissian, New York, 1993: 90.

[6] Natianal Academy af Sciences, *Peer Review in the Department af Energy—Office af Science and Technalagy*, Interim Repart, Natianal Academy Press, Washington, DC, 1997; Natianal Academy af Sciences, *Peer Review in Environmental Technalagy Develapment: The Department af Energy—Office af Science and Technalagy*, Natianal Academy Press, Washingtan, DC, 1998; Natianal Academy af Sciences, *Strengthening Science at the U.S. Enviranmental Pratectian Agency: Research-Management and Peer-Review Practices*, Natianal Academy Press, Washingtan, DC, 2000; U.S. General Accaunting Office, *EPA's Science Advisary Baard Panels: Impraved Palicies and Pracedures Needed ta Ensure Independence and Balance*, GAO–01–536, Washingtan, DC, 2001; U.S. Environmental Pratectian Agency, Office af Inspectar General, *Pilat Study: Science in Support af Rulemaking 2003*–P–00003, Washingtan, DC, 2002; Carnegie Cammissian an Science, Technalagy, and Gavernment, *In the Natianal Interest: The Federal Government in the Refarm af K–12 Math and Science Educatian*, Carnegie Cammissian, New Yark, 1991; U.S. General Accaunting Office, *Endangered Species Pragram: Informatian an Haw Funds Are Allacated and What Activities are Emphasized*, GAO–02–581, Washingtan, DC 2002.

[7] Natianal Research Cauncil, *Science and Judgment in Risk Assessment*, Natianal Academy Press, Washingtan, DC, 1994.

[8] Presidential/Congressianal Cammissian an Risk Assessment and Risk Management, Risk Cammissian Repart, Volume 2, *Risk Assessment and Risk Management in Regulatary Decisian-Making*, 1997:103.

of information" disseminated by Federal agencies. Public Law 106–554, 515(a). The Information Quality Act was crafted as an amendment to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, which requires OMB, among other things, to "develop and oversee the implementation of policies, principles, standards, and guidelines to * * * apply to Federal agency dissemination of public information." In addition, Executive Order 12866, 58 FR 51735 (Oct. 4, 1993), establishes that OIRA is "the repository of expertise concerning regulatory issues," and it directs OMB to provide guidance to the agencies on regulatory planning. E.O. 12866, section 2(b). The Order also requires that "[e]ach agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, or other information." E.O. 12866, section 1(b)(7). Finally, OMB has general authority to manage the agencies under the purview of the President's Constitutional authority to oversee the unitary Executive Branch. *See, e.g.*, the Budget and Accounting Procedures Act of 1950, as amended, 31 U.S.C. 1111; Reorganization Plan No. 2 of 1970, 84 Stat. 2085; Executive Order 11541, 35 FR 10737 (July 1, 1970); Executive Order 12866. All of these authorities support this Bulletin.

The Requirements of This Bulletin

This Bulletin addresses peer review of scientific information disseminations that contain findings or conclusions that represent the official position of one or more Departments or agencies of the Federal Government.

Section I: Definitions

Section I provides definitions that are central to this Bulletin. Several terms are identical to or based on those used in OMB's government-wide information quality guidelines 67 FR 8452 (Feb. 22, 2002), and the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The term "Administrator" means the Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget. The term "agency" includes all agencies subject to the Paperwork Reduction Act, *see* 44 U.S.C. 3502(1). The term "Information Quality Act" means Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658).

The term "dissemination" means agency initiated or sponsored distribution of information to the public. Dissemination does not include distribution limited to government employees or agency contractors or grantees; intra- or inter-agency use or sharing of government information; or responses to requests for agency records under the Freedom of Information Act, the Privacy Act, the Federal Advisory Committee Act or similar law. This definition also excludes distribution limited to correspondence with individuals or persons, press releases, archival records, public filings, subpoenas and adjudicative processes. Finally, "dissemination" also excludes information distributed for peer review in compliance with this Bulletin, provided that the distributing agency includes an appropriate and clear disclaimer on the information, as explained more fully below.

In the context of this Bulletin, the definition of "dissemination" also goes beyond the definition in OMB's government-wide information quality guidelines to address the need for peer review prior to official dissemination of the information product. In cases where a draft report or other information is released by an agency for purposes of peer review, a question may arise as to whether the draft report constitutes an official "dissemination" under information-quality guidelines. Normally, draft reports undergoing peer review are not intended as disseminations—because they are not yet final—and thus Section I instructs agencies to make this clear by presenting the following disclaimer in the report: "THIS INFORMATION IS DISTRIBUTED SOLELY FOR THE PURPOSE OF PRE-DISSEMINATION PEER REVIEW UNDER APPLICABLE INFORMATION QUALITY GUIDELINES. IT HAS NOT BEEN FORMALLY DISSEMINATED BY [THE AGENCY] AND SHOULD NOT BE CONSTRUED TO REPRESENT ANY AGENCY DETERMINATION OR POLICY."

This disclaimer should appear on each page of a draft report in cases where the information is highly relevant to specific policy or regulatory deliberations. Agencies also should discourage state, local, international and private organizations from using information in draft reports that are undergoing peer review. Draft influential scientific information being presented at scientific meetings prior to peer review must include the disclaimer: "THE VIEWS IN THIS REPORT (PRESENTATION) ARE THOSE OF THE AUTHOR(S) AND DO NOT NECESSARILY REPRESENT THE VIEWS OF THE FUNDING AGENCY."

For the purposes of the peer review Bulletin, the term "scientific information" means factual inputs, data, models, analyses, or scientific assessments related to such disciplines as the behavioral and social sciences, public health and medical sciences, life and earth sciences, engineering, or physical sciences. This includes any communication or representation of knowledge such as facts or data, in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual forms. This definition includes information that an agency disseminates from a web page, but does not include the provision of hyperlinks on a Web page to information that others disseminate. This definition excludes opinions, where the agency's presentation makes clear that an individual's opinion, rather than a statement of fact or of the agency's views, is being offered.

The term "influential scientific information" means the scientific information the dissemination of which the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions. In OMB's government-wide information quality guidelines, the term "influential information" is used in the context of "influential scientific, financial, or statistical information." However, this Bulletin only covers "influential scientific information."

For the purposes of this Bulletin, the term "scientific assessment" means an evaluation of a body of scientific or technical knowledge which typically synthesizes multiple factual inputs, data, models, assumptions, and/or applies best professional judgment to bridge uncertainties in the available information. These assessments include, but are not limited to, state-of-science reports, technology assessments, weight-of-evidence analyses, meta-analyses, risk assessments, toxicological profiles of substances, integrated assessment models, hazard determinations, exposure assessments, or health, ecological, or safety assessments. The assessment will often draw upon knowledge from multiple disciplines.

Section II: Peer Review of Influential Scientific Information

Section II requires each agency to subject "influential" scientific information to peer review prior to dissemination. For dissemination of influential scientific information, Section II provides agencies broad discretion in determining what type of peer review is appropriate and what procedures should be employed to select appropriate reviewers.

The National Academy of Public Administration suggests that the intensity of peer review should be

commensurate with the significance of the information being disseminated and the likely implications for policy decisions.[9] Furthermore, agencies need to consider tradeoffs between depth of peer review and timeliness.[10] More rigorous peer review is necessary for information that is based on novel methods or presents complex challenges for interpretation. Furthermore, the need for rigorous peer review is greater when the information contains precedent-setting methods or models, presents conclusions that are likely to change prevailing practices, or is likely to affect policy decisions that have a significant impact.

This tradeoff can be considered in a benefit-cost framework. The costs of peer review are the direct costs of the peer review activity, and the potential delay in government and private actions that can result from peer review. The benefits of peer review are equally clear: the insights offered by peer reviewers may lead to policy with more benefits and/or fewer costs. In addition to contributing to strong science, peer review, if performed fairly and rigorously, can build consensus among stakeholders and reduce the temptation for courts and legislators to second-guess agency actions.[11] While it will not always be easy for agencies to quantify the benefits and costs of peer review, we encourage agencies to approach peer review from a benefit-cost perspective.

Regardless of the peer review mechanism chosen, agencies should strive to ensure that their peer review practices are characterized by both scientific integrity and process integrity. "Scientific integrity," in the context of peer review, refers to such issues as "expertise and balance of the panel members, the identification of the scientific issues and clarity of the charge to the panel, and the quality, focus and depth of the discussion of the issues by the panel, the rationale and supportability of the panel's findings, and the accuracy and clarity of the panel report." "Process integrity" includes such issues as "transparency and openness, avoidance of real or perceived conflicts of interest, a workable process for public comment and involvement," as well as adhering to defined procedures.[12]

When deciding what type of peer review mechanism is appropriate for a specific information product, agencies will need to consider at least the following issues: individual versus panel review; timing; the scope of the review; the selection of reviewers; disclosure; public participation; and disposition of reviewer comments. These issues are relevant to any peer review under this Bulletin.

Individual Versus Panel Review

Letter reviews by several experts generally will be more expeditious than convening a panel of a dozen or more experts. Individual letters are more appropriate when a draft document covers only one discipline or when premature disclosure of a sensitive report to a public panel could cause harm to government or private interests. When time and resources warrant, panels are preferable, as they tend to be more deliberative than individual letter reviews and the reviewers can learn from each other. There are also multi-stage processes in which confidential letter reviews are conducted prior to release of a draft document for public notice and comment, followed by a formal panel review.

These more rigorous and expensive processes are appropriate for highly complex, multidisciplinary, and more important documents, especially those that are novel or precedent-setting.

Timing of Peer Review

As a general rule, it is most useful to consult with peers early in the process of producing an information product. For example, in the context of risk assessments, it is valuable to have the choice of input data and the specification of the model reviewed by peers before the agency invests time and resources in implementing the model and interpreting the results. "Early" peer review occurs in time to "focus attention on data inadequacies in time for corrections."[13]

When an information product is a critical component of rule-making, it is important to obtain peer review before the agency announces its regulatory options so that any technical corrections can be made before the agency becomes invested in a specific approach or the positions of interest groups have hardened. If review occurs too late, it is unlikely to contribute to the course of a rulemaking. For instance, use of peer review is more often regarded as "generally successful" when it occurs "early" in the agency's deliberative process. Furthermore, investing in a more rigorous peer review early in the process "may provide net benefit by reducing the prospect of challenges to a regulation that later may trigger time consuming and resource-draining litigation."[14]

Scope of the Review

The "charge" contains the instructions to the peer reviewers regarding the objective of the peer review and the specific advice sought. The importance of the information, which shapes the goal of the peer review, influences the charge. For instance, the goal of the review might be to determine the utility of a body of literature for drawing certain conclusions about the feasibility of a technology or the safety of a product. In this context, an agency might ask reviewers to determine the relevance of conclusions drawn in one context for other contexts (*e.g.*, different exposure conditions or patient populations).

The charge to the reviewers should be determined in advance of the selection of the reviewers. In drafting the charge, it is important to remember the strengths and limitations of peer review. Peer review is most powerful when the charge is specific and steers the reviewers to specific technical questions while also directing reviewers to offer a broad evaluation of the overall product.

Uncertainty is inherent in science, and in many cases individual studies do not produce conclusive evidence. Rather, what is being reviewed in the case of scientific assessments is a scientific judgment rather than "scientific fact."[15] Specialists attempt to reach a consensus by weighing the accumulated evidence. As such, it is important that peer reviewers be asked to ensure that scientific uncertainties are clearly identified and characterized. Furthermore, since not all uncertainties will have an equal effect on the conclusions drawn, reviewers can be asked to ensure that the potential

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[9] National Academy of Public Administration, Setting Priorities, Getting Results: A New Direction for EPA, National Academy Press, Washington, DC, 1995:23.

[10] Presidential/Congressional Commission on Risk Assessment and Risk Management, Risk Commission Report, 1997.

[11] Mark R. Powell, *Science at EPA: Information in the Regulatory Process*, Resources for the Future, Washington, D.C., 1999: 148, 176; Sheila Jasanoff, *The Fifth Branch: Science Advisors as Policy Makers*, Harvard University Press, Boston, 1990: 242.

[12] ILSI Risk Sciences Institute, "Policies and Procedures: Model Peer Review Center of Excellence," 2002: 4. Available at *http://rsi.ilsi.org/file/Policies&Procedures.pdf*.

[13] Testimony of Bruce Alberts, PhD., President, National Academy of Sciences, February 24, 1998, Hearing on S. 981, before Senate Committee on Governmental Affairs.

[14] Fred Anderson, Mary Ann Chirba Martin, E. Donald Elliott, Cynthia Farina, Ernest Gellhorn, John D. Graham, C. Boyden Gray, Jeffrey Holmstead, Ronald M. Levin, Lars Noah, Katherine Rhyne, Jonathan Baert Wiener, "Regulatory Improvement Legislation: Risk Assessment, Cost-Benefit Analysis, and Judicial Review," *Duke Environmental Law and Policy Forum*, Fall 2000, vol. XI (1): 132.

[15] Mark R. Powell, *Science at EPA: Information in the Regulatory Process*, Resources for the Future, Washington, DC, 1999: 139.

implications of the uncertainties for the technical conclusions drawn are clear. Within this context, peer reviewers can make an important contribution by distinguishing scientific facts from professional judgments. Reviewers might be asked to provide advice on reasonable judgments that can be made from the scientific evidence, but the charge should make clear that the reviewers are not to provide advice on the policy (*e.g.*, the amount of uncertainty that is acceptable or the amount of precaution that should be embedded in an analysis). Such considerations are the purview of the government.[16] In addition, peer reviewers might be asked to consider value-of-information analyses that identify whether more research is likely to decrease key uncertainties.[17] Value-of-information analysis was suggested for this purpose in the reports of the Presidential/Congressional Commission on Risk Assessment and Risk Management.[18] A description of additional research that would appreciably influence the conclusions of the assessment might help an agency target any additional research resources available for this problem.

Selection of Reviewers

Expertise. The most important factor in selecting reviewers is expertise: ensuring that the selected reviewer has the knowledge, experience, and skills necessary to perform the review. In cases where the document being reviewed spans a variety of scientific disciplines or areas of technical expertise, reviewers who represent the necessary spectrum of knowledge should be chosen. For instance, expertise in applied mathematics and statistics is essential in the review of models, thereby allowing an audit of calculations and claims of significance and robustness based on the numeric data.[19] For some reviews, evaluation of biological plausibility is as important as statistical modeling.

Balance. Reviewers should also be selected to represent a diversity of scientific perspectives relevant to the subject. On most controversial issues, there exists a range of respected scientific viewpoints regarding interpretation of the available literature. Inviting reviewers with competing views on the science may lead to a sharper, more focused peer review. Indeed, as a final layer of review, some organizations (*e.g.*, the National Academy of Sciences) specifically recruit reviewers with strong opinions to test the scientific strength and balance of their reports.

Independence. In its narrowest sense, independence in a reviewer means that the reviewer was not involved in producing the draft document to be reviewed. However, for peer review of some documents, a broader view of independence is often necessary to assure credibility of the process. Reviewers are generally not employed by the agency or office producing the document. As the National Academy of Sciences has stated, "external experts often can be more open, frank, and challenging to the status quo than internal reviewers, who may feel constrained by organizational concerns." [20] The Carnegie Commission on Science, Technology, and Government notes that "external science advisory boards serve a critically important function in providing regulatory agencies with expert advice on a range of issues." [21] However, the choice of reviewers requires a case-by-case analysis. In some instances, reviewers employed by other federal and state agencies may be sufficiently independent.

A related issue raised by some commentators is whether government-funded scientists in universities and consulting firms have sufficient independence from the federal agencies that support their work to be appropriate peer reviewers for those agencies.[22] This concern can be mitigated in situations where the scientist determines the hypothesis to be tested or the method to be developed, which effectively creates a buffer between the scientist and the agency. Similarly, when an agency awards grants through a competitive process that includes peer review, the agency's potential to influence the scientist's research is limited. As such, when a scientist is awarded a government research grant through an investigator-initiated, peer-reviewed competition, there generally should be no question as to that scientist's ability to offer independent scientific advice to the agency on other projects. This contrasts, for example, to a situation in which a scientist has a consulting or contractual arrangement with the agency or office sponsoring a peer review. Likewise, when the agency and a researcher work together to design or implement a study, there is less independence from the agency. Furthermore, if a scientist has repeatedly served as a reviewer for the same agency, some may question whether that scientist is sufficiently independent from the agency to be employed as a peer reviewer on agency-sponsored projects.

As the foregoing suggests, independence issues pose a complex set of questions which much be considered by agencies when peer reviewers are selected. In general, agencies should make an effort to rotate peer review responsibilities across the available pool of qualified reviewers, recognizing that in some cases repeated service by the same reviewer is needed because of essential expertise.

Some agencies have built entire organizations to provide independent scientific advice while other agencies tend to employ ad hoc scientific panels on specific issues. Respect for the independence of reviewers may be enhanced if an agency collects names of potential reviewers based on considerations of expertise and reputation for objectivity from the public, including scientific or professional societies. The Department of Energy's use of the American Society of Mechanical Engineers to identify potential peer reviewers from a variety of different scientific societies provides an example of how professional societies can assist in the development of an independent peer review panel.[23]

Conflict of Interest. The National Academy of Sciences defines "conflict of interest" as any financial or other interest that conflicts with the service of an individual on the review panel because it could impair the individual's objectivity or could create an unfair competitive advantage for a person or organization.[24] This standard provides a

[18] Ibid.

[17] Granger Morgan and Max Henrion, "The Value of Knowing How Little You Know," *Uncertainty: A Guide to Dealing with Uncertainty in Quantitative Risk and Policy Analysis*, Cambridge University Press, 1990: 307.

[18] Presidential/Congressional Commission on Risk Assessment and Risk Management, Risk Commission Report, 1997, Volume 1: 39, Volume 2: 91.

[19] William W. Lowrance, *Modern Science and Human Values*, Oxford University Press, New York, NY 1985: 86.

[20] National Research Council, *Peer Review in Environmental Technology Development Programs: The Department of Energy's Office of Science and Technology*, National Academy Press, Washington, D.C., 1998: 3.

[21] Carnegie Commission on Science, Technology, and Government, *Risk and the Environment: Improving Regulatory Decision Making*, Carnegie Commission, New York, 1993: 90.

[22] Lars Noah, "Scientific 'Republicanism': Expert Peer Review and the Quest for Regulatory Deliberation", *Emory Law Journal*, Atlanta, Fall 2000:1066.

[23] American Society for Mechanical Engineers, *Assessment of Technologies Supported by the Office of Science and Technology, Department of Engineering: Results of the Peer Review for Fiscal Year 2002*, ASME Technical Publishing, Danvers, MA, 2002.

[24] National Academy of Science, "Policy and Procedures on Committee Composition and Balance

Continued

useful benchmark for agencies to consider in selecting peer reviewers. Agencies should make a special effort to examine prospective reviewers' potential financial conflicts, including significant investments, consulting arrangements, employer affiliations and grants/contracts. Financial ties of potential reviewers to regulated entities and regulatory agencies should be scrutinized when the information being reviewed is likely to be relevant to regulatory policy. The inquiry into potential conflicts goes beyond financial investments and business relationships and includes work as an expert witness, consulting arrangements, honoraria and sources of grants and contracts. To prevent any real or perceived conflicts of interest with potential reviewers and questions regarding the independence of reviewers, we refer agencies to federal ethics requirements, applicable standards issued by the Office of Government Ethics, and the prevailing practices of the National Academy of Sciences. Specifically, peer reviewers who are federal employees (including special government employees) are subject to federal requirements governing conflicts of interest. *See, e.g.*, 18 U.S.C. 208; 5 CFR part 2635. With respect to reviewers who are not federal employees, agencies should adopt or adapt the prevailing practices of the NAS regarding committee composition, conflicts, and balance [25] and/or the applicable ethics requirements that have been developed by the U.S. government, including the standards of the Office of Government Ethics.[26] Both NAS and the Federal Government recognize that under certain circumstances some conflict may be unavoidable in order to obtain the necessary expertise. *See,* for example, 18 U.S.C. 208(b)(3).

Disclosure Policies: Anonymous Versus Identified Reviewers

In choosing the appropriate peer review mechanism, agencies must balance the need for confidentiality of reviews with the need for transparency. In a journal review, the most common practice is to keep the names and affiliations of the reviewers confidential. This confidentiality is designed to encourage reviewers to be candid in their evaluations of the draft product under review. Such confidentiality may also encourage participation by qualified scientists. However, in the context of peer review of government products, such confidentiality may not always add to the credibility of the review process. Where the issue under review is likely to have large public or private sector impacts, the agency may decide that more transparency is in the public interest. In such cases, disclosure of the slate of reviewer names and their qualifications can strengthen public confidence in the peer review process. It may be feasible to disclose information about reviewers without disclosing their specific opinions. The degree of public disclosure of information about reviewers should balance the need for transparency with the need to protect the privacy of scientists.

Public Participation

Public comments can be important in shaping expert deliberations. Agencies may decide that peer review should precede an opportunity for public comment to ensure that the public receives the most scientifically strong product (rather than one that may change substantially as a result of peer reviewer suggestions). However, there are situations in which public participation in peer review is an important aspect of obtaining a high-quality product through a credible process. Agencies, however, should avoid open-ended comment periods, which may delay completion of peer reviews and complicate the completion of the final work product.

Public participation can take a variety of forms, including opportunities to provide oral comments before a peer review or requests to provide written comment to the peer reviewers. Another option is for agencies to publish a "request for comment" or other notice in which they solicit public comment before a panel of peer reviewers performs its work.

Disposition of Reviewer Comments

A peer review is considered completed once the Agency considers and addresses the reviewers' comments. All reviewer comments should be given reasonable consideration and be incorporated where relevant and valid. As part of the peer review planning process, agencies should determine whether they will consider reviewer comments confidential or make them available to the public once the reviewed document is disseminated. For instance, in the context of risk assessments, the National Academy of Sciences recommends that peer review include a written evaluation made available for public inspection.[27] Reviewers should be informed about how their comments will be disseminated, whether they will be disclosed with attribution, or whether they will be summarized without attribution. In cases where there is a public panel, the agency should plan publication of both the peer review report(s) and the Agency's response to peer reviewer comments.

Section III: Peer Review of Highly Influential Scientific Assessments

Whereas Section II leaves most of the considerations regarding the form of the peer review to the agency's discretion, Section III requires a more rigorous form of peer review for highly influential scientific assessments. The requirements of Section II of this Bulletin apply to Section III. In addition, Section III has some specific requirements, which are discussed below. In planning a peer review under Section III, agencies typically will have to devote greater resources and attention to the issues discussed in Section II, *i.e.*, individual versus panel review; timing; the scope of the review; the selection of reviewers; disclosure; public participation; and disposition of reviewer comments.

The term "scientific assessment" means an evaluation of a body of scientific or technical knowledge which typically synthesizes multiple factual inputs, data, models, assumptions, and/or applies best professional judgment to bridge uncertainties in the available information. These assessments include, but are not limited to, state-of-science reports, technology assessments, weight-of-evidence analyses, meta-analyses, risk assessments, toxicological profiles of substances, integrated assessment models, hazard determinations, exposure assessments, or health, ecological, or safety assessments. Typically, the data and models used in scientific assessments have already been subject to some form of peer review (*e.g.*, refereed journal peer review or peer review under Section II of this Bulletin).

A scientific assessment is considered "highly influential" if the agency or the OIRA Administrator determines that the dissemination could have a clear and substantial impact on important public policies (including regulatory actions) or private sector decisions with a potential effect of more than $500 million in any one year or that the

and Conflicts of Interest for Committees Used in the Development of Reports," May 2003: Available at: *http://www.nationalacademies.org/coi/index.html.*

[25] Ibid.

[26] United States Office of Government Ethics, "Standards of Ethical Conduct for Employees of the Executive Branch," Washington, D.C., 2002. Available at: *http://www.usoge.gov/pages/forms_pubs_otherdocs/fpo_files/reference/rfsoc_02.pdf.*

[27] National Research Council, *Risk Assessment in the Federal Government: Managing the Process*, National Academy Press, Washington, DC, 1983.

dissemination involves precedent setting, novel and complex approaches, or significant interagency interest. One of the ways information can exert economic impact is through the costs or benefits of a regulation based on the disseminated information. The qualitative aspect of this definition may be most useful in cases where it is difficult for an agency to predict the potential economic effect of dissemination. If information is covered by Section III, an agency is required to adhere to the peer-review procedures specified in Section III.

With regard to the selection of reviewers, Section III(2)(a) emphasizes consideration of expertise and balance. Expertise refers to the required knowledge, experience and skills required to perform the review whereas balance refers to the need for diversity in scientific perspective and disciplines. We emphasize that the term "balance" here refers not to balancing of stakeholder or political interests but rather to a broad and diverse representation of respected perspectives and intellectual traditions within the scientific community.

Section III(2)(b) instructs agencies to consider barring participation by scientists with a conflict of interest. The conflict of interest standards for Sections II and III of the Bulletin are identical. As discussed under Section II, those peer reviewers who are federal employees, including Special Government Employees, are subject to applicable statutory and regulatory standards for federal employees. For non-government employees, agencies should adopt or adapt the applicable ethical standards used by the Federal Government and/or the NAS.

Section III(2)(c) instructs agencies to ensure that reviewers are independent of the agency sponsoring the review. Scientists employed by the sponsoring agency are not permitted to serve as reviewers for highly influential scientific information. This does not preclude Special Government Employees, such as academics appointed to advisory committees, from serving as peer reviewers. Agencies (or their contractors) should seek and consider potential reviewers who have been nominated based on their expertise and objectivity by the public, including scientific and professional societies. We considered whether a reviewer is independent of the agency if that reviewer receives a substantial amount of research funding from the agency sponsoring the review. Research grants that were awarded to the scientist based on investigator-initiated, competitive, peer-reviewed proposals do not generally raise issues of independence. However, significant consulting and contractual relationships with the agency may raise issues of independence or conflict, depending upon the situation. Repeated use of the same reviewer in multiple assessments may raise issues of independence unless the particular reviewer's expertise is essential. Agencies can generally avoid the effect of use of the same reviewer by rotating membership across the available pool of qualified reviewers. Similarly, when using standing panels of scientific advisors, we suggest rotating membership among qualified scientists in order to obtain fresh perspectives and reinforce the reality and perception of independence from the agency. Section III(3)(c) also requires agencies to consider the prevailing selection practices used by the National Academy of Sciences, since they were designed to ensure independence from sponsors in the Federal Government.

Section III(3) requires agencies to provide reviewers with sufficient background information, including access to key studies, data and models, to perform their role as peer reviewers. In this respect, the peer review envisioned in Section III is more rigorous than some forms of journal peer review, where the reviewer is often not provided access to underlying data or models. Reviewers should be informed of applicable access, objectivity, reproducibility and other quality standards under federal information quality laws.

Section III(4) addresses opportunity for public participation in peer review, and provides that the agency should, wherever possible, provide for public participation. In some cases, an assessment may be so sensitive that it is critical that the agency's assessment achieve a high level of quality before it is publicized. In those situations, a rigorous yet confidential peer-review process may be appropriate, prior to public release of the assessment. If an agency decides to make a draft assessment publicly available at the onset of a peer review process, the agency shall, whenever possible, provide a vehicle for the public to provide written comments, make an oral presentation before the peer reviewers, or both. When written public comments are received, the agency should ensure that peer reviewers receive copies of comments that address significant scientific issues with ample time to consider them in their review.

Section III(5) requires that agencies instruct reviewers to prepare a peer review report that describes the nature and scope of their review and their findings and conclusions. The report should disclose the name of each peer reviewer and a brief description of their organizational affiliation, credentials and relevant experiences. When the agency uses a panel, the peer review report should either summarize the views of the group as a whole (including any dissenting views) or summarize the views of individual reviewers (with or without attribution of specific views to specific names). The agency must also prepare a written response to the peer review report, indicating whether the agency agrees with the reviewers and what actions the agency has taken or plans to take to address the points made by reviewers. The agency is required to disseminate the peer review report and the agency's response to the report on the agency's web site, including all the materials related to the peer review such as charge statement, peer review report, and agency response to the review.

Section III(6) authorizes but does not require an agency to commission an entity independent of the agency to select peer reviewers and/or manage the peer review process in accordance with this section. The entity may be a scientific or professional society, a firm specializing in peer review, or a non-profit organization with experience in peer review.

Section IV: Alternative Procedures

Peer review as described in this Bulletin is only one of many procedures that agencies can employ to ensure an appropriate degree of pre-dissemination quality of influential scientific information. As an alternative to complying with Sections II and III of this Bulletin, an agency may instead (1) rely on scientific information produced by the National Academy of Sciences, (2) commission the National Academy of Sciences to peer review an agency draft scientific information product, or (3) employ an alternative procedure or set of procedures, specifically approved by the OIRA Administrator in consultation with OSTP, that ensures that the scientific information product meets applicable information-quality standards. For example, an agency might choose to commission a respected third party other than the NAS (*e.g.*, the Health Effects Institute or the National Commission on Radiation Protection and Measurement) to conduct an assessment or series of related assessments. The purpose of Section IV is to encourage innovation in the methods used to ensure pre-dissemination quality control of influential scientific information.

Section V: Peer Review Planning

Section V requires agencies to begin a systematic process of peer review planning for influential scientific information and highly influential scientific assessments that the agency plans to disseminate in the foreseeable future. A key feature of planning is a web site listing of forthcoming influential scientific disseminations that is regularly updated by the agency, at least every six months. Each entry on the list of forthcoming disseminations should include a preliminary title of the planned report, a short paragraph describing the subject and purpose of the planned report, and an agency contact person. In addition, the agency should briefly describe its peer review plan, including the anticipated number of reviewers (3 or less; 4–10; more than 10), whether they shall work as individuals or a panel, and a succinct description of the primary disciplines or types of skills, expertise and experience needed in the review.

In addition, each peer review plan shall include the following: (1) Whether reviewers will be selected by the agency or by a designated outside organization; (2) whether the public, including scientific or professional societies, will be asked to nominate potential peer reviewers; (3) whether there will be opportunities for the public to comment on the work product to be peer reviewed, and if so, how and when these opportunities will be provided; and (4) whether or not the agency will provide peer reviewers copies of significant and relevant public comments prior to doing their work.

The peer review agenda will allow agencies to gauge the extent of public interest in the peer review process for influential scientific information. The agenda can also be used by the public to monitor agency compliance with this Bulletin. The Bulletin requires agencies to update their peer review agenda at least every six months. However, in some cases—particularly for highly influential scientific assessments and other particularly important information products—more frequent updates of existing entries on the agenda, or the addition of new entries to the agenda, may be warranted. When new entries are added to the agenda of forthcoming reports and other information products, the public should be provided with sufficient time to comment on the agency's peer review plan for that report or product. Agencies shall consider public comments on the peer review plan. Agencies are encouraged to offer some form of listserve for members of the public who would like to be notified by email each time an agency's peer review agenda has been updated.

The peer review planning requirements of this Bulletin are designed to be implemented in phases. Specifically, the planning requirements of the Bulletin will go into effect for documents subject to Section III of the Bulletin (highly influential scientific assessments) four months after publication. However, the planning requirements do not go into effect for documents subject to Section II of the Bulletin until one year after publication. It is expected that agency experience with the planning requirements of the Bulletin for the smaller scope of documents encompassed in Section III will be used to inform implementation of these planning requirements for the larger scope of documents covered under Section II.

Section VI: Certification in the Administrative Record

If an agency relies on influential scientific information subject to the requirements of this Bulletin in support of a regulatory action, the agency shall include in the administrative record for that action a certification that explains how the agency has complied with this Bulletin and the Information Quality Act. Relevant materials are to be placed in the administrative record.

Section VII: Safeguards and Waivers

Section VII establishes basic procedures to protect privacy and confidentiality concerns, and to allow for waiver of the requirements of the Bulletin where necessary. First, peer review must be conducted in a manner that respects privacy interests, confidential business information, and intellectual property. Second, the agency head may waive or defer some or all of the peer review requirements of Sections II or III of this Bulletin if there is a compelling rationale for waiver or deferral. If the agency head waives the peer review requirements prior to dissemination, peer review should be conducted as soon as practicable thereafter.

Section VIII: Exemptions

There are a variety of situations where agencies need not conduct peer review under this Bulletin. These include, for example, disseminations of sensitive information related to national security, foreign affairs, or negotiations involving international treaties and trade where compliance with this Bulletin would interfere with the need for secrecy or promptness.

An information product is not covered by the Bulletin unless it represents an official view of one or more Departments or agencies of the Federal Government. Since the Bulletin covers only official "disseminations" of the U.S. government, it does not cover information products released by government-funded scientists (*e.g.*, those supported extramurally or intramurally by federal agencies, or those working in state or local governments with federal support) if those information products are not represented as the views of the agency or Department supporting the research. In cases where the imprimatur of the Federal Government is not intended, government-funded scientists are advised to include a statement with their disseminated work indicating that "the views in this report are those of the author(s) and do not necessarily represent the views of the funding agency".

This Bulletin does not cover official disseminations that arise in adjudications and permit proceedings, unless the agency determines that the influential dissemination is scientifically or technically novel (*i.e.*, a major change in accepted practice) and likely to have precedent-setting influence on future adjudications or permit proceedings. This exclusion is intended to cover, among other things, licensing, approval and registration processes for specific products and development activities, as well as site-specific disseminations such as those made under Superfund or the National Environmental Policy Act (NEPA). The Bulletin also does not directly cover information supplied to the government by third parties (*e.g.*, studies by private consultants, companies and private, non-profit organizations, or research institutions such as universities). However, if a Department or agency plans to disseminate information supplied by a third party (*i.e.*, using this information to support decisions, thereby adopting this information as an official dissemination), the requirements of the Bulletin apply, assuming the dissemination is "influential".

The Bulletin does not cover time-sensitive medical, health, and safety disseminations (for this purpose, "health" includes public health, or plant or animal infectious diseases), or disseminations based primarily on data from a recent clinical trial that was adequately peer reviewed before the trial began.

This Bulletin covers original data and formal analytic models used by agencies in Regulatory Impact Analyses (RIAs). However, the RIA documents themselves are already reviewed through an interagency review process

under EO 12866 that involves application of the principles and methods defined in OMB Circular A–4. In that respect, RIAs are excluded from coverage by this Bulletin, although agencies are encouraged to have RIAs reviewed by peers within the government for adequacy and completeness. One model for such a review prior to submission to OIRA is offered by the Interagency Economic Peer Review (IEPR). The IEPR comprises agency economists engaged in benefit-cost analysis from across the Federal Government.

The Bulletin does not cover accounting, budget, and financial information including that which is generated or used by agencies that focus on interest rates, banking, currency, securities, commodities, futures, or taxes.

Routine statistical information released by federal statistical agencies (*e.g.*, periodic demographic and economic statistics) and the analysis of these data to compute standard indicators and trends (*e.g.*, unemployment and poverty rates) is excluded from this Bulletin.

The Bulletin does not cover information disseminated in connection with rules that materially alter entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof, other than influential scientific information disseminated in connection with non-routine rules in this category.

In general, the Bulletin does not impose new peer-review requirements on information that has already been adequately peer reviewed. Under the terms of the Bulletin, agencies should exercise discretion in determining when a draft information product has already been adequately peer reviewed. The mere existence of a public comment process (*e.g.*, notice-and-comment procedures under the Administrative Procedures Act) does not constitute adequate peer review, because it does not assure that qualified, impartial specialists in relevant fields have performed a critical evaluation of the agency's draft product.[28] For both Sections II and III of this Bulletin, principal findings, conclusions and recommendations in official reports of the National Academy of Sciences are generally presumed to have been adequately peer reviewed. Publication in a refereed scientific journal may mean that adequate peer review has been performed. However, because the intensity of journal review is highly variable, there may be cases in which an agency determines that a more rigorous or transparent review process is necessary. For instance, an agency may determine a particular journal review process did not address all of the questions that the agency should address before publishing a report. In addition, because science primarily advances through further research in which new data challenges prior theories, prior peer review and publication is not by itself sufficient grounds for determining that no further review is necessary.

Congress has assigned the NAS a special role in advising the Federal Government on scientific and technical issues. The peer-review procedures of the NAS are generally quite rigorous, and thus agencies should presume that major findings from NAS reports have been adequately peer reviewed.

If information is disseminated pursuant to an exemption to this Bulletin, subsequent disseminations are not automatically exempted. For example, if influential scientific information is first disseminated in the course of an exempt agency adjudication, but is later disseminated in the context of a non-exempt rulemaking, the subsequent dissemination will be subject to the requirements of this Bulletin even though the first dissemination was not.

Section IX: OIRA and OSTP Responsibilities

OIRA, in consultation with OSTP, is responsible for overseeing agency implementation of the requirements of this Bulletin. In order to foster learning about peer review practices across agencies, OIRA and OSTP shall form an interagency workgroup on peer review that meets regularly, discusses progress and challenges, and recommends improvements to peer review practices under the Bulletin.

Section X: Effective Date and Existing Law

The requirements of this Bulletin, with the exception of Section V, apply to information disseminated on or after four months after publication of this Bulletin. However, the Bulletin does not apply to information products that are already being addressed by an agency-initiated peer review process (*e.g.*, a draft is already being reviewed by a formal scientific advisory committee established by the agency). An existing peer review mechanism mandated by law should be implemented by the agency in a manner as consistent as possible with the practices and procedures outlined in this Bulletin. As noted above, the requirements in Section V apply to "highly influential scientific assessments," as designated in Section III of the Bulletin, within four months of publication of the final Bulletin. The requirements in Section V apply to documents subject to Section II of the Bulletin one year after publication of the final Bulletin.

Section XI: Judicial Review

This Bulletin is intended to improve the internal management of the executive branch and is not intended to create any new right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. Nor does this Bulletin abridge any existing rights of action. Consistent with current law, materials generated during the peer review process may be considered by courts adjudicating existing rights of action.

Bulletin for Peer Review

I. Definitions

For purposes of this Bulletin—

1. The term "Administrator" means the Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget;

2. The term "agency" has the same meaning as in the Paperwork Reduction Act, 44 U.S.C. 3502(1);

3. The term "dissemination" means agency initiated or sponsored distribution of information to the public (see 5 CFR 1320(d) (definition of "Conduct or Sponsor")). Dissemination does not include distribution limited to government employees or agency contracts or grantees; intra- or inter-agency use or sharing of government information; or responses to requests for agency records under the Freedom of Information Act, the Privacy Act, the Federal Advisory Committee Act or similar law. This definition also excludes distribution limited to correspondence with individuals or persons, press releases, archival records, public filings, subpoenas and adjudicative processes. The term "dissemination" also excludes information distributed for peer review in compliance with this Bulletin, provided that the distributing agency includes a clear disclaimer on the information as follows: "THIS INFORMATION IS DISTRIBUTED SOLELY FOR THE PURPOSE OF PRE-DISSEMINATION PEER REVIEW UNDER APPLICABLE INFORMATION QUALITY GUIDELINES. IT HAS NOT

[28] William W. Lowrance, *Modern Science and Human Values*, Oxford University Press, New York, NY 1985: 86.

BEEN FORMALLY DISSEMINATED BY [THE AGENCY] AND SHOULD NOT BE CONSTRUED TO REPRESENT ANY AGENCY DETERMINATION OR POLICY";

4. The term "influential scientific information" means scientific information the dissemination of which the agency reasonably can determine that dissemination of which will have or does have a clear and substantial impact on important public policies or private sector decisions;

5. The term "Information Quality Act" means section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658);

6. The term "scientific assessment" means an evaluation of a body of scientific or technical knowledge which typically synthesizes multiple factual inputs, data, models, assumptions, and/or applies best professional judgment to bridge uncertainties in the available information. These assessments include, but are not limited to, state-of-science reports, technology assessments, weight-of-evidence analyses, meta-analyses, risk assessments, toxicological profiles of substances, integrated assessment models, hazard determinations, exposure assessments, or health, ecological, or safety assessments, and

7. The term "scientific information" means factual inputs, data, models, analyses, or scientific assessments related to the behavioral and social sciences, public health and medical sciences, life and earth sciences, engineering, or physical sciences. This includes any communication or representation of knowledge such as facts or data, in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual forms. This definition includes information that an agency disseminates from a web page, but does not include the provision of hyperlinks to information that others disseminate. This definition does not include opinions, where the agency's presentation makes clear that what is being offered is someone's opinion rather than fact or the agency's views.

II. Peer Review of Influential Scientific Information

1. *In General:* To the extent permitted by law, each agency shall have a peer review conducted on all influential scientific information that the agency intends to disseminate. Agencies need not, however, have peer review conducted on information that has already been subjected to adequate peer review.

2. *Adequacy of Peer Review:* To be considered "adequate" for purposes of the preceding paragraph, a peer review need not comply with all of the requirements of this Bulletin. An agency may deem a prior peer review adequate if it determines that the peer review was sufficiently rigorous in light of the novelty and complexity of the science to be reviewed and the benefit and cost implications. For both Sections II and III of this Bulletin, principal findings, conclusions and recommendations in official reports of the National Academy of Sciences are generally presumed to have been adequately peer reviewed.

3. *Choice of Peer Review Mechanism:* When planning a peer review for influential scientific information, the agency shall select an appropriate peer review mechanism based on the novelty and complexity of the science to be reviewed and the benefit and cost implications. Depending on these factors, appropriate peer review mechanisms can range from review by qualified specialists within the Federal Government to formal review by an independent body of experts outside the government. Peer reviewers shall be selected on the basis of necessary technical or scientific expertise, and should not have participated in development of the work product.

4. *Conflicts:* In order to properly handle participation by scientists with a conflict of interest, the agency—or the entity selecting the peer reviewers—shall (i) ensure that those reviewers serving as federal employees (including special government employees as defined in 18 U.S.C. 202(a)) comply with applicable federal ethics requirements (ii) apply or adapt the federal ethics requirements for reviewers who are not federal employees; and (iii) consider the conflict of interest policy used by the National Academy of Sciences, including principles regarding potential financial conflicts arising from factors such as a reviewers' investments, employer and business affiliations, grants, contracts and consulting income. For scientific assessments relevant to specific regulations, a reviewer's financial ties to both regulated entities (*e.g.*, businesses) and the agency should be examined.

5. *Transparency:* A detailed summary or copy of the reviewers' comments, as a group or individually, shall be made available to the public and, where appropriate, be made part of the administrative record for related agency actions. Agencies shall consider the comments of the reviewers.

III. Additional Peer Review Requirements for Highly Influential Scientific Assessments

1. *Applicability:* This section applies to influential scientific information which the agency or the Administrator determines is a scientific assessment that:

(i) Could have a clear and substantial impact on important public policies (including regulatory actions) or private sector decisions with a potential effect of more than $500 million in any year, or

(ii) Involves precedent setting, novel, and complex approaches, or significant interagency interest.

2. *Selection of Reviewers:*

a. *Expertise and Balance:* Peer reviewers shall be selected to provide the necessary expertise, experience and skills, including specialists from multiple disciplines, as necessary. The group of reviewers shall be sufficiently broad and diverse to fairly represent the relevant scientific perspectives and fields of knowledge.

b. *Conflicts:* In order to properly handle participation by scientists with a conflict of interest, the agency—or the entity selecting the peer reviewers—shall (i) ensure that those reviewers serving as federal employees (including special government employees) comply with applicable federal ethics requirements; (ii) apply or adapt the federal ethics requirements for reviewers who are not federal employees; and (iii) consider the conflict of interest policy used by the National Academy of Sciences, including principles regarding potential financial conflicts arising from factors such as a reviewers' investments, employer and business affiliations, grants, contracts and consulting income. For scientific assessments relevant to specific regulations, a reviewer's financial ties to both regulated entities (*e.g.*, businesses) and the agency should be examined.

c. *Independence:* In order to ensure participation by scientists who are independent of the agency sponsoring the review, the agency—or entity selecting the reviewers—shall (i) bar participation by scientists employed by the agency sponsoring the review unless the reviewer's service as a peer reviewer defines the government employment (*i.e.*, special government employees); (ii) consider requesting the nomination of potential reviewers based on expertise and objectivity from the public, including scientific and professional societies; and (iii) consider the prevailing selection practices of the National Academy of Sciences

concerning ties of a potential committee member to the sponsoring agency. Agencies should avoid repeated use of the same reviewer on multiple assessments unless his or her participation is essential. Agencies are encouraged to rotate membership on panels across the pool of qualified reviewers. Research grants that were awarded to scientists based on investigator-initiated, competitive, peer-reviewed proposals generally do not raise issues as to independence or conflicts.

3. *Information Access:* The agency—or entity managing the peer review—shall provide the reviewers with sufficient information—including background information about key studies or models—to enable them to understand the data, analytic procedures, and assumptions used to support the key findings or conclusions of the draft assessment. Reviewers shall be informed of applicable access, objectivity, reproducibility and other quality standards under the federal laws governing information access and quality.

4. *Opportunity for Public Participation:* If the agency decides to make a draft assessment publicly available at the same time it is submitted for peer review (or during the peer review process), the agency shall, whenever practical, provide to peer reviewers a compilation or summary of relevant public comments on the draft assessment that address significant scientific or technical issues. When there is sufficient public interest, the agency—or entity managing the peer review—shall consider establishing a public comment period for a draft report and sponsoring a public meeting where oral presentations on scientific issues can be made to the peer reviewers by interested members of the public. Time limits for public participation shall be specified.

5. *Peer Review Reports:* The agency—or entity managing the peer review—shall instruct peer reviewers to prepare a report that describes the nature of their review and their findings and conclusions. The peer review report should either summarize the views of individual reviewers (either with or without specific attributions, as long as the reviewers are informed in advance of the agency's plans for disclosure) or represent the views of the group as a whole (including any dissenting views). The peer review report shall also disclose the names, organizational affiliations, and a short paragraph on the credentials and relevant experiences of each peer reviewer. The agency is required to prepare a written response to the peer review report explaining: The agency's agreement or disagreement; any actions the agency has undertaken or will undertake in response to the report; and (if applicable) the reasons the agency believes those actions satisfy any key concerns or recommendations in the report. The agency shall disseminate the final peer review report and the agency's written statement of response on the agency's Web site, and all the materials related to the peer review (charge statement, peer review report, and agency response) shall be included in the administrative record for any related agency action.

6. *Selection and Management of Peer Review Panel:* The agency may commission entities independent of the agency to select peer reviewers and/or manage the peer review process in accordance with this section.

IV. Alternative Procedures

As an alternative to complying with Sections II and III of this Bulletin, an agency may instead: (i) Rely on a scientific information produced by the National Academy of Sciences; (ii) commission the National Academy of Sciences to peer review an agency draft scientific information product; or (iii) employ an alternative scientific procedure or process, specifically approved by the Administrator in consultation with OSTP, that ensures that the scientific information product satisfies applicable information quality standards. The alternative procedure(s) may be applied to a single report or group of reports.

V. Peer Review Planning

1. *Peer Review Agenda:* Each agency shall post on its Internet Web site, and update at least every six months, an agenda designating all planned and ongoing influential scientific information subject to Section II and highly influential scientific assessments subject to Section III of this Bulletin.

2. *Peer Review Plans:*

a. *General Requirements:* For each entry on the agenda that is subject to this Bulletin, the agency shall describe the peer review plan. Each peer review plan shall include: (i) A paragraph including the title, subject and purpose of the planned report, as well as an agency contact to whom inquiries may be directed to learn the specifics of the plan; (ii) whether the review will be conducted by a panel or individual letters; (iii) the anticipated number of reviewers (3 or less; 4–10; or more than 10); and (iv) a succinct description of the primary disciplines or types of expertise needed in the review.

b. *Designations:* Each peer review plan shall designate the following: (i) Whether reviewers will be selected by the agency or by a designated outside organization; (ii) whether the public, including scientific or professional societies, will be asked to nominate potential peer reviewers; (iii) whether there will be opportunities for the public to comment on the work product to be peer reviewed, and if so, how and when these opportunities will be provided; and (iv) whether the agency will provide peer reviewers copies of significant and relevant public comments prior to doing their work.

c. *Agenda Updates:* Agencies are encouraged to offer a listserve to alert interested members of the public when new entries are added or updated.

d. *Public Comment:* Agencies shall establish a mechanism for allowing the public to comment on the adequacy of the peer review plans and designations. Agencies must consider public comments on peer review plans.

VI. Certification in the Administrative Record

If an agency relies on influential scientific information or a highly influential scientific assessment subject to the requirements of this Bulletin in support of a regulatory action, it shall include in the administrative record for that action a certification explaining how the agency has complied with the requirements of this Bulletin and the Information Quality Act.

VII. Safeguards and Waivers

1. *Privacy and Confidentiality:* Peer review shall be conducted in a manner that respects (i) privacy interests; (ii) confidential business information; and (iii) intellectual property.

2. *Waiver:* The agency head may waive or defer some or all of the peer review requirements of Section II and III of this Bulletin where warranted by a compelling rationale. If the agency head waives the peer review requirements prior to dissemination, peer review should be conducted as soon as practicable thereafter.

VIII. Exemptions

Agencies need not have peer review conducted on information that is:

1. Related to national security, foreign affairs, or negotiations involving international trade or treaties where compliance with this Bulletin would interfere with the need for secrecy or promptness;

2. Produced by government-funded scientists (*e.g.*, those supported extramurally or intramurally by federal agencies or those working in state or

local governments with federal support) if those information products are not represented as the views of a Department or agency. To qualify for this exemption, scientists are advised to include in their information product a clear disclaimer that "the views in this report are those of the author(s) and do not necessarily represent the views of the funding agency";

3. Disseminated in the course of an individual agency adjudication or permit proceeding (including a registration, approval, licensing, site-specific determination), unless the agency determines that the influential dissemination is scientifically or technically novel and likely to have precedent-setting influence on future adjudications and/or permit proceedings;

4. A medical, health, or safety dissemination where the agency determines that the dissemination is time-sensitive or is based primarily on data from a recent clinical trial that was adequately peer reviewed before the trial began.

5. An agency regulatory impact analysis or regulatory flexibility analysis subject to interagency review under Executive Order 12866;

6. Routine statistical information released by federal statistical agencies (*e.g.*, periodic information about unemployment and poverty rates);

7. Accounting, budget, and financial information, including that which is generated or used by agencies that focus on interest rates, banking, currency, securities, commodities, futures, or taxes; or

8. Information disseminated in connection with rules that materially alter entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof, except that influential scientific information disseminated in connection with non-routine rules is not exempt.

IX. Responsibilities of OIRA and OSTP

OIRA, in consultation with OSTP, shall be responsible for overseeing implementation of the requirements of this Bulletin. An interagency group, chaired by OSTP and OIRA, shall meet periodically to foster better understanding about peer review practices and to assess progress in the implementation of this Bulletin.

X. Effective Date and Existing Law

The requirements of this Bulletin, with the exception of those in Section V (Peer Review Planning), apply to information disseminated on or after four months after publication, except that they do not apply to information for which an agency has already commenced a peer-review process. Any existing peer review mechanisms mandated by law should be employed in a manner as consistent as possible with the practices and procedures laid out herein. The requirements in Section V apply to "highly influential scientific assessments," as designated in Section III of this Bulletin, within four months of publication. The requirements in Section V apply to documents subject to Section II of this Bulletin one year after publication.

XI. Judicial Review

This Bulletin is intended to improve the internal management of the executive branch, and is not intended to create any new right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. Nor does this Bulletin abridge any existing rights of action. Consistent with current law, materials generated during the peer review process may be considered by courts adjudicating existing rights of action.

[FR Doc. 04–9572 Filed 4–27–04; 8:45 am]

BILLING CODE 3110–01–P

OVERSEAS PRIVATE INVESTMENT CORPORATION

Sunshine Act Meeting

TIME AND DATE: Thursday, April 29, 2004, 9 a.m. (open portion), 9:15 a.m. (closed portion).

PLACE: Offices of the Corporation, Twelfth Floor Board Room, 1100 New York Avenue, NW., Washington, DC.

STATUS: Meeting open to the public from 9 a.m. to 9:15 a.m. Closed portion will commence at 9:15 a.m. (approx.).

MATTERS TO BE CONSIDERED:

1. President's Report.
2. Approval of January 29, 2004, Minutes (open portion).
3. Testimonial—Gary A. Barron.
4. Testimonial—John B. Taylor.

FURTHER MATTERS TO BE CONSIDERED: (Closed to the public 9:15 a.m.)

1. Auditors Report to the Board.
2. Finance Project—Iraq.
3. Insurance Project—Iraq.
4. Insurance Project—Egypt.
5. Finance Project—Central and Eastern Europe.
6. Finance Project—Asia.
7. Finance Project—Asia.
8. Finance Project—Nigeria.
9. Finance Project—Chile.
10. Finance Project—Multi-country.
11. Finance Project—Global.
12. Approval of January 29, 2004, Minutes (closed portion).
13. Pending Major Projects.
14. Reports.

CONTACT PERSON FOR INFORMATION: Information on the meeting may be obtained from Connie M. Downs at (202) 336–8438.

Dated: April 15, 2004.

Connie M. Downs,

Corporate Secretary, Overseas Private Investment Corporation.

[FR Doc. 04–9705 Filed 4–26–04; 11:30 am]

BILLING CODE 3210–01–M

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

Green Dolphin Systems Corporation; Order of Suspension of Trading

April 26, 2004.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Green Dolphin Systems Corporation ("GDLS") because of questions regarding the accuracy of assertions by GDLS and by others, in press releases and public statements to investors concerning, among other things, GDLS' business relationship with a national restaurant chain.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above listed company.

Therefore, it is ordered, pursuant to section 12(k) of the Securities Exchange Act of 1934, that trading in the above listed company is suspended for the period from 9:30 a.m. e.d.t. April 26, 2004 through 11:59 p.m. e.d.t., on May 7, 2004.

By the Commission.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 04–9713 Filed 4–26–04; 12:52 pm]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49586; File No. SR–NSX–2004–03]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Stock Exchange Amending Its Fee Schedule To Cap Members Monthly Transaction Fees and Reduce the Designated Dealer's Principal Activity Fees

April 21, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")[1] and Rule 19b–4[2] thereunder, notice is hereby given that on March 31, 2004, the National Stock Exchange℠ (the "Exchange" or "NSX"℠)[3] filed with the Securities and Exchange Commission ("Commission") the proposed rule change, as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comment on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its fee schedule to place a cap of $200,000 per member on monthly transaction fees and to reduce the charge for Designated Dealers' principal activity from $0.0025 to $0.001 per share for non-Nasdaq securities.

The text of the proposed rule change appears below. New text is in italics. Deleted text is in brackets.

* * * * *

Rule 11.10. National Securities Trading System Fees

A. Trading Fees

* * * * *

(g) Proprietary ([p]*P*rincipal) Transactions.

(1)(A) All Designated Dealers in securities other than Nasdaq securities, except those acting as Preferencing Dealers or Contributing Dealers, will be charged *$0.001*[0.0025] per share (*$0.1*[0.25]/100 shares) for principal transactions.

* * * * *

(i) [Reserved.] *Transaction Fee Cap. The monthly transaction fees charged to each member shall be equal to the lesser of (1) the amounts assessed pursuant to Paragraphs (A)(a) through (A)(h) of this Rule 11.10 or (2) $200,000.*

* * * * *

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 IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing two changes to its fee schedule. First, the Exchange proposes to introduce a cap on the total monthly transaction fees assessed to each member. There is currently no limit to the overall amount of transaction fees that may be charged. However, under the new fee provision, the monthly transaction fee will now be capped at $200,000 per member. Second, the Exchange proposes to reduce the charge for a Designated Dealer trading in non-Nasdaq securities when not acting as a Preferencing Dealer or Contributing Dealer.[4] The current fee is $0.0025 per share for principal transactions. The Exchange proposes to reduce this fee to $0.001 per share, which is the equivalent of the Exchange's current charge for Intermarket Trading System or "ITS" transactions.

The Exchange believes that the implementation of these changes will allow for a reduction in the overall level of fees paid by members while ensuring that each member pays an equitable share of the costs associated with operating the Exchange.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act,[5] in general, and with section 6(b)(4) of the Act,[6] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges. The Exchange also believes that the proposed rule change is consistent with Section 6(b)(5) of the Act[7] in that it is designed 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. The Exchange believes that the proposed changes will create incentives for members to use the Exchange trading system, thereby increasing competition, which, in turn, will enhance the National Market System.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received in connection with the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act[8] Rule 19b–4(f)(2)[9] thereunder, because it changes a due, fee or other charge imposed by the Exchange. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange recently changed its name and was formerly known as The Cincinnati Stock Exchange or "CSE." *See* Securities Exchange Act Release No. 48774 (November 12, 2003), 68 FR 65332 (November 19, 2003) (SR–CSE–2003–12).

[4] A Preferencing Dealer trades against public agency market or marketable limit orders which the Dealer presents as agent in accordance with the Exchange's price-time and agency/principal priority rules. *See* Exchange Rule 11.9(u). A Contributing Dealer is a member that must maintain certain minimum net capital, be registered with the Exchange with respect to one or more securities, and provide regular bids and offers for round lots of securities in which it is registered. *See* Exchange Rule 11.9(a)(6).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

[9] 17 CFR 240.19b–4(f)(2).

Comments may be submitted by any of the following methods:

Electronic comments:

• Use the Commission's Internet comment for (*http://www.sec.gov/rules/sro.shtml*); or

• Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NSX–2004–03 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–NSX–2004–03. 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 NSX. 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–NSX–2004–03 and should be submitted on or before May 19, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 04–9628 Filed 4–27–04; 8:45 am]

BILLING CODE 8010–01–P

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49597; File No. SR–NASD–2004–051]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change and Amendments No. 1 and No. 2 Thereto by the National Association of Securities Dealers, Inc. Relating to the Use of Summary Orders for NNMS Order-Delivery ECNs Using the SIZE MPID in SuperMontage

April 21, 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 March 23, 2004, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. On April 9, 2004, Nasdaq filed Amendment No. 1 to the proposed rule change,[3] and on April 19, 2004, Nasdaq filed Amendment No. 2 to the proposed rule change.[4] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

Nasdaq proposes to provide those NNMS Order-Delivery ECNs participating in SuperMontage with an order type (Summary Orders) that will generate a warning message if an un-attributed order they enter into the system would lock or cross the best bid or best offer displayed in Nasdaq. Pursuant to section 19(b)(3)(A) of the Act[5] and Rule 19b–4(f)(6) thereunder,[6] Nasdaq has designated the proposed rule change as non-controversial and one effecting a change that: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) will not become operative for at least thirty days after the date of this filing.[7] Nasdaq intends to implement the proposed rule change on or about July 17, 2004,[8] and will inform market participants of the exact implementation date via a Head Trader Alert on *http://www.nasdaqtrader.com*.

Below is the text of the proposed rule change, as amended. Proposed new language is in *italic;* proposed deletions are in [brackets].

* * * * *

4700. NASDAQ NATIONAL MARKET EXECUTION SYSTEM (NNMS)

4701. Definitions

Unless stated otherwise, the terms described below shall have the following meaning:

(a)–(nn) No Change.

(oo) [Reserved] *The term "Summary" shall mean, for priced limit orders so designated, that if an order is marketable upon receipt by NNMS, it shall be rejected and returned to the entering party. Summary Orders may only be entered by NNMS Order Delivery ECNs. Summary Orders may only be designated as Non-Attributable Orders.*

* * * * *

4706. Order Entry Parameters

(a) Non-Directed Orders—

(1) General. The following requirements shall apply to Non-Directed Orders Entered by NNMS Market Participants:

(A) No Change.

(B) A Non-Directed Order must be a market or limit order, must indicate whether it is a buy, short sale, short-sale exempt, or long sale, and may be designated as "Immediate or Cancel," "Day," "Good-till-Cancelled," "Auto-Ex," "Fill or Return," "Pegged," "Discretionary," "Sweep," "Total Day," "Total Good till Cancelled," [or] "Total Immediate or Cancel," *or "Summary."*

(1) through (12) No Change.

(13) An order may be designated as "Summary," in which case the order

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated April 8, 2004 ("Amendment No. 1"). Amendment No. 1 replaced the originally filed proposal in its entirety. This Amendment No. 1 also replaced and superceded an earlier Amendment filed by Nasdaq, also marked Amendment No. 1, dated March 26, 2004. Telephone conversation between Thomas P. Moran, Associate General Counsel, Nasdaq, and A. Michael Pierson, Attorney, Division, Commission on March 26, 2004.

[4] *See* letter from Edward S. Knight, Executive Vice President and General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated April 16, 2004 ("Amendment No. 2"). Amendment No. 2 replaced Amendment No. 1 in its entirety.

[5] 15 U.S.C. 78s(b)(3)(A).

[6] 17 CFR 240.19b–4(f)(6).

[7] On March 9, 2004, Nasdaq provided Commission staff with a description and text of the proposed rule change.

[8] Telephone conversation between Thomas P. Moran, Associate General Counsel, Nasdaq, and A. Michael Pierson, Attorney, Division, Commission on April 21, 2004.

shall be designated either as Day or GTC. A Summary Order that is marketable upon receipt by NNMS shall be rejected and returned to the entering party. If not marketable upon receipt by NNMS, it will be retained by NNMS. Summary Day and GTC orders may be executed prior to the market open if required under Rule 4710(b)(3)(B). Summary Orders may only be entered by NNMS Order Delivery ECNs. Summary Orders may only be designated as Non-Attributable Orders.

(C)–(F) No Change.

(2) No Change.

(A) through (B) No Change.

(b)–(e) No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change, as amended, and discussed any comments it received on the proposed rule change, as amended. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq is proposing the adoption of a new voluntary order type for the use of NNMS Order-Delivery ECNs participating in SuperMontage. Called a Summary Order ("SO"), the order type is intended to provide NNMS Order-Delivery ECNs the ability to receive a warning message if an un-attributed order entered by them for display under the SIZE MPID in the montage is marketable and would lock or cross the best bid or best offer in NNMS. NNMS Order-Delivery ECNs already receive such lock/cross warnings when they enter attributable quotes/orders into the system and the proposed order type is designed to provide the same functionality for un-attributed orders that NNMS Order-Delivery ECNs enter into SIZE.[9] As such, the order type should give NNMS Order-Delivery ECNs an equal ability to manage risk when using either attributed or un-attributed orders. SOs, which may only be designated as DAY or Good-Till-Cancelled ("GTC") would be retained by the system and processed in the normal course if they would not lock/cross the best bid or offer in NNMS. Retained SOs would be made available for execution, if required, as part of Nasdaq's pre-opening unlocking and uncrossing process.

2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with the provisions of section 15A of the Act,[10] in general, and section 15A(b)(6) of the Act,[11] in particular, in that it is designed 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.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change, as amended, will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act,[12] and subparagraph (f)(6) of Rule 19b–4,[13] thereunder because it does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; (iii) become operative for 30 days from the date on which it was filed. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors. or otherwise in furtherance of the purposes of the Act.[14]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send e-mail to *rule-comments@sec.gov*. Please include File Number NASD–2003–051 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 NASD–2003–051. 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 NASD. 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 NASD–2003–051 and should be submitted on or before May 19, 2004.

[9] SuperMontage's SIZE feature only accepts orders.

[10] 15 U.S.C. 78*o*–3.

[11] 15 U.S.C. 78*o*–3(b)(6).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6).

[14] For purposes of calculating the 60-day abrogation period, the Commission considers the proposed rule change to have been filed on April 19, 2004, the date Nasdaq filed Amendment No. 2.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 04–9629 Filed 4–27–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49598; File No. SR–NSCC–2003–20]

Self-Regulatory Organizations; National Securities Clearing Corporation; Order Approving Proposed Rule Change To Eliminate the Higher Capital Requirements Imposed on Members for Processing Investment Fund Transactions Through NSCC's Mutual Fund Services

April 22, 2004.

I. Introduction

On October 9, 2003, the National Securities Clearing Corporation ("NSCC") filed with the Securities and Exchange Commission ("Commission") and on October 22, 2003, amended proposed rule change SR–NSCC–2003–20 pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").[1] Notice of the proposal was published in the **Federal Register** on March 22, 2004.[2] No comment letters were received. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description

The purpose of the proposed rule change is to amend the standards of financial responsibility required for certain NSCC applicants and members using NSCC's Mutual Fund and Insurance Services. Specifically, the proposed rule change deletes Addendum V to NSCC's Rules thereby eliminating the higher capital requirements imposed on NSCC Mutual Fund/Insurance Services Members and Fund Members processing Investment Funds transactions through NSCC's Mutual Fund Services.

Mutual Fund Services are non-guaranteed services offered by NSCC under NSCC Rule 52. In November 2000, NSCC expanded the types of products eligible for processing through NSCC's Mutual Fund Services to include "Investment Funds."[3] An Investment Fund is defined in Rule 1 of NSCC's Rules as a "fund or investment entity subject to regulation under applicable Federal and State banking and/or insurance laws." Examples of such funds include stable value funds, guaranteed investment contracts which are regulated as group annuities, and collective bank investment trusts.

NSCC adopted Addendum V, "Financial Standards for Applicants and Participants Processing Investment Fund Transactions through Mutual Fund Services," in connection with making Investment Fund products eligible for processing at NSCC. Addendum V modified the standards of financial responsibility and operational capability set forth in Addenda B and I[4] of NSCC's Rules to impose more stringent capital requirements on Mutual Fund/Insurance Services Members and Fund Members that process Investment Funds through NSCC's Mutual Fund Services. The more stringent financial standards were adopted because of NSCC's unfamiliarity with the product. Since its introduction, however, this service has been actively used and each day brings new requests by firms to become participants in order to take advantage of the services. NSCC has experienced no member defaults in the processing of Investment Funds through NSCC's Mutual Fund Services.

NSCC has determined that the current financial standards are an unnecessary barrier to entry. Based on NSCC's experience to date, the stringency of the financial criteria applicable to members doing transactions in Investment Funds is not commensurate with the associated risks.

Although NSCC is reducing the financial requirements imposed on all Mutual Fund/Insurance Services Member and Fund Member applicants and members seeking to process Investment Fund transactions at NSCC by deleting Addendum V, such applicants and members shall remain subject to the criteria set forth in Addenda B and I.

III. Discussion

Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency be designed to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible.[5] The Commission finds that NSCC's proposed rule change is consistent with this requirement because while it is reducing the financial requirement imposed on Mutual Fund/Insurance Services Members and Fund Members, it should not affect NSCC's ability to protect itself against the risk of member default.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular section 17A of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to section 19(b)(2) of the Act; that the proposed rule change (File No. SR-NSCC–2003–20) be and hereby is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[6]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 04–9630 Filed 4–27–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49587; File No. SR–Phlx–2003–54]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 by the Philadelphia Stock Exchange, Inc. To Amend Rules Relating to the Minimum Net Capital for Specialists in Index Fund Shares

April 21, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4[2] thereunder, notice is hereby given that on October 20, 2003, the Philadelphia Stock Exchange, Inc. ("Phlx" 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 Exchange. On March 29, 2004, the Phlx amended the proposal.[3] Amendment No. 1 completely replaces and supersedes the original filing. The Commission is

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[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 49422 (March 16, 2004), 69 FR 13344.

[3] Securities Exchange Act Release No. 43606 (November 21, 2000), 65 FR 71182 (November 29, 2000) [File No. SR–NSCC–00–05].

[4] Addendum B applies to Mutual Fund/Insurance Services Members processing mutual funds through NSCC's Mutual Fund Services, and Addendum I applies to Fund Members processing mutual funds through NSCC's Mutual Fund Services.

[5] 15 U.S.C. 78q–1(b)(3)(F).

[6] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* March 26, 2004 letter from Mark I. Salvacion, Director and Counsel, Phlx, to Rachael Grad, Attorney, Division of Market Regulation, SEC and attachments ("Amendment No. 1").

publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to add a new subsection (B) to Exchange Rule 703(a)(v), which would establish a minimum net capital requirement of $1,000,000 for specialists in Index Fund Shares. The text of the proposed rule change is below. Proposed new language is in italics.

Rule 703(a)

(i)–(iv) No change.

(v)(*A*) An assigned Specialist in Trust Shares, as defined in Rule 803(i), that are listed on the Exchange, shall be required to maintain a minimum of $1,000,000 in net capital. The assigned Specialist shall immediately inform the Examinations Department upon failure to be in compliance with such requirement. *(B) An assigned Specialist in Index Fund Shares, as defined in Rule 803(l)(2)(A), that are listed on the Exchange, shall be required to maintain a minimum of $1,000,000 in net capital. The assigned Specialist shall immediately inform the Examinations Department upon failure to be in compliance with such requirement.* The Exchange may waive the financial requirements of this Rule 703(a)(v) in unusual circumstances.

(vi)–(ix) No change.

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 Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Phlx has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to increase the minimum net capital requirement for specialists in Index Fund Shares because of the unique risks associated with Index Fund Shares.[4] Currently, Exchange Rule 703(a)[5] sets forth certain categories of net capital requirements for various types of member organizations, based on the type of security or activity in which the member organization engages. For example, subsection (v) of Exchange Rule 703(a)[6] provides that an assigned specialist in Trust Shares is required to maintain a minimum of $1,000,000 in net capital. Because of the potential risks associated with trading Trust Shares, specialists in Trust Shares are expected to make a greater financial commitment for the privilege of acting as a specialist in Trust Shares.[7]

Index Fund Shares that are to be listed on the Exchange, just as Trust Shares, are expected to entail a substantial financial commitment on the part of the specialist assigned to them because most, if not all, index fund shares are created and redeemed in large blocks called "creation units" which may be as large as 50,000 shares per unit. Because the potential risks associated with Index Fund Shares are no less than the risks associated with Trust Shares, the proposed rule change establishes a minimum net capital requirement of $1,000,000 for specialists in Index Fund Shares. As such, proposed Rule 703(a)(v)(B) is substantially similar to current Rule 703(a)(v), which would be renumbered Rule 703(a)(v)(A). The Exchange believes that imposing a higher net capital requirement is one way to ensure that the Index Fund Share specialist can carry out his or her duties to maintain a fair and orderly market. Moreover, the Exchange believes that the higher minimum net capital requirement for Index Fund Shares pursuant to proposed Section 703(a)(v)(B) will ensure that only sufficiently capitalized firms will apply to become specialists in Index Fund Shares.

The proposed higher minimum net capital requirement for specialists in Index Fund Shares listed and traded on the Phlx on a primary basis would not apply to Index Fund Shares traded on an unlisted trading privileges basis. This is due to the fact that specialists, in the case of Index Fund Shares traded on an unlisted trading privileges basis, do not generally undertake the same financial commitments to create and redeem Index Fund Shares as do specialists in their primary market.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[8] in general, and furthers the objectives of section 6(b)(5) of the Act[9] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Phlx does not believe that the proposed rule change would impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

[4] "Index Fund Share" is defined in Exchange Rule 803(l)(2)(A) as a "security (I) that is issued by an open-end management investment company based on a portfolio of stocks that seeks to provide investment results that correspond generally to the price and yield performance of specified foreign or domestic stock index; (II) that is issued by such an open-end management investment company in a specified aggregate minimum number in return for a deposit of specified number of shares of stock and/or a cash amount with a value equal to the next determined net asset value; and (III) that, when aggregated in the same specified minimum number, may be redeemed at a holder's request by such open-end management investment company which will pay to the redeeming holder the stock and/or cash with a value equal to the next determined net asset value."

[5] *See* Phlx Rule 703(a).

[6] *See* Phlx Rule 703(a)(v).

[7] *See* Securities Exchange Act Release No. 45129 (December 4, 2001), 66 FR 64331 (December 12, 2001) (SR–Phlx–99–41) (Order approving $1 million minimum net capital requirement for specialists in Trust Shares).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal 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–Phlx–2003–54 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–Phlx–2003–54. 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. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Phlx. 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–Phlx–2003–54 and should be submitted on or before May 19, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 04–9567 Filed 4–27–04; 8:45 am]

BILLING CODE 8010–01–P

[10] 17 CFR 200.30–3(a)(12).

TENNESSEE VALLEY AUTHORITY

Paperwork Reduction Act of 1995, as Amended by P.L. 104–13; Proposed Collection; Comment Request

AGENCY: Tennessee Valley Authority.

ACTION: Proposed collection; comment request.

SUMMARY: The proposed information collection described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended). The Tennessee Valley Authority is soliciting public comments on this proposed collection as provided by 5 CFR section 1320.8(d)(1). Requests for information, including copies of the information collection proposed and supporting documentation, should be directed to the Agency Clearance Officer: Alice D. Witt, Tennessee Valley Authority, 1101 Market Street (EB 5B), Chattanooga, Tennessee 37402–2801; (423) 751–6832. (SC: 000XYDJ)

Comments should be sent to the Agency Clearance Officer no later June 28, 2004.

SUPPLEMENTARY INFORMATION:

Type of Request: Regular submission; proposal for an extension of a currently approved collection, with revisions, which will expire August 31, 2004. (OMB Control number: 3316–0105)

Title of Information Collection: TVA Police Customer Satisfaction Survey.

Frequency of Use: On occasion.

Affected Public: Individuals and Small Businesses.

Small Business or Organizations Affected: Yes.

Estimated Number of Annual Responses: 50.

Estimated Total Annual Burden Hours: 4.25.

Estimated Average Burden Hours Per Response: 5 minutes.

Need For and Use of Information: This information collection will be randomly distributed to individuals who use TVA facilities and come in contact with TVA Police Officers (*i.e.*, campers, boaters, marina operators, etc.) to provide feedback on the quality of the security and safety provided by TVA Police on TVA managed public lands. Individuals may also provide feedback by accessing the TVA Police Web site (*http://www.tva.gov*). The information collected will be used to evaluate current security and safety policies and to identify new opportunities for improvements.

Jacklyn J. Stephenson,

Senior Manager, Enterprise Operations, Information Services.

[FR Doc. 04–9588 Filed 4–27–04; 8:45 am]

BILLING CODE 8120–08–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements Filed the Week Ending April 16, 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–2004–17585.

Date Filed: April 16, 2004.

Parties: Members of the International Air Transport Association.

Subject: CSC/26/Meet/004/2004 dated April 14, 2004. Expedited Rescission of Resolutions r1–3. Intended effective date: expedited May 1, 2004.

Andrea M. Jenkins,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. 04–9627 Filed 4–27–04; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2003–14246]

Airport Privatization Pilot Program

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice to reopen comment period for final application of New Orleans Lakefront Airport, New Orleans, Louisiana.

SUMMARY: The Federal Aviation Administration (FAA) is reopening the comment period for the Orleans Levee District's final application for participation of New Orleans Lakefront Airport (NEW) in the Airport Privatization Pilot Program. Specifically, the FAA is seeking information and comments from interested parties on the Operating Agreement of American Airports Lakefront, LLC, the proposed private sponsor. This agreement was not available to the FAA during the original public comment period, January 16, 2003, to May 23, 2003, published in the **Federal Register** as (68 FR 12969) and

(68 FR 2391). The comment period is now reopened until May 28, 2004.

DATES: Comments must be received May 28, 2004.

ADDRESSES: The Operating Agreement of American Airports Lakefront, LLC and the final application are available for public review in the Dockets Office, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. The documents have been filed under FAA Docket Number 2003–14246. The Dockets Office is open between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Dockets Office is on the plaza level of the Nassif Building at the Department of Transportation at the above address. Also, you may review public dockets on the Internet at *http://dms.dot.gov.*

The Orleans Levee District, the airport sponsor, has also made a copy of the agreement and the application available at the following location: Administration Building, New Orleans Lakefront Airport, 6001 Stars and Stripes Boulevard, New Orleans, Louisiana 70126.

The Administration Building is open weekdays from 9 a.m. and 4 p.m. with the exception of legal holidays. The contact person is Max L. Hearn who may be reached at (504) 243–4000.

Comments on the agreement must be delivered or mailed, in duplicate, to: the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You must identify the docket number "FAA Docket No 2003–14246" at the beginning of your comments. Commenters wishing the FAA to acknowledge receipt of their comments must include a preaddressed, stamped postcard on which the following statement is made: "Comments to FAA Docket No. 2003–14246." The postcard will be date stamped and mailed to the commenter. You may also submit comments through the Internet to *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Kevin C. Willis, Compliance Specialist (AAS–400), (202) 267–8741) Airport Compliance Division, Office of Airport Safety and Standards, Federal Aviation Administration, 800 Independence Ave., SW., Washington, DC 20591.

SUPPLEMENTARY INFORMATION: Title 49 of the U.S. Code section 47134 authorizes the Secretary of Transportation, and through delegation, the FAA Administrator, to exempt a sponsor of a public use airport that has received Federal assistance from certain Federal requirements in connection with the privatization of the airport by sale or lease to a private party. Specifically, the Administrator may exempt the sponsor from all or part of the requirements to use airport revenues for airport-related purposes, to pay back a portion of Federal grants upon the sale of an airport, and to return airport property deeded by the Federal Government upon transfer of the airport. The Administrator is also authorized to exempt the private purchaser or lessee from the requirement to use all airport revenues for airport-related purposes, to the extent necessary to permit the purchaser or lessee to earn compensation from the operations of the airport. The FAA application procedures for the Airport Privatization Pilot Program (62 FR 48693) are available for review on the FAA Web site: *www.faa.gov/arp/publications/fedreg.cfm?arpnav=fedr.*

On March 2, 2000, Orleans Levee District submitted a preliminary application for the participation of the New Orleans Lakefront Airport in the Airport Privatization Pilot Program. On March 8, 2001, the FAA accepted the Orleans Levee District's preliminary application for the New Orleans Lakefront Airport, after reviewing additional information provided by the Orleans Levee District. After selecting a private operator and negotiating an agreement, the Orleans Levee District filed its final application on April 23, 2002. On January 16, 2003, the Federal Aviation Administration (FAA) published a notice in the **Federal Register** (68 FR 2391) seeking information and comments from interested parties on the final application by the Orleans Levee District for participation of New Orleans Lakefront Airport (NEW) in the Airport Privatization Pilot Program. The original deadline for submitting comments was March 12, 2003. However, the comment period was extended until May 23, 2003, to allow the public more time to comment and for the FAA to receive comments from airport users and interested parties at a public meeting at New Orleans Lakefront Airporf on May 10, 2003.

On April 6, 2004, at the FAA's request, the private operator submitted a coy of the operating agreement for American Airports Lakefront, LLC. The agreement outlines the responsibilities of American Airports Corporation and United Professionals in fulfilling the duties of the private operator. This agreement was not available to the FAA during the original public comment period, January 16, 2003, to May 23, 2003, published in the **Federal Register** as (68 FR 12969) and (68 FR 2391).

Since this agreement is considered part of the final application and will be used by the FAA in making its final determination, the agency has decided to make it available for 30-day public comment.

Dated: Issued in Washington, DC on April 15, 2004.

David L. Bennett,

Director, Office of Airport Safety and Standards.

[FR Doc. 04–9626 Filed 4–27–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Commercial Space Transportation Advisory Committee—Open Meeting

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Commercial Space Transportation Advisory Committee open meeting.

SUMMARY: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C. App. 2), notice is hereby given of a meeting of the Commercial Space Transportation Advisory Committee (COMSTAC). The meeting will take place on Thursday, May 20, 2004, from 8 a.m. to 5 p.m. at the Federal Aviation Administration Headquarters Building, 800 Independence Avenue, SW., Washington, DC, in the Bessie Coleman Conference Center, 2nd Floor. This will be the 39th meeting of the COMSTAC.

The 2004 Commercial Space Transportation Market Forecasts, which includes the 2004 COMSTAC Commercial Geosynchronous Orbit Launch Demand Model and the 2004 Commercial Space Transportation Forecast for Non-Geosynchronous Orbits will be briefed and distributed at the May meeting. There will also be a briefing on the recent report entitled The Economic Impact of Commercial Space Transportation on the U.S. Economy, 2004 and an activities report from FAA's Associate Administrator for Commercial Space Transportation.

Meetings of the COMSTAC Working Groups (Technology and Innovation, Reusable Launch Vehicle, Risk Management, and Launch Operations and Support) will be held on Wednesday, May 19, 2004. For specific information concerning the times and locations of these meetings, contact the Contact Person listed below.

Individuals who plan to attend and need special assistance, such as sign language interpretation or other

reasonable accommodations, should inform the Contact Person listed below in advance of the meeting.

FOR FURTHER INFORMATION CONTACT: Brenda Parker (AST–200), Office of the Associate Administrator for Commercial Space Transportation (AST), 800 Independence Avenue, SW., Room 331, Washington, DC 20591, telephone (202) 385–4713; e-mail *brenda.parker@faa.dot.gov.*

Issued in Washington, DC, April 19, 2004.

Patricia G. Smith,

Associate Administrator for Commercial Space Transportation.

[FR Doc. 04–9625 Filed 4–27–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) received a request for a waiver of compliance with certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

Northeast Illinois Railroad Corporation (METRA)

[Docket Number FRA–2004–17027]

The Northeast Illinois Railroad Corporation (METRA) seeks a waiver of compliance, Docket Number FRA–2004–17027, with the Passenger Equipment Safety Standards, 49 CFR part 238: section 103 (fire safety), section 203 (static end strength), section 205 (anti-climbing mechanism), section 207 (link between coupling mechanism and car body), section 209 (forward-facing end structure of locomotives), section 211 (collision posts), section 219 (truck-to-car-body attachment), section 223 (locomotive fuel tanks), section 225 (electrical systems), section 227 (suspension system), and section 237 (automated monitoring) as it pertains to alerters for super hy-rail vehicles utilized to move stranded passenger trains in rescue operations.

METRA is requesting the waiver to be pro-active in establishing a rescue plan for electric propulsion passenger train operations in the event of a power failure similar to that experienced in the Northeast in 2003. The plan calls for the hy-rail vehicles to be positioned strategically throughout the electric propulsion service area to push or pull stranded passenger trains to stations where the passengers can be safely unloaded. METRA states that these rescue movements would be made at a restricted speed by a certified locomotive engineer trained on the operation of the hy-rail vehicles and prior to any movement train brakes would receive a Class 1A brake test in compliance with 49 CFR 238.315.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (FRA–2004–17027) and must be submitted to the Docket Clerk, DOT Docket Management Facility, Room PL–401 (Plaza Level), 400 7th Street, SW., Washington, DC 20590. Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://dms.dot.gov.*

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). The Statement may also be found at *http://dms.dot.gov.*

Issued in Washington, DC on April 22, 2004.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. 04–9633 Filed 4–27–04; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–6 (Sub–No. 409X)]

The Burlington Northern and Santa Fe Railway Company—Abandonment Exemption—in Jefferson, Thayer and Nuckolls Counties, NE, and Republic County, KS

On April 8, 2004, The Burlington Northern and Santa Fe Railway Company (BNSF) filed with the Board a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon and discontinue service over a 39.95-mile line of railroad between milepost 167.78 near Superior, NE, and milepost 127.83 near Reynolds, NE, in Jefferson, Thayer and Nuckolls Counties, NE, and Republic County, KS. The line traverses United States Postal Service Zip Codes 66935, 66959, 66964, 68325, 68327, 68375, 68429, 68943, and 68978. The line includes the stations of Hardy, Byron, Chester, Hubbell, and Reynolds.

The line does not contain federally granted rights-of-way. Any documentation in BNSF's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979).

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by July 27, 2004.

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption. Each OFA must be accompanied by a $1,100 filing fee. *See* 49 CFR 1002.2(f)(25).

All interested persons should be aware that, following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 will be due no later than May 18, 2004. Each trail use request must be accompanied by the filing fee, which is scheduled to increase to $200, effective April 28, 2004. *See* 49 CFR 1002.2(f)(27).[1]

All filings in response to this notice must refer to STB Docket No. AB–6

[1] *See Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services—2002 New Fees*, STB Ex Parte No. 542 (Sub-No. 4) (STB served Mar. 29, 2004).

(Sub-No. 409X) and must be sent to: (1) Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001; and (2) Michael Smith, Freeborn & Peters LLP, 311 S. Wacker Drive, Suite 3000, Chicago, IL 60606–6677. Replies to the petition are due on or before May 18, 2004.

Persons seeking further information concerning abandonment and discontinuance procedures may contact the Board's Office of Public Services at (202) 565–1592 or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Section of Environmental Analysis (SEA) at (202) 565–1539. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by SEA will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Other interested persons may contact SEA to obtain a copy of the EA (or EIS). EAs in these abandonment proceedings normally will be made available within 60 days of the filing of the petition. The deadline for submission of comments on the EA will generally be within 30 days of its service.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: April 19, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 04–9411 Filed 4–27–04; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–103 (Sub–No. 17X)]

The Kansas City Southern Railway Company—Abandonment Exemption—in Jackson County, MO

On April 8, 2004, The Kansas City Southern Railway Company (KCSR) filed with the Board a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903–05 to abandon approximately 1.3 miles of its line of railroad known as the Second Street Track located in Kansas City, Jackson County, MO. The line consists of two segments: (1) The first segment extends from milepost 0+/−, located in an unused rail yard, to milepost 0+5188′+/−, at the crossing of the Second Street Track and a Union Pacific Railroad Company line, a distance of approximately 0.98 miles; and (2) the second segment branches off northwest from the first segment between Main Street and Grand Avenue at milepost 0–W of that line, and continues west to approximately milepost 0+1518′–W at the east end of railroad bridge B–1–W.[1] The line traverses United States Postal Service Zip Code 64105 and includes no stations.

In addition to an exemption from 49 U.S.C. 10903, petitioner seeks exemption from 49 U.S.C. 10904 [offer of financial assistance (OFA) procedures] and 49 U.S.C. 10905 [public use conditions]. KCSR also seeks relief from the trail use provisions of the Board's regulations at 49 CFR 1152.29, which indicates that KCSR is not likely to be willing to enter into any negotiations for use of the line as a trail. In support, KCSR contends that exemption from these provisions is necessary to allow redevelopment of the River Market area by the City of Kansas City (the City) in a manner consistent with the surrounding community and the City's approved redevelopment plan for the area. These requests will be addressed in the final decision.

The line does not contain federally granted rights-of-way. Any documentation in KCSR's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979).

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by July 27, 2004.

Any OFA under 49 CFR 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption. Each offer must be accompanied by a $1,100 filing fee. *See* 49 CFR 1002.2(f)(25).

All interested persons should be aware that, following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Unless the Board grants the requested exemption from public use provisions, any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 will be due no later than May 10, 2004. Each trail use request must be accompanied by the filing fee, which is scheduled to increase to $200, effective April 28, 2004. *See* 49 CFR 1002.2(f)(27).[2]

All filings in response to this notice must refer to STB Docket No. AB–103 (Sub-No. 17X) and must be sent to: (1) Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001; and (2) William A. Mullins, Baker & Miller, PLLC, 2401 Pennsylvania Avenue, NW., Suite 300, Washington, DC 20037. Replies to the KCSR petition are due on or before May 10, 2004.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Services at (202) 565–1592 or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Section of Environmental Analysis (SEA) at (202) 565–1539. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by SEA, will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Other interested persons may contact SEA to obtain a copy of the EA (or EIS). EAs in these abandonment proceedings normally will be made available within 60 days of the filing of the petition. The deadline for submission of comments on the EA will generally be within 30 days of its service.

Board decisions and notices are available on the Board's Web site at *http://www.stb.dot.gov.*

Decided: April 20, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 04–9412 Filed 4–27–04; 8:45 am]

BILLING CODE 4915–01–P

[1] KCSR notes that bridge B–1–W was incorrectly identified as bridge C–1–W in KCSR's newspaper notice of the proposed abandonment, published in the Kansas City Star on March 8, 2004, but the location of the bridge was correctly stated.

[2] *See Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services—2002 New Fees*, STB Ex Parte No. 542 (Sub-No. 4) (STB served Mar. 29, 2004).

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Wage & Investment Reducing Taxpayer Burden (Notices) Issue Committee of the Taxpayer Advocacy Panel

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Wage & Investment Reducing Taxpayer Burden (Notices) Issue Committee of the Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Wednesday, May 26, 2004, from 12 noon e.d.t. to 1 p.m. e.d.t.

FOR FURTHER INFORMATION CONTACT: Sallie Chavez at 1–888–912–1227, or (954) 423–7979.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Wage & Investment Reducing Taxpayer Burden (Notices) Issue Committee of the Taxpayer Advocacy Panel will be held Wednesday, May 26, 2004, from 12 noon e.d.t. to 1 p.m. e.d.t. via a telephone conference call. Individual comments will be limited to 5 minutes. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or (954) 423–7979, or write Sallie Chavez, TAP Office, 1000 South Pine Island Road, Suite 340, Plantation, FL 33324. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Sallie Chavez. Ms. Chavez can be reached at 1–888–912–1227 or (954) 423–7979, or post comments to the Web site: *http://www.improveirs.org.*

The agenda will include: various IRS issues.

Dated: April 23, 2004.

Bernard Coston,

Director, Taxpayer Advocacy Panel.

[FR Doc. 04–9646 Filed 4–27–04; 8:45 am]

BILLING CODE 4830–01–P

Federal Register

Wednesday,
April 28, 2004

Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for the Arroyo Toad (Bufo californicus); Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AT42

Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for the Arroyo Toad *(Bufo californicus)*

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the federally endangered arroyo toad (*Bufo californicus*) pursuant to the Endangered Species Act of 1973, as amended (Act). We propose to designate a total of approximately 138,713 acres (ac) (56,133 hectares (ha)) of critical habitat in Monterey, Santa Barbara, Ventura, Los Angeles, San Bernardino, Riverside, Orange, and San Diego Counties, California.

We hereby solicit data and comments from the public on all aspects of this proposal, including data on economic and other impacts of designation. We may revise this proposal prior to final designation to incorporate or address new information received during the two public comment periods.

DATES: We will accept comments from all interested parties until May 28, 2004. We must receive requests for public hearings, in writing, at the address shown in the **ADDRESSES** section by May 13, 2004.

ADDRESSES: If you wish to comment, you may submit your comments and materials concerning this proposal by any one of these methods:

1. You may submit written comments and information to Diane Noda, Field Supervisor, U.S. Fish and Wildlife Service, Ventura Fish and Wildlife Office, 2493 Portola Road, Suite B, Ventura, CA 93003.

2. You may hand-deliver written comments to our Ventura Office, at the address given above.

3. You may submit comments by fax to our Ventura Office (facsimile 805/644–3958) or our Carlsbad Office (facsimile 760/431–9624).

4. You may send comments by electronic mail (e-mail) to: *fw1artoch@r1.fws.gov*. Please see the Public Comments Solicited section below for file format and other information about electronic filing. In the event that our internet connection is not functional, please submit your comments by the alternate methods mentioned above.

Comments and materials received, as well as supporting documentation used in the preparation of this proposed rule, will be available for public inspection, by appointment, during normal business hours at the Ventura Fish and Wildlife Office at the address given above, or at the Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA (telephone 760/431–9440).

FOR FURTHER INFORMATION CONTACT: For information about Monterey, San Luis Obispo, Santa Barbara, and Ventura Counties, northern Los Angeles County, and the desert portion of San Bernardino County, contact Diane Noda, Field Supervisor, Ventura Fish and Wildlife Office, at the address given above (telephone 805/644–1766; facsimile 805/644–3958). For information about Los Angeles, San Bernardino, Riverside, Orange, and San Diego Counties, contact Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, at the address given above (telephone 760/431–9440; facsimile 760/431–9624).

SUPPLEMENTARY INFORMATION:

Designation of Critical Habitat Provides Little Additional Protection to Species

In 30 years of implementing the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), we have found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources. Our present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. We believe that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

Role of Critical Habitat in Actual Practice of Administering and Implementing the Act

While attention to, and protection of, habitat is paramount to successful conservation actions, we have consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources. Sidle (1987) stated, "Because the ESA can protect species with and without critical habitat designation, critical habitat designation may be redundant to the other consultation requirements of section 7."

Currently, only 445 species or 36 percent of the 1,244 listed species in the U.S. under our jurisdiction have designated critical habitat. We address the habitat needs of all 1,244 listed species through conservation mechanisms such as listing, section 7 consultations, the section 4 recovery planning process, the section 9 protective prohibitions of unauthorized take, section 6 funding to the States, and the section 10 incidental take permit process. We believe that it is these measures that may make the difference between extinction and survival for many species.

Procedural and Resource Difficulties in Designating Critical Habitat

We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected us to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves us with little ability to prioritize our activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, and to comply with the growing number of adverse court orders. As a result, our own proposals to list critically imperiled species, and make final listing determinations on existing proposals, are all significantly delayed.

The accelerated schedules of court-ordered designations have left us with almost no ability to provide for adequate public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals due to the risks associated with noncompliance with judicially-imposed deadlines. This, in turn, fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, is very expensive, and in the final analysis, provides relatively little additional protection to listed species.

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects, and the cost of requesting and responding to public comment, and in some cases the costs of compliance with the National Environmental Policy Act of 1969—all are part of the cost of critical habitat designation. These costs result in minimal benefit to the species that is not already afforded by the protections of the Act enumerated earlier, and they directly reduce the funds available for direct and tangible conservation actions.

Public Comments Solicited

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule are hereby solicited. Comments particularly are sought concerning:

(1) The reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act, including whether the benefit of designation will outweigh any threats to the species due to designation;

(2) Specific information on the amount and distribution of arroyo toad habitat, and what habitat is essential to the conservation of the species and why;

(3) Land use designations and current or planned activities in the areas proposed as critical habitat and their possible impacts on proposed critical habitat;

(4) Any foreseeable economic or other potential impacts resulting from the proposed designation—in particular, any impacts on small entities;

(5) Economic and other values associated with designating critical habitat for the arroyo toad, such as those derived from nonconsumptive uses (*e.g.*, hiking, camping, bird-watching, enhanced watershed protection, improved air quality, increased soil retention, "existence values," and reductions in administrative costs); and

(6) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods (see **ADDRESSES** section). Please submit Internet comments to *fw1artoch@r1.fws.gov* in ASCII file format and avoid the use of special characters or any form of encryption. Please also include "Attn: Arroyo toad" in your e-mail subject header and your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly by calling our Ventura Fish and Wildlife Office at phone number 805/644–1766. Please note that the Internet address *fw1artoch@r1.fws.gov* will be closed out at the termination of the public comment period.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. Requests for public hearings must be made, in writing, at least 15 days prior to the close of the public comment period. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings in the **Federal Register** and local newspapers at least 15 days prior to the first hearing.

Background

Background information on the arroyo toad can be found in our final designation of critical habitat for this species, published on February 7, 2001 (66 FR 9414). That information is incorporated by reference into this proposed rule. The following new information has come to our attention since that time:

(1) Individual toads have been observed as far as 1.2 miles (mi) (2 kilometers (km)) from the streams where they breed (Service 1999; Varanus Biological Services, Inc., in litt. 1999), but are most commonly found within 650 to 3,280 feet (ft) (200 to 1,000 meters (m)) of those streams in coastal areas with broad floodplains (Griffin *et al.* 1999; Holland and Sisk 2000), and 160 to 650 ft (50 to 200 m) in more mountainous areas away from the coast (Ramirez 2002a, 2002b, 2002c, 2003). Arroyo toads typically burrow underground during periods of inactivity and thus tend to use upland habitats that have sandy, friable (readily crumbled) soils, but upland sites with extremely compact soils can also be used (D. Holland, in litt. 2000).

(2) Juvenile arroyo toads remain on or near the saturated substrate at the edges of breeding pools from a week to several months after metamorphosis (D. Holland, in litt. 2000). They are active during the day and can be exposed on the barren sand, although they are rather cryptic (*i.e.*, hidden or camouflaged) at this time. Crushing of toads by humans, livestock, or vehicles can be a substantial source of mortality at this stage (Service 1999; D. Holland, in litt. 2000).

(3) In a study using pitfall traps, Holland and Sisk (2000) reported arroyo toad captures in upland habitats averaging more than 1,640 ft (500 m) and 980 ft (300 m) from two separate coastal streams; one arroyo toad was even captured 3,940 ft (1,175 m) beyond the edge of the riparian habitat bordering the stream. However, radio telemetry and pitfall trap studies from a variety of inland streams often bordered by steep, dry terrain show arroyo toad activity typically closer to the active stream channel. Four separate studies of inland populations by Ramirez (2002a, 2002b, 2002c, 2003) showed that arroyo toads burrowed no farther than 121 to 1,062 ft (37 to 324 m) from the edge of a stream, with an overall average of approximately 52 ft (16 m) between a toad's burrow and the edge of the stream.

(4) The nonnative organisms whose introduction and spread into arroyo toad habitat can pose a particularly serious threat include, among others, giant reed (*Arundo donax*), bullfrogs (*Rana catesbeiana*), green sunfish (*Lepomis cyanellus*), and chytrid fungus (*Batrachochytrium dendrobatidis*) (Sweet 1992; Service 1999; S. Sweet, pers. comm. 2003).

(5) In addition to a variety of other human activities outlined in a previous **Federal Register** notice (66 FR 9414), off-highway vehicle use within stream channels, floodplains, and adjacent uplands and the inadvertent or intentional introduction of nonnative species may cause adverse impacts to arroyo toads.

Previous Federal Actions

We designated a total of approximately 182,360 acres (ac) (73,780 hectares (ha)) of critical habitat for the arroyo toad on February 7, 2001 (66 FR 9414). On November 6, 2001, the Building Industry Legal Defense Foundation, Foothill/Eastern Transportation Corridor Agency, National Association of Home Builders, California Building Industry Association, and Building Industry Association of San Diego County filed a lawsuit in the District of Columbia against the Service challenging the designation of arroyo toad critical habitat and alleging errors by the Service in promulgating the final rule. *Building Industry Legal Defense Foundation, et al.* v. *Gale Norton, Secretary of the Interior, et al.* Civ. No. 01–2311 (JDB) (D.D.C.). On October 30, 2002, the court set aside the designation and ordered us to publish a new critical habitat designation final rule for the arroyo toad by July 30, 2004.

This proposal for critical habitat differs from the previous designation of critical habitat for the arroyo toad with respect to the mapping grid size and changes in locations of critical habitat due to new survey data. We reduced the minimum mapping unit from a 250-meter UTM grid to a 100-meter UTM grid. This allows for the grid to more closely follow watershed boundaries. Based on new survey results and reevaluation of arroyo toad habitat, additional stream reaches are included in this proposal, including sections of the Santa Clara River, Cajon Wash, Kitchen Creek, and Kinley Creek. The lengths of several streams included in proposed critical habitat are also reduced in several instances from the previous designation. These reductions occur where the likelihood of arroyo toad occupancy and the quality of arroyo toad habitat are low, such as along portions of Piru, San Francisquito, and Castaic Creeks. In addition, we have determined that habitat conditions in Arroyo Seco are not essential for the conservation of the species since closer scrutiny and comments from Forest Service biologists and USGS biologists indicate the stream gradient in Arroyo Seco is too steep for the arroyo toad. Consequently, we have not included this area in this proposal. New exclusions from critical habitat under section 4(b)(2) are contained in this proposed rule and discussed in the relevant exclusion sections.

Critical Habitat

Critical habitat is defined in section 3 of the Act. It receives protection under section 7 of the Act. Further information regarding the definition of critical habitat and how we implement related policies and regulations can be found in the **Federal Register** at 66 FR 9414.

Methods

Our methods for identifying the arroyo toad critical habitat included in this proposal are identical to the methods we used to make our final designation for this species on February 7, 2001 (66 FR 9414).

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to designate as critical habitat, we consider those physical and biological features (primary constituent elements) that are essential to the conservation of the species, and that may require special management considerations or protection. These features are used for all listed species and include, but are not limited to: Space for individual and population growth and for normal behavior; food, water, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing of offspring; and habitats that are protected from disturbance or are representative of the historic and geographical and ecological distributions of a species.

The specific biological and physical features, otherwise referred to as the primary constituent elements (PCEs), which comprise essential arroyo toad habitat are described below. These lands provide aquatic and terrestrial habitat essential for the maintenance of self-sustaining populations and metapopulations (a set of local populations or breeding sites within an area, where typically migration from one local population or breeding site to other areas containing suitable habitat is possible, but not routine) of arroyo toads throughout its range.

Space for Individual and Population Growth, and for Normal Behavior

The arroyo toad is found along medium-to-large-sized streams in coastal and desert drainages in central and southern California and Baja, Mexico. It occupies aquatic, riparian (areas near a source of water), and upland habitats in a reduced number of suitable drainages within its range. Essential habitat for the arroyo toad is created and maintained by the fluctuating hydrological, geological, and ecological processes operating in riparian ecosystems and the adjacent uplands. Periodic flooding that modifies stream channels, redistributes channel sediments, and alters pool location and form, coupled with upper terrace stabilization by vegetation, is required to keep a stream segment suitable for all life stages of the arroyo toad. Periodic flooding helps maintain areas of open, sparsely vegetated, sandy stream channels and terraces.

Eggs and tadpoles require aquatic habitat, as described below. Juvenile and adult arroyo toads require and spend much of their lives in riparian and upland habitats adjacent to breeding locations. Riparian habitats used by subadults and adults for foraging and burrowing include sand bars, alluvial terraces, and streamside benches that lack vegetation, or are sparsely to moderately vegetated. Upland habitats used by arroyo toads during both the breeding and nonbreeding seasons include alluvial scrub, coastal sage scrub, chaparral (shrubby plants adapted to dry summers and moist winters), grassland, and oak woodland. Arroyo toads also have been found in agricultural fields (Griffin *et al.* 1999), but these lands may constitute sinks (areas where mortality rates are higher than reproduction rates) over the long term, due to tilling, pesticide and fertilizer applications, and heavy equipment use (Griffin and Case 2001).

The substrate in habitats preferred by arroyo toads consists primarily of sand, fine gravel, or pliable soil, with varying amounts of large gravel, cobble, and boulders. Areas that are damp and have less than 10 percent vegetation cover provide the best conditions for juvenile survival and rapid growth (Service 1999). Arroyo toads must be able to move between the stream and upland foraging sites, as well as up and down the stream corridor.

Food, Water, and Physiological Requirements

Arroyo toad tadpoles eat microscopic algae, bacteria, and protozoans sucked up from the spaces among pebbles, gravel, and sand or abraded from stones (Sweet 1992). Juveniles and adults feed on insects, but specialize on ants. When foraging, arroyo toads are often found around the driplines of oak trees. These areas often lack vegetation, yet have sufficient levels of prey. When active at night, toads often can be observed near ant trails feeding on ants, beetles, and other prey.

Cover or Shelter

During the day and other periods of inactivity, arroyo toads seek shelter by burrowing into the sand. Thus, areas of sandy or friable (readily crumbled) soils are necessary to burrow, but these soils can be interspersed with gravel or

cobble deposits. Arroyo toads may also seek temporary shelter under rocks or debris and have been found in mammal burrows on occasion. Upland sites with extremely compact soils can also be used for foraging and dispersal (D. Holland, in litt. 2000).

Sites for Breeding, Reproduction and Rearing of Offspring

The arroyo toad has specialized breeding habitat requirements. They favor shallow pools and open sand and gravel channels along low-gradient (typically less than 6 percent) reaches of medium-to-large-sized streams (Service 1999). These streams can have either intermittent or perennial streamflow and typically experience periodic flooding that scours vegetation and replenishes fine sediments. In at least some portions of its range, the species also breeds in smaller streams and canyons where low-gradient breeding sites are more sporadically distributed. Breeding pools must persist long enough for the completion of larval development (at least in most years), which is generally March through June, depending on location and weather. Sweet (1992) measured the average age to metamorphosis of arroyo toad larvae on the Los Padres National Forest at 71 days, with a predicted minimum of 62 days. Peak metamorphosis occurs during June and July in the northern part of the toad's range, and from late April through June further south, although it may be later, particularly at higher elevations (D. Holland, in litt. 2000).

Breeding arroyo toads lay their eggs in water over substrates of sand, gravel, or cobble in open sites such as overflow pools, old flood channels, and shallow pools along streams. Such habitats rarely have closed canopies over the lower banks of the stream channel due to periodic flood events. Heavily shaded pools are generally unsuitable for larval and juvenile arroyo toads because of lower water and soil temperatures and poor algal mat development. Pools less than 12 inches (30 centimeters (cm)) deep with clear water, flow rates less than 0.2 ft per second (5 cm per second), and bottoms composed of sand or well-sorted fine gravel are favored by adults for breeding and egg deposition (Sweet 1992). Larvae usually hatch in 4 to 6 days at water temperatures of 54 to 59 degrees Fahrenheit (12 to 16 degrees Celsius). Although egg strings are laid in very slow moving water, larvae (tadpoles) can be found in water velocities of up to 1.0 to 1.3 ft per second (30 to 40 cm per second) (Sweet 1992).

Disturbance, Protection, and the Historical Geographical Distributions

As a result of agriculture and urbanization, and the construction, operation, and maintenance of water storage reservoirs, flood control structures, roads, and recreational facilities such as campgrounds and off-highway vehicle parks, many arroyo toad populations have been reduced in size or extirpated (eliminated) due to extensive habitat loss from the 1920s into the 1990s. Although these factors have not dramatically reduced the range of the arroyo toad, within its range many of the habitats that were historically capable of supporting large numbers of arroyo toads have been lost in the last 100 years. Jennings and Hayes (1994) believe that the loss of habitat, coupled with the manipulation of water levels in many central and southern California streams and rivers, predation from introduced aquatic species, and habitat degradation from introduced plant species, caused arroyo toads to be extirpated from 76 percent of their previously occupied habitat in California. Through focused survey efforts over the past few years, a few new arroyo toad populations have been discovered. Because of these recent efforts, however, it is unlikely that many more populations remain undiscovered. The conservation and subsequent protection of the remaining arroyo toad populations are essential for its conservation (Service 1999).

Pursuant to our regulations, we are required to identify the known physical and biological features, *i.e.*, PCEs, essential to the conservation of the arroyo toad, together with a description of any critical habitat that is proposed. In identifying the PCEs, we used the best available scientific and commercial data available. The physical ranges described in the PCEs may not capture all of the variability that is inherent in natural systems that support arroyo toads. The PCEs determined essential to the conservation of arroyo toad include, but are not limited to:

1. Rivers or streams with hydrologic regimes that supply water to provide space, food, and cover needed to sustain eggs, tadpoles, metamorphosing juveniles, and adult breeding toads. Specifically, the conditions necessary to allow for successful reproduction of arroyo toads are:

a. breeding pools with areas less than 12 in (30 cm) deep;

b. areas of flowing water with current velocities less than 1.3 ft per second (40 cm per second); and

c. surface water that lasts for a minimum length of 2 months in most years, *i.e.*, a sufficient wet period in the spring months to allow arroyo toad larvae to hatch, mature, and metamorphose.

2. Low-gradient stream segments (typically less than 6 percent) with sandy or fine gravel substrates that support the formation of shallow pools and sparsely vegetated sand and gravel bars for breeding and rearing of tadpoles and juveniles.

3. A natural flooding regime, or one sufficiently corresponding to a natural regime, that will periodically scour riparian vegetation, rework stream channels and terraces, and redistribute sands and sediments, such that breeding pools and terrace habitats with scattered vegetation are maintained.

4. Riparian and adjacent upland habitats (particularly alluvial streamside terraces and adjacent valley bottomlands that include areas of loose soil where toads can burrow underground) to provide foraging and living areas for subadult and adult arroyo toads.

5. Stream channels and adjacent upland habitats that allow for migration to foraging areas, overwintering sites, dispersal between populations, and recolonization of areas that contain suitable habitat.

Arroyo toads are not distributed uniformly throughout the critical habitat units. Arroyo toad breeding habitat is patchily distributed along the stream courses, and the same is true of appropriate upland habitat. Some areas primarily provide for migration and dispersal between breeding and foraging habitats or allow for dispersal to additional breeding pools that will accommodate increased populations during favorable years. Habitat conditions within streams can change rapidly in response to streamflows and other factors, such as the development and shifting of sand and gravel bars, and creation and disappearance of pools. Terrace and upland habitats, although more stable than streambed and riparian habitats, may change as a result of rainfall, earthquakes, fires, and other natural events. These factors may cause the habitat suitability of given areas to vary over time, thus affecting the distribution of arroyo toads.

The combination of appropriate aquatic, riparian, and upland habitats forms ecologically functional units. These features and the lands that they represent are essential to the conservation of the arroyo toad. All lands identified as essential and proposed as critical habitat contain one or more of the PCEs for the arroyo toad.

Criteria Used To Identify Critical Habitat

The criteria we used to identify critical habitat are identical to the criteria outlined in the final designation previously published in the **Federal Register** on February 7, 2001 (66 FR 9414).

To evaluate our critical habitat model, we assessed its effectiveness at capturing documented toad locations from studies that focused specifically on surveying toads in upland habitats and studies involving radio telemetry. Holland and Sisk (2000) established extensive pitfall trap arrays at discrete distances from two stream courses and operated these arrays at various periods throughout the year. They had 466 captures of arroyo toads, 35 (7.5 percent) of which were identified as being in upland areas. Those toads were captured at distances that ranged from 49 to 3,855 ft (15 to 1,175 m) from the upland-riparian ecotone (boundary) (Holland and Sisk 2000). For the two areas sampled in that study (Cristianitos Creek and the upper Santa Margarita River), we found that our critical habitat boundaries encompassed an average of 76 percent of the pitfall trapping stations where arroyo toads were detected.

We also assessed studies that involved the tracking of arroyo toads with radio telemetry equipment. For example, in a number of studies by Ramirez (2002a, 2002b, 2002c, 2003), arroyo toads were tracked from the end of breeding activity until the commencement of aestivation, generally May through September. Cumulatively, these four studies involved the tracking of 77 adult arroyo toads in three separate critical habitat units in Orange, San Bernardino, and Los Angeles Counties. All but one of the numerous burrow sites chosen by these arroyo toads fell within our proposed critical habitat boundaries.

Proposed Critical Habitat Designation

The approximate area encompassing the proposed critical habitat by county and land ownership is shown in Table 1, and proposed critical habitat units for the arroyo toad in Table 2.

TABLE 1.—APPROXIMATE CRITICAL HABITAT IN ACRES (AC) (HECTARES (HA)) BY COUNTY AND LAND OWNERSHIP

County	Forest Service	BLM	FWS	Military	State/Local	Tribal	Private	Total
Monterey	0	0	0	6,453 ac (2,612 ha).	0	0	93 ac (38 ha)	6,546 ac (2,650 ha).
Santa Barbara	6,435 ac (2,604 ha).	0	0	0	0	0	4,553 ac (1,842 ha).	10,988 ac (4,446 ha).
Ventura	6,538 ac (2,645 ha).	0	0	0	0	0	1,105 ac (447 ha).	7,643 ac (3,092 ha).
Los Angeles	5,299 ac (2,144 ha).	27 ac (11 ha)	0	0	0	0	7,688 ac (3,111 ha).	13,014 ac (5,266 ha).
San Bernardino	2,631 ac (1,065 ha).	117 ac (47 ha)	0	2,594 ac (1,050 ha).	1,166 ac (472 ha).	0	9,306 ac (3,766 ha).	15,814 ac (6,400 ha).
Riverside	1,457 ac (589 ha).	1,047 ac (424 ha).	0	0	16 ac (6 ha)	0	966 ac (391 ha)	3,486 ac (1,410 ha).
Orange	483 ac (195 ha)	0	0	107 ac (43 ha)	2,135 ac (864 ha).	0	4,932 ac (1,996 ha).	7,657 ac (3,099 ha).
San Diego	9,949 ac (4,026 ha).	284 ac (115 ha)	755 ac (305 ha)	3,338 ac (1,351 ha).	3,544 ac (1,434 ha).	3,082 ac (1,247 ha).	52,613 ac (21, 292 ha).	73,565 ac (29,770 ha).
Total	32,792 ac (13,269 ha).	1,475 ac (597 ha).	755 ac (305 ha)	12,492 ac (5,056 ha).	6,861 ac (2,775 ha).	3,082 ac (1,247 ha).	81,256 ac (32,882 ha).	138,713 ac (56,133 ha).

TABLE 2.—CRITICAL HABITAT UNITS PROPOSED FOR THE ARROYO TOAD

Critical habitat unit	County	Acres	Ha
Northern			
1. San Antonio River	Monterey	6,546	2,649
2. Sisquoc River	Santa Barbara	6,574	2,660
3. Upper Santa Ynez River Basin (including Indian Barbara and Mono Creeks)	Santa Barbara	4,414	1,786
4. Sespe Creek	Ventura	4,138	1,675
5. Piru Creek (Upper and Lower)	Ventura, L.A.	3,966	1,605
6. Upper Santa Clara River Basin (Castaic, San Francisquito Creeks)	Los Angeles	7,398	2,994
7. Upper Los Angeles River Basin (Big Tujunga, Mill, Alder Creeks)	Los Angeles	4,213	1,705
Southern			
8. Black Star and Baker Creeks	Orange	172	69
9. San Jacinto River Basin/Bautista Creek	Riverside	683	277
10. San Juan Creek Basin (including Trabuco Creek)	Orange, Riverside	6,285	2,543
11. San Mateo Basin (Christianitos, Talega, Gabino, La Paz Creeks)	Orange, San Diego	4,580	1,853
12. Lower Santa Margarita Basin (De Luz, Roblar, Sandia)	San Diego	1,840	744
13. Upper Santa Margarita Basin (including Temecula and Arroyo Seco Creeks)	Riverside, San Diego	3,628	1,468
14. Lower and Middle San Luis Rey Basin (Pala, Keys Creeks)	San Diego	15,376	6,222
15. Upper San Luis Rey Basin (above Lake Henshaw)	San Diego	11,725	4,745
16. Santa Ysabel Creek (Santa Maria, Guejito, Temescal Creeks)	San Diego	11,080	4,484
17. San Diego River Basin (including San Vicente Creek)	San Diego	2,309	934
18. Sweetwater River Basin (Viejas and Peterson Creeks)	San Diego	9,235	3,737
19. Cottonwood Creek Basin (many tributaries)	San Diego	15,800	6,394
20. Upper Santa Anna River Basin/Cajon Wash	San Bernardino	1,263	511

TABLE 2.—CRITICAL HABITAT UNITS PROPOSED FOR THE ARROYO TOAD—Continued

Critical habitat unit	County	Acres	Ha
Desert			
21. Little Rock Creek (including Santiago Creek)	Los Angeles	941	381
22. Upper Mojave (West Fork, Deep, Horsethief, Little Horsethief)	San Bernardino	14,550	5,848
23. Whitewater River	Riverside	1,997	808

Critical habitat includes arroyo toad habitat throughout the species' range in the United States (*i.e.*, Monterey, Santa Barbara, Ventura, Los Angeles, Riverside, San Bernardino, Orange, and San Diego Counties, CA). Lands proposed for critical habitat designation are under private, local agency, county, State, Tribal, and Federal ownership, and have been divided into 23 Critical Habitat Units. Although all of the units we are proposing for critical habitat are within the geographic range of the species, we are not proposing all of the areas known to be occupied by the arroyo toad. We are not proposing any areas outside of the geographical area occupied by the species at the time it was listed. A brief description of each unit, and reasons why it is essential for the conservation of the arroyo toad, are presented below. The units are generally based on geographically distinct river basins. In several instances, a river basin has been broken into two or more units based on human or natural landscape features that effectively separate portions of the basin (*e.g.*, a large reservoir or gorge). Based on observations recorded since 1985, each unit is occupied by arroyo toads.

Jennings and Hayes (1994) estimate that arroyo toads have lost 76 percent of their historic habitat. Although the linear measure of historically occupied streams may not be 4 times what is currently occupied, museum records and data on extant populations indicate that the habitats capable of supporting large numbers of arroyo toads have decreased dramatically in the last 100 years. The reaches that typically support, or historically supported, the highest densities of toads are those in the lower and middle portions of river basins, usually associated with third order (a stream characterization based on size) or larger streams. Many of those reaches have been lost to, or degraded by, urban development, intensive agriculture, water diversions, sand and gravel mining operations, and reservoirs. As discussed in more detail below, with respect to the individual units, we find that all of the areas we are proposing for designation may require special management considerations or protections due to threats to the species and/or its habitat. Such management considerations and protections would benefit the arroyo toad and its habit because: Exotic predators and pets may eat or injure arroyo toads; unnatural water releases from dams can wash away arroyo toad eggs and tadpoles, promote the growth of exotic species, or reduce the availability of open sand bar habitat; water diversions can dry a streambed prior to the completion of metamorphosis from tadpole to toad; toads can be crushed by channel maintenance, road construction, or the plowing of agricultural fields with heavy machinery; toads can be trampled during recreational activities; arroyo toad habitat can be adversely affected by agricultural practices, the invasion of exotic species, inundation from water impoundments, or frequent human use; and water quality can be compromised by runoff from urban, industrial, or agricultural land uses. However, the designation of critical habitat does not carry with it any requirement that landowners or land managers implement any special management or protection programs.

Northern Region

The following seven critical habitat units are located in the Northern Region for the arroyo toad, as discussed in the Recovery Plan (Service 1999). Most of the lands are federally owned, and special management considerations and protections for the toad will likely be addressed through the section 7 consultation process and the development of management plans and conservation strategies. Because the toad populations in this unit have been reduced in size, and their habitat fragmented by road construction, dams, agriculture, and urbanization, it is essential to protect them to reduce further loss of genetic diversity and safeguard against the loss of any one population due to random natural or human-caused events. The Forest Service is the primary landowner of proposed critical habitat within the Northern Region. However, a very small proportion of Forest Service land in this region falls within critical habitat proposed for the arroyo toad.

Unit 1: San Antonio River, Monterey County

Unit 1 consists of the San Antonio River and adjacent uplands, from about 2 mi (3 km) upstream of the confluence with Mission Creek downstream to San Antonio Reservoir, a distance of about 17 mi (27 km), and includes small portions of Mission Creek and other tributaries. The unit encompasses approximately 6,546 ac (2,649 ha), of which more than 98 percent is on the Fort Hunter Liggett Military Reservation and the other 2 percent is privately owned.

The northernmost known population of arroyo toads is located here, and is approximately 100 mi (160 km) north of the nearest documented extant population. The onset of breeding activity along the San Antonio River has not been documented prior to the last week in April (Liz Clark, U.S. Army Reserve, pers. comm. 2003), which is several weeks later than the onset of breeding activity documented for arroyo toad populations on the Los Padres National Forest to the south (Sweet 1992). Arroyo toads in this unit may experience climatic conditions not faced by toads at sites found farther south. The protection of this area is essential to maintaining the complete genetic variability of the species and the full range of ecological settings within which it is found, which is essential to the ability of the arroyo toad to adapt to changing environmental conditions. Arroyo toads can be found along the entire length of this segment of the San Antonio River (Service 1999), which is still in a relatively natural state, consists of high-quality arroyo toad habitat, and supports probably one of the largest populations within the Northern Region. This area contains all the primary constituent elements, including breeding pools in low-gradient stream segments, sandy substrates, seasonal flood flows, and relatively undisturbed riparian habitat and upland benches for foraging and dispersal.

We consider other areas along the San Antonio River within Fort Hunter Liggett as essential for the conservation of the species, but excluded them from this proposal because they are within

mission-essential training areas (*see* Exclusions Under Section 4(b)(2)). Thus, we are proposing the majority of the essential lands along the San Antonio River as critical habitat, but we are excluding a portion of the essential lands (less than 50 percent), which are within mission-essential training areas on Fort Hunter Liggett (Army 2003). Military operations (including occasional troop movements and weed control) in and near the riparian zone, yet outside of mapped mission-essential training areas, may create the need for special management considerations in this unit.

Unit 2: Sisquoc River, Santa Barbara County

Unit 2 consists of 27 mi (43 km) of the Sisquoc River and adjacent uplands, from Sycamore Campground downstream to just below the confluence with La Brea Creek. The unit encompasses approximately 6,574 ac (2,660 ha), of which 61 percent is private land and 39 percent is within the Los Padres National Forest. Upper stretches of the river are within the National Forest and mostly within the San Rafael Wilderness Area. Below the National Forest boundary, the river and adjacent uplands are on rural private lands. This long, undammed stream is occupied arroyo toad habitat and is one of the few remaining major rivers in southern California with a natural flow regime. This area contains all of the primary constituent elements, including breeding pools in low-gradient stream segments, sandy or fine gravel substrates, seasonal flood flows, and relatively undisturbed riparian/upland habitat for foraging and dispersal. This area is essential to maintaining genetic diversity of the species. The protection of this population is essential as it is a core population. Grazing, sand and gravel mining, and limited recreational activities are the primary disturbances to arroyo toad habitat in this unit that may require special management considerations.

Unit 3: Upper Santa Ynez River Basin, Santa Barbara County

Unit 3 is located upstream of Gibraltar Reservoir and incorporates portions of the upper Santa Ynez River, Indian Creek, Mono Creek, and adjacent uplands. The unit encompasses approximately 4,414 ac (1,786 ha) within the boundaries of Los Padres National Forest, with 88 percent on National Forest lands and 12 percent on private non-residential inholdings. The segment of the upper Santa Ynez River proposed for designation extends 10 mi (16 km) from Jameson Reservoir downstream to Gibraltar Reservoir. Indian Creek is proposed from the Buckthorn Creek confluence down to its confluence with Mono Creek, a distance of approximately 5 mi (8 km). Mono Creek and associated uplands are proposed for designation for 7.5 mi (12 km) from the first unnamed stream below The Narrows to its confluence with the Santa Ynez River. This area contains all of the primary constituent elements, including breeding pools in low-gradient stream segments, sandy or fine gravel substrates, seasonal flood flows, and relatively undisturbed riparian/upland habitat for foraging and dispersal.

A large and well-studied arroyo toad population occurs in this area (Sweet 1992, 1993). It is likely a remnant of a much larger population that historically extended downstream below what is now Lake Cachuma and upstream into the area occupied by Jameson Reservoir. The population along Mono Creek is one of the more robust populations of arroyo toads on the Los Padres National Forest and is free of exotic vertebrate predators for much of its length (Jamie Uyehara, Forest Service, pers. comm. 2003). Unit 3 is also the wettest area occupied by arroyo toads in the Northern Region (Teale Data Center 1998; California Irrigation Management Information System 2000).

Arroyo toads in this unit likely experience precipitation and soil moisture conditions not faced by toads at drier sites. Potential adaptations to these conditions make the protection of this area essential to maintaining the genetic diversity of the species. Because it is within, or is surrounded by, National Forest land, this area has favorable habitat conditions for population persistence. The arroyo toad population inhabiting Mono and Indian Creeks is particularly healthy and could be used as a source for the reestablishment of arroyo toads in downstream reaches of the Santa Ynez River, if warranted. The leading threats to arroyo toads in this area, primarily along the lower Santa Ynez River and lower Mono Creek, are from exotic species, recreation, and problems associated with an upstream dam (*e.g.*, sediment trapping, altered hydrological regime, temperature changes). To ensure arroyo toad habitat in this unit is protected, special management considerations or protections may be needed.

Unit 4: Sespe Creek, Ventura County

Unit 4 includes 22 mi (35 km) of Sespe Creek and adjacent uplands, from the lower end of Sespe Gorge (elevation approximately 3,530 ft (1,076 m)) downstream to the confluence with Alder Creek. The unit encompasses approximately 4,138 ac (1,675 ha), of which 87 percent is on the Los Padres National Forest, primarily within the Sespe Wilderness. The remainder is in remote, private inholdings. One of the largest arroyo toad populations on the Los Padres National Forest occurs in this unit along Sespe Creek (Forest Service, in litt. 1999), which is undammed and retains its natural flooding regime. This core population is spread over large areas of excellent habitat, including numerous high-quality breeding pools, an abundance of sandy substrates, unimpeded seasonal flood flows, and relatively undisturbed riparian habitat and upland benches for foraging and dispersal (Service 1999). Up to several hundred adult arroyo toads inhabit this reach of the Sespe River (Sweet 1992, 1993), and during years of successful reproduction, such as 2003, thousands of juveniles can be found as well (Tom Murphy, Forest Service, pers. comm. 2003).

Arroyo toads have been found up to 3,300 ft (1,000 m) in elevation in this area, which is one of the highest known occurrences in the Northern Region. The arroyo toads in this unit likely experience temperature extremes or other environmental conditions not faced by toads at lower elevations. Potential adaptations to these conditions make the protection of this area essential for the maintenance of the genetic diversity of the species. In all likelihood, arroyo toad populations in units 4, 5, and 6 historically were part of a large Santa Clara River Basin metapopulation. Ecologically, these units provided a link between the more coastal populations on the Sisquoc and Santa Ynez Rivers, and populations in the Desert Region. Substantial barriers to toad movement now exist between these units, including dams, agriculture, and urban development. Impacts to the Sespe Creek habitat come from recreational activities and exotic predators. Special management considerations or protection may be needed to control and reverse these threats.

Unit 5: Piru Creek, Ventura and Los Angeles Counties

Unit 5 includes Piru Creek and adjacent uplands from the confluence with Lockwood Creek downstream to Pyramid Reservoir (Subunit 5a), and from the confluence with Fish Creek downstream to Lake Piru (Subunit 5b). Subunit 5b also includes Agua Blanca Creek from Devil's Gateway downstream to the confluence with Piru Creek. The unit encompasses approximately 3,966

ac (1,605 ha), 85 percent of which is within the Los Padres and Angeles National Forests, with the remaining on a few private inholdings. Subunit 5a is in a remote setting within the Los Padres National Forest, and most of subunit 5b is within the Sespe Wilderness.

Although much of the historical arroyo toad habitat along Piru Creek is now inundated by the two reservoirs, a substantial arroyo toad population occurs in this unit (Service 1999). The upper portion of subunit 5a is free of exotic vertebrate predators and the arroyo toad population there has been increasing and expanding over the past several years (J. Uyehara, pers. comm. 2003). The expansion of the population is likely due, in part, to seasonal campground closures and the elimination of suction-dredge mining. Because lower Piru Creek (subunit 5b) is below a large dam, the habitat there has experienced some degradation over the years from perennial water releases, rapid changes in flow volume, excessive flows during the breeding season, and an increased presence of exotic predators. However, future releases from Pyramid Dam are scheduled to more closely mimic natural flows and benefit the arroyo toad (Eva Begley, California State Division of Water Resources, pers. comm. 2003). This should result in an expanded, stable population distributed over areas of good-to-excellent habitat that is generally undisturbed by human activities. Both upper and lower Piru Creek contain all of the primary constituent elements, including breeding pools in low-gradient stream segments, sandy substrate, seasonal flood flows (modified to some extent below Pyramid Dam), and riparian habitat and upland benches for foraging and dispersal. Special management considerations may be required above and beyond those currently in place to address threats posed by horse and cattle grazing, recreation, and unnatural flows that could potentially be released from Pyramid Dam.

Unit 6: Upper Santa Clara River Basin, Los Angeles County

Unit 6 includes portions the Santa Clara River, Castaic Creek, San Francisquito Creek, and adjacent uplands. The unit encompasses approximately 7,398 ac (2,994 ha) of which 83 percent is private land and 17 percent is within the Angeles National Forest. Subunit 6a, predominantly within the Angeles National Forest, includes Castaic Creek from Bear Canyon downstream to Castaic Lake, and Fish Creek from Cienaga Spring to the confluence with Castaic Creek. Subunit 6b includes Castaic Creek from the downstream edge of The Old Road right-of-way (adjacent to Interstate 5) down to the confluence with the Santa Clara River, the Santa Clara River from the confluence with Bouquet Creek down to the confluence with Castaic Creek, and San Francisquito Creek from Drinkwater Canyon downstream to the confluence with the Santa Clara River. Subunit 6c includes the upper Santa Clara River from Arrastre Canyon downstream to the confluence with Bee Canyon Creek.

A healthy population of arroyo toads can be found on Castaic Creek above the reservoir (subunit 6a) (Bill Brown, Forest Service, pers. comm. 2003). Although unknown at the time the Recovery Plan was published (Service 1999), arroyo toads also occupy subunit 6b along the Santa Clara River. This portion of the Santa Clara River was originally excluded from designation as critical habitat for the arroyo toad, in part because we believed that a breeding population of arroyo toads could not be sustained in this area. Recent observations of arroyo toads, including eggs, prove this to be incorrect (Ruben Ramirez, Cadre Environmental, pers. comm. 2003). We had also previously stated (66 FR 9414) that the Natural River Management Plan (NRMP) (Valencia Company 1998) adequately protected this section of the Santa Clara River as a dispersal corridor. However, uplands along this section of the Santa Clara River remain unprotected and threatened by development. Because this section of the Santa Clara River supports a breeding population of arroyo toads, connects arroyo toad habitat in Castaic Creek with San Francisquito Creek, and is in need of further protection, we believe it is essential habitat for the arroyo toad metapopulation in the upper Santa Clara River Basin and, in turn, is essential for the conservation of the species.

Although not detected during a recent survey (Impact Sciences 2001), the Castaic Creek portion of subunit 6b contains high-quality arroyo toad habitat within its meandering floodplain and is connected to the occupied reach of the Santa Clara River. The habitat in this river segment is important to the long-term persistence of the Santa Clara River population by allowing for natural population expansion and fluctuation. Although previously included as critical habitat for the arroyo toad, the portion of Castaic Creek from The Old Road Bridge (adjacent to Interstate 5) upstream to Castaic Lagoon contains largely marginal to moderate quality habitat and is not included in this proposal. Arroyo toads have not been detected in this reach during recent surveys (Impact Sciences 2001). Although the habitat looks suitable for arroyo toads, they have not been detected during recent surveys in San Francisquito Creek, which empties into the Santa Clara River (Ed Ervin, U.S. Geological Survey (USGS), pers. comm. 2003). However, in 1997, calling arroyo toad males were heard along San Francisquito Creek near the old St. Francis Dam (Ian Swift, Mountains Recreation and Conservation Authority, pers. comm. 2003). In any event, lower San Francisquito Creek offers an excellent opportunity for further expansion of the arroyo toad population in subunit 6b and is important for the long-term persistence of the Santa Clara River population. The upper portion of the Santa Clara River (subunit 6c) supports a breeding population of arroyo toads (N. Sandburg, in litt. 2001; Rick Farris, Service, pers. comm. 2001; Frank Hovore, Hovore and Associates; in litt. 2001) and has the potential to greatly increase in size with appropriate protection.

Subunits 6a, 6b, and 6c contain all the primary constituent elements, including breeding pools in low-gradient stream segments, sandy substrates, seasonal flood flows, and riparian and upland habitats for foraging and dispersal. The majority of the lands within unit 6 are private, and arroyo toad habitat is adversely affected by urban development, agriculture, recreation, and mining. Exotic species are a concern here as well. Special management considerations or protection may be required in this unit to address these threats. This unit is the easternmost population in the Northern Region, and as such, provides the final link in the range of ecological settings for this region the maintenance of which is essential to the conservation of the species.

Unit 7: Upper Los Angeles River Basin, Los Angeles County

Unit 7 includes portions of Big Tujunga, Mill, and Alder Creeks, and adjacent uplands in the upper Los Angeles River Basin. The unit encompasses approximately 4,213 ac (1,705 ha), of which 64 percent is within the Angeles National Forest and 36 percent is on private lands. This unit is divided into two subunits. Subunit 7a includes 11.8 mi (19 km) of Big Tujunga Creek from below Big Tujunga Dam downstream to Hansen Lake. Subunit 7b encompasses: (1) Approximately 8 mi (13 km) of upper Big Tujunga Creek from immediately above Big Tujunga Reservoir upstream to 1.2 mi (2 km)

above the confluence with Alder Creek, (2) almost 3.7 mi (6 km) of Mill Creek from the Monte Cristo Creek confluence downstream to Big Tujunga Creek, and (3) 1.9 mi (3 km) of Alder Creek from the Mule Fork confluence downstream to Big Tujunga Creek.

Within the last 15 years, the drainages in this unit have been reported to be occupied by arroyo toads (Forest Service, in litt. 1996; Forest Service 2000; California Natural Diversity Data Base (CNDDB) 2003), and, collectively, these toads represent the only significant known population remaining in the coastal foothills of the San Gabriel Mountains. This unit is essential because it is occupied and contains several primary constituent elements including sandy low-gradient stream segments and highly braided river channels supporting sparse vegetation indicating periodic scouring (USGS 2002). Threats that may require special management considerations include adverse (*i.e.*, timing, amount) water releases from Big Tujunga Dam, exotic predators, such as crayfish and bullfrogs, and exotic plants, such as Arundo donax. This unit also contains populations that occur in high-elevation environments that are atypical for arroyo toad and that belong to a metapopulation of the species in the Northern Region.

Southern Region

The following 13 critical habitat units are located in the Southern Region for the arroyo toad and consist of a range of geographic locations from coastal regions to interior mountains. Arroyo toads probably occurred throughout the up- and downstream portions of each of these rivers and creek basins, but are now found only in segments of the rivers and creeks, due to loss or change of habitat and exotic predators. Each of these critical habitat units contains river basins that are identified in the Southern Region of the Recovery Plan (Service 1999). Conserving arroyo toad populations in these river basins is necessary for preserving the species' full range of genetic and phenotypic variation and is essential to the conservation of the species and may require special management considerations or protection.

Unit 8: Lower Santa Ana River Basin/ Black Star and Baker Creeks, Orange County

Unit 8 includes portions of Black Star and Baker Creeks and adjacent uplands in the lower Santa Ana River Basin. The unit encompasses approximately 172 ac (70 ha) just above Irvine Lake, of which 92 percent is private land and 8 percent is within the Cleveland National Forest. We are proposing a 0.7 mi (1 km) stretch of Black Star Creek and associated uplands and a 1.5-mi (0.9-km) stretch of lower Baker Canyon and associated uplands upstream from the Cleveland National Forest boundary as critical habitat. We consider other high-quality habitats along Santiago Creek as essential but excluded them from this proposed rule because they are within the approved Orange County Central Coastal Subregion Natural Community Conservation Plan (NCCP)/Habitat Conservation Plan (HCP) area (see Discussion in Application of Section 4(a)(3)(B) and Exclusions Under Section 4(b)(2)).

Unit 8 is considered essential because it contains several primary constituent elements including shallow, exposed pools and open habitat with sandy terraces (Harmsworth Associates 2001), low-gradient stream segments with sandy washes, a natural flooding regime that periodically scours riparian vegetation and reworks stream channels and terraces, and riparian and adjacent uplands habitats that provide for foraging habitat and living areas for adult and subadult toads and dispersal between areas containing suitable habitat. Maintaining a population in this unit would enhance the viability of the larger arroyo toad metapopulation that extends across the lower coastal mountain slopes of the Santa Ana Mountains from Santiago Creek to San Mateo Creek (crossing into Units 10 and 11). Toads in this unit are significant to the overall conservation of the species because they are likely a relict population of a larger historical population that existed along the lower Santa Ana River Basin prior to the urbanization of the greater Los Angeles area. This relict population may contain unique genetic variation from a greater Santa Ana River Basin population that, with adequate protection and intermittent gene flow, would promote greater genetic diversity within the metapopulation. Toads were observed in lower Baker Canyon and at the confluence of Silverado Creek and Santiago Creek during the 1970s and 1980s (Robert Fisher, USGS, in litt. 1985; CNDDB 2003). However, surveys performed along Santiago Creek in 1997 failed to detect arroyo toads (Harmsworth Associates 1998), and reportedly no arroyo toads were detected in 2000 during surveys on Irvine Company land within this unit (Harmsworth Associates 2001). These survey efforts, however, did not cover all of the high-quality habitats that still exist within this unit (*e.g.*, upper reaches of Baker Canyon). Additional surveys are needed to determine the occupancy status of toads in this unit and their population size. Since suitable habitat still exists, special management considerations, such as augmenting or reestablishing toad populations, may be required for this unit. Threats that may require special management considerations include residential activities near the streams and past commercial sand and gravel removal operations.

Unit 9: San Jacinto River Basin / Bautista Creek, Riverside County

Unit 9 includes portions of Bautista Creek and adjacent uplands in the San Jacinto River Basin. The unit encompasses approximately 683 ac (276 ha), of which 98 percent is within the San Bernardino National Forest and the remaining 2 percent is on State land. We are proposing a 3.1-mi (5.1-km) discontinuous stretch of Bautista Creek as critical habitat. We also consider high-quality habitat along the San Jacinto River as essential from the Sand Canyon confluence downstream to the Soboba Indian Reservation border and along Bautista Creek from the San Bernardino National Forest boundary downstream to near the middle of section 27 (T5S, R1E), where the stream enters a debris basin, but excluded that area from the proposed critical habitat because it is within the Western Riverside MSHCP planning area (*see* Discussion in Application of Section 4(a)(3)(B) and Exclusions Under Section 4(b)(2)). There is also high-quality habitat on the Soboba Indian Reservation along the San Jacinto River and Indian Creek, as well as records of arroyo toads upstream from the Reservation along the San Jacinto River. However, there is uncertainty regarding the amount of high-quality habitat and its occupancy by arroyo toads on the Reservation, and therefore, whether this habitat is essential to the conservation of the species. As a consequence, we have not included lands within the Soboda Indian Reservation in the proposed rule. We are interested in working with the Soboba Indian Tribe in determining the occupancy of these areas and in developing a management plan that will address the conservation needs of the arroyo toad.

Unit 9 is comprised of a substantial arroyo toad population in Bautista Creek within the San Bernardino National Forest (USGS 2000, 2001). This population, along with another smaller population on the San Jacinto River (Brock Ortega, Dudek and Associates, in litt. 2001) which is being excluded from proposed critical habitat due to the

Western Riverside MSHCP, likely extends downstream onto Tribal and other private lands, and represents one of the easternmost populations within the species' range. Unit 9 is essential for arroyo toad conservation because it contains several primary constituent elements including low gradient sandy streambeds with slow moving water suitable for arroyo toad breeding and adjacent upland terrace for foraging and burrowing. The arroyo toad population in this unit is one of the easternmost populations and is isolated from other known populations to the south in the Santa Margarita Watershed, to the west in the San Juan Watershed, and from populations to the north in the Santa Ana Watershed. Therefore, conserving this population is important for the species' recovery because it may contain unique genetic, phenotypic and/or behavioral characteristics. The threats that may require special management considerations for this unit include destruction of habitat and mortality of individual toads from recreation and vehicular traffic from nearby roadways (USGS 2001).

Unit 10: San Juan Creek Basin, Orange County

Unit 10 includes portions of San Juan Creek, Bell Canyon, Trabuco Creek, and adjacent uplands in the San Juan Creek Basin. The unit encompasses approximately 6,285 ac (2,544 ha), of which 54 percent is private land, 34 percent is Orange County Park Land (Caspers Wilderness Park and O'Neill Regional Park), and 12 percent is within the Cleveland National Forest. Subunit 10a covers approximately 20.5 mi (33 km) of San Juan Creek from the bottom of Decker Canyon downstream to Interstate 5 and includes about 2.5 mi (4 km) of Bell Canyon from just below Crow Canyon downstream to the confluence with San Juan Creek. Subunit 10b covers approximately 5 mi (8 km) of Trabuco Creek from Falls Canyon to approximately 0.9 mi (1.4 km) downstream of the State Route 241 (Foothill Transportation Corridor) bridge.

Unit 10 supports a large core population in San Juan and Bell Creeks (P. Bloom, environmental consultant, in litt. 1998; USGS, in litt. 1999a; CNDDB 2003) that is concentrated within Caspers Wilderness Park and private lands downstream (P. Bloom in litt. 1998), the protection of which is essential for the conservation of the species. These areas contain several primary constituent elements, such as low-gradient stream segments with sandy or fine gravel substrates that support shallow pools and alluvial scrub habitat that provides foraging habitat. This unit also supports a population along a stretch of Trabuco Creek (D. Holland, in litt. 2000) where conditions such as low-gradient streams with shallow pools and adjacent upland habitat for foraging and burrowing are favorable for population persistence. Arroyo toad populations in this unit possibly belong to a greater arroyo toad metapopulation in the Santa Ana Mountains and may serve as an important linkage between toads in Santiago Creek (Unit 8) to the north and the San Mateo Creek Basin to the south. Threats to this population that may require special management considerations include exotic predators (bullfrogs), increased water diversions, and residual effects of recent gravel mining operations (Bloom 1998).

Unit 11: San Mateo Creek Basin, San Diego and Orange Counties

Unit 11 includes portions of San Mateo, Cristianitos, Talega, Gabino, and La Paz Creeks, and adjacent uplands in the San Mateo Creek Basin. The unit encompasses approximately 4,580 ac (1,854 ha), of which 68 percent is within portions of Marine Corps Base, Camp Pendleton (Camp Pendleton), including areas leased to outside parties for other land uses (*i.e.*, San Onofre State Park and agricultural lands) and adjacent cantonment areas; 1 percent is within the Cleveland National Forest; and 31 percent is on private land. This unit is divided into three subunits. Subunit 11a extends about 3.1 mi (5 km) from the Cristianitos Creek confluence downstream to just below Interstate 5. Subunit 11a also includes portions of Cristianitos Creek from just above Gabino Creek downstream to the confluence with San Mateo Creek. This subunit also includes approximately 3.1 mi (5 km) of Gabino Creek upstream from its confluence with Cristianitos Creek, including about 0.6 mi (1 km) of La Paz Creek, as well as approximately 2.7 mi (4.3 km) of Talega Creek upstream from its confluence with Cristianitos Creek and beyond the boundaries of Camp Pendleton. Subunit 11b covers approximately 0.4 mi (0.7 km) of San Mateo Creek beyond the boundaries of Camp Pendleton within the Cleveland National Forest near Devils Canyon, and subunit 11c covers approximately 3.9 mi (6.3 km) on San Onofre Creek within cantonment areas in Camp Pendleton. We consider other high-quality habitats along San Mateo, San Onofre, and Talega Creeks within Camp Pendleton as essential, but excluded them from this proposed rule because they are within mission-essential training areas (see Discussion of Exclusions Under Section 4(b)(2)).

This unit contains several primary constituent elements, including low-gradient stream segments with sandy or fine gravel substrates, shallow pools for breeding and rearing of tadpoles and juveniles, and riparian and adjacent uplands habitats for foraging and dispersal to other populations. With so many favorable habitat conditions, Unit 11 is able to support large core populations in San Mateo and Cristianitos Creeks (Holland and Goodman 1998; CNDDB 2003) and is essential for the species. An unusual and important aspect of this unit is its close proximity to the coast because nearly all of the historic near-coastal populations have been extirpated due to extensive urbanization and river channelization along the coastal regions of southern California. Distinctive climatic conditions near the coast may provide different selective pressures on toads in this area, and favor specific genetic characteristics that help maintain the genetic diversity of the species. Threats to this arroyo toad essential habitat that may require special management considerations include cumulative impacts from military and other human activities, including direct mortality from vehicle collisions and vehicular crossings of stream beds, fire, exotic predators, and invasive plants (Holland and Goodman 1998).

Unit 12: Lower Santa Margarita River Basin, San Diego County

Unit 12 includes approximately 8.7 mi (14 km) of the Santa Margarita River and adjacent uplands, including almost 2.1 mi (3.4 km) of De Luz Creek from the town of De Luz to the boundary of Camp Pendleton (Subunit 12a) in the lower Santa Margarita River Basin, and from the lower end of Temecula Canyon along the lower Santa Margarita River to the westernmost boundary between Camp Pendleton and the Naval Weapons Station Seal Beach Detachment Fallbrook (Fallbrook Naval Weapons Station) (Subunit 12b). The unit encompasses approximately 1,840 ac (745 ha), of which 17 percent is within the Fallbrook Naval Weapons Station, 1 percent is on State land, and 82 percent is on private land. We consider other high-quality habitats along the Santa Margarita River in the very northeastern corner of Camp Pendleton as well as further downstream from the Camp Pendleton/Fallbrook boundary as essential, but excluded them from this proposed rule because they are within mission-essential training areas on Camp

Pendleton (see Discussion of Exclusions Under Section 4(b)(2)).

Recent surveys of the Santa Margarita River and De Luz Creek immediately downstream of this unit on Camp Pendleton have documented what is probably the largest known population of arroyo toads (Holland 1995; Holland and Goodman 1998; Varanus Biological Services, Inc. 1999; Holland and Sisk, 2001; CNDDB 2003). This unit contains several primary constituent elements including rivers with suitable hydrologic regimes, low-gradient stream segments with sandy substrates supporting shallow pools and gravel bars for breeding and rearing tadpoles and juveniles, and riparian and adjacent upland habitat to provide foraging and living areas for subadult and adult toads. This unit is important for the recovery of the species because of its size, proximity to other large populations on Camp Pendleton, and potential connectivity to populations in the upper Santa Margarita River Basin (Unit 13). Threats to this habitat that may require special management considerations include cumulative impacts to the species' habitat from military and other human activities, including direct mortality from vehicle collisions and vehicular crossings of stream beds, fire, exotic predators, and invasive plants (Holland and Goodman 1998).

Unit 13: Upper Santa Margarita River Basin, San Diego and Riverside Counties

Unit 13 is located upstream from Vail Lake and includes portions of Temecula and Arroyo Seco Creeks, and adjacent uplands in the upper Santa Margarita Basin. The unit encompasses approximately 3,627 ac (1,468 ha), of which 82 percent is private land, 17 percent is within the Cleveland National Forest, and 1 percent is BLM land. This unit is divided into two subunits. Subunit 13a includes 3.7 mi (5.9 km) of Arroyo Seco Creek from Crosley Homestead downstream to just north of the Riverside/San Diego County boundary and further downstream within the Cleveland National Forest. Subunit 13b includes approximately 7.2 mi (11.6 km) of Temecula Creek from Dodge Valley downstream to the Riverside/San Diego County boundary. We consider other high-quality habitats along Temecula, Wilson, and Arroyo Seco Creeks as essential, but excluded them from this proposed rule because they are within the Western Riverside MSHCP planning area (see Discussion in Application of Section 4(a)(3)(B) and Exclusions Under 4(b)(2)).

Unit 13 contains documented occurrences in Temecula, Wilson, and Arroyo Seco Creeks (AMEC Earth and Environmental, Inc. 2001; CNDDB 2003) and is essential because it contains high-quality habitat, such as broad, flat alluvial valleys with good foraging habitat, loose soils for burrowing, and shallow pools for breeding. The habitat conditions are favorable for population expansion and long-term persistence, and the unit provides a potential link to populations in the lower Santa Margarita River Basin (Unit 12). Sand mining operations and exotic predators (CNDDB 2003) threaten arroyo toad habitat in this unit and may require special management considerations.

Unit 14: Lower and Middle San Luis Rey River Basin, San Diego County

Unit 14 includes portions of the San Luis Rey River below Lake Henshaw and adjacent uplands, and includes sections of Pala and Keys Creeks in the lower and middle San Luis Rey River Basin. The unit encompasses approximately 15,376 ac (6,222 ha), of which 82 percent is private land, 12 percent (1856 ac (751 ha)) is on the Pala Indian Reservation, and 7 percent (1021 ac (413 ha)) is on the Rincon Indian Reservation. Approximately 30 mi (48 km) of the San Luis Rey River from the western edge of the La Jolla Indian Reservation downstream to the confluence with Guajome Creek near the City of Oceanside are proposed for designation. It also includes approximately 3.4 mi (5.5 km) of Pala Creek and 1.7 mi (2.7 km) of Keys Creek upstream from their confluence with the San Luis Rey River.

This long, low-elevation (all below 1,000 ft (305 m) in elevation) unit is situated in a broad, flat valley with a low-gradient river that supports shallow pools and sandy substrates in adjacent upland terraces for foraging and burrowing. This unit is essential for the recovery of the arroyo toad because it supports one of the largest core populations within the species' range (Dudek and Associates, Inc. in litt. 1995; Tierra Madre Consultants, Inc., in litt. 1995; California Department of Transportation (Caltrans) 1998; Varanus Biological Services, Inc., in litt. 1999; KEA Environmental, Inc., in litt. 2000). Special management considerations that are required in this unit include minimizing impacts from intensive urbanization, agriculture, exotic predators, and plants, and addressing issues regarding dams and water diversions in the upper end of the unit.

We are including lands on the Pala and Rincon Indian Reservations because they consist of some of the highest quality occupied habitat, such as low-gradient rivers containing shallow pools for breeding and upland habitat for foraging, in this unit (Tierra Environmental Services 1999; Varanus Biological Services, Inc. 1999). If these high-quality habitats on the Reservations are lost, the migration of individuals and continuity of gene flow along the San Luis Rey River would be precluded, resulting in fragmentation of remaining toad populations outside of the Reservations and their greater susceptibility to extirpation. The Service will be attempting to work closely with the Pala and Rincon Band of Mission Indians prior to the final designation of critical habitat to achieve necessary conservation measures for the species and to subsequently exclude the these Reservation lands from critical habitat. Designation of these Reservation lands is essential to the conservation of the species and may require special management considerations, such as minimizing development impacts in riparian areas and adjacent upland habitat.

Unit 15: Upper San Luis Rey River Basin, San Diego County

Unit 15 includes the upper San Luis Rey River above Lake Henshaw, two of its headwater tributaries, and adjacent uplands in the upper San Luis Rey River Basin. The unit encompasses approximately 11,725 ac (4,745 ha), of which 86 percent is private land and 14 percent is within the Cleveland National Forest. This unit consists of two subunits. Subunit 14a covers almost 8.7 mi (14 km) of the upper San Luis Rey River from the Indian Flats area downstream to the upper end of Lake Henshaw and includes about 7.8 mi (12.5 km) of Agua Caliente Creek from the western edge of section 13 (T10S, R3E) to the confluence with the San Luis Rey. Subunit 14b includes approximately 1.6 mi (2.5 km) of the West Fork of the San Luis Rey River, where it runs through Barker Valley. Arroyo toads occur in each of these drainages, with the largest concentration found along Agua Caliente Creek.

This unit is essential because it contains several primary constituent elements including low-gradient stream segments with sandy substrates supporting shallow pools, and riparian and adjacent upland habitats to provide areas foraging and burrowing. This unit is important for the recovery of the species because it contains a unique assemblage of several small, disjunct, high-elevation arroyo toad populations and one large, core population on Agua Caliente Creek (E. Gergus, San Diego State University, in litt. 1992; CNDDB 2003) in an area where in-stream and/or overland dispersal between

populations is likely still possible. Maintaining adequate genetic connectivity within this population increases the probability of these populations' long term persistence. Groundwater pumping on private lands, exotic predators, and grazing are the primary disturbances to arroyo toad habitat that may require special management in this unit.

Unit 16: Santa Ysabel Creek Basin, San Diego County

Unit 16 includes portions of Santa Ysabel Creek and adjacent uplands, and includes portions of Santa Maria Creek, Guejito Creek, and Temescal Creek (Pamo Valley) in the San Dieguito River/Santa Ysabel Creek Basin. The unit encompasses approximately 11,080 ac (4,484 ha), of which 93 percent is private land, 6 percent is within the Cleveland National Forest, and 1 percent is on the Mesa Grande Indian Reservation. The unit consists of four subunits. Subunit 16a includes approximately 7.9 mi (12.7 km) of Santa Ysabel Creek and adjacent uplands from the Mesa Grande Indian Reservation downstream to the western boundary of the Cleveland National Forest near Boden Canyon (which is the eastern boundary of the San Diego MSCP area). This subunit also includes approximately 4.3 mi (7 km) of Temescal Creek from the northern edge of Pamo Valley to the confluence with Santa Ysabel Creek and 0.1 mi (0.1 km) of Boden Canyon and adjacent uplands on the Cleveland National Forest at approximately 0.75 mi (1.2 km) upstream from the Santa Ysabel Creek confluence. Subunit 16b includes approximately 7.5 mi (12 km) of Guejito Creek from the 2,000-ft (610-m) elevation contour downstream to the San Diego MSCP boundary near San Pasqual Valley. Subunit 16c covers approximately 5.3 mi (8.5 km) of Santa Maria Creek from the west side of Ramona to the San Diego MSCP boundary near San Pasqual Valley. Subunit 16d includes approximately 5.2 mi (8.3 km) of Santa Ysabel Creek and adjacent uplands from approximately 0.5 mi (0.8 km) east of Highway 79 downstream to approximately 0.25 mi (0.4 km) downstream of the confluence with Witch Creek. We consider other high-quality habitats along Santa Ysabel, Santa Maria, and Guejito Creeks as essential, but excluded them from this proposed rule because they are within the approved San Diego MSCP plan area (see discussion in Application of Section 4(a)(3)(B) and Exclusions Under Section 4(b)(2) of the Act).

All of the drainages included in this unit are occupied by arroyo toads, and a large population exists along Temescal and Santa Ysabel Creeks within Pamo Valley (Varanus Biological Services, Inc. 1999; Tierra Environmental Services, in litt. 2001; USGS, in litt. 2002; CNDDB 2003). This unit is essential because it contains several primary constituent elements including low-gradient sandy stream segments with shallow pools for breeding and rearing of tadpoles, and upland sandy terraces that provide foraging and burrowing habitat. This unit is also essential for the species' recovery because it supports a large core population and contains several additional populations that are interconnected. In addition, this unit provides an important linkage for genetic interchange with a core arroyo toad population in the San Pasqual Valley, which is within the San Diego MSCP. A population of arroyo toads was recently discovered in high-quality habitat along Santa Ysabel Creek upstream from Lake Sutherland (USGS, in litt. 2002). Protection of this population, on the Santa Ysabel Open Space Preserve, and another population in Witch Creek (E. Gergus, in litt. 1992), a tributary of Santa Ysabel Creek, is essential for the recovery of the species because they exist in an undammed portion of the Santa Ysabel Creek drainage above Lake Sutherland and are thus subject to a more natural flooding regime. Within this portion of the upper Santa Ysabel Creek, approximately 40 ac (16 ha) of Mesa Grande Indian Reservation is included as critical habitat. This Reservation is located between occupied areas on the Santa Ysabel Open Space Preserve and the confluence of Witch and Santa Ysabel Creeks, which is downstream from where toads were discovered in Witch Creek in the early 1990s. Conserving habitat on the Mesa Grande Reservation is essential to allow for the migration of toads to support the genetic and demographic continuity within this population along the upper portions of Santa Ysabel Creek. Grazing, exotic predators, and urbanization (Tierra Environmental Services, in litt. 2001; CNDDB 2003) are the primary threats to this arroyo toad essential habitat that may require special management considerations in this unit.

Unit 17: San Diego River Basin/San Vicente Creek, San Diego County

Unit 17 includes portions of the San Diego River and San Vicente Creek and adjacent uplands in the San Diego River Basin. The unit encompasses approximately 2,309 ac (934 ha), of which 75 percent is private land, 19 percent is within the Cleveland National Forest, and 6 percent is on the Capitan Grande Indian Reservation. The unit is broken into four subunits—three disjunct sections of the San Diego River and one section of San Vicente Creek. Subunit 17a includes approximately 5 mi (8 km) of the San Diego River from Ritchie Creek downstream through 0.5 mi (0.9 km) of the Capitan Grande Indian Reservation to the upper edge of El Capitan Reservoir and approximately 0.6 mi (1 km) of lower Cedar Creek. Subunit 17b includes 0.9 mi (1.5 km) of the San Diego River from El Capitan Reservoir to El Monte County Park. Subunit 17c covers almost 4.3 mi (7 km) of the San Diego River from approximately 1.2 mi (2 km) below El Monte County Park downstream to the confluence with San Vicente Creek. Subunit 17d includes 1.4 mi (2.3 km) of San Vicente Creek from the west side of San Diego Country Estates downstream to where the creek crosses Wildcat Canyon Road (the MSCP area boundary). We consider other high-quality habitats along San Vicente Creek and the San Diego River as essential, but excluded them from this proposed rule because they are within the approved San Diego MSCP plan area (see Discussion in Application of Section 4(a)(3)(B) and Exclusions Under Section 4(b)(2)).

The upper San Diego River and San Vicente Creek are both occupied by arroyo toads (E. Gergus, in litt. 1992; Varanus Biological Services, Inc. 1999; CNDDB 2003). This unit is essential since it contains several primary constituent elements such as low-gradient stream segments with sandy substrates supporting shallow pools for breeding, riparian and adjacent upland habitats that provide foraging, living, and migration areas for subadult and adult toads. This unit is important for arroyo toad conservation because it encompasses several significant populations and includes suitable habitat for population expansion, thus increasing the probability of the long-term persistence of these populations. It also provides an important linkage to populations occurring within the San Diego MSCP area. This unit also includes high quality habitat, such as low-gradient stream segments and adjacent upland terrace areas for foraging and burrowing, on the Capitan Grande Indian Reservation along the upper portions of the San Diego River and above Capitan Reservoir. These areas are between areas of occupied high quality habitat outside of the Reservation along the San Diego River. Conserving habitat on the Capitan Grande Reservation is essential to allow for the migration of toads to support the

genetic and demographic continuity within this population on the upper portions of the San Diego River. Minimizing threats from development is necessary to maintain the viability of the populations in this unit. Consequently, special management considerations or protection may be required.

Unit 18: Sweetwater River Basin, San Diego County

Unit 18 includes portions of the Sweetwater River, Peterson Canyon, Viejas Creek, and adjacent uplands in the Sweetwater River Basin. The unit encompasses approximately 9,235 ac (3,737 ha), of which 54 percent is private land, 23 percent is on California State Park land, 12 percent is within the Cleveland National Forest, 8 percent is on the San Diego National Wildlife Refuge, 3 percent is on California Department of Fish and Game (CDFG) land, and less than 1 percent is on the Sycuan Indian Reservation. The unit is broken into four subunits—three disjunct sections of the Sweetwater River and one section of Viejas Creek. Subunit 18a covers approximately 20 mi (32 km) of the Sweetwater River from the top of Upper Green Valley in Cuyamaca Rancho State Park downstream to the San Diego MSCP area boundary. Subunit 18b includes approximately 0.7 mi (1.2 km) of the Sweetwater River between the MSCP boundary and Loveland Reservoir and 1.5 mi (2.4 km) of Peterson Canyon from just east of the Taylor Creek confluence downstream to the top of Loveland Reservoir. Subunit 18c encompasses approximately 16 mi (26 km) of the Sweetwater River, within the MSCP boundary, from immediately below Loveland Dam downstream to the upper edge of Sweetwater Reservoir. Subunit 18d covers 1.8 mi (2.9 km) of Viejas Creek and associated uplands from the western border of the Viejas Indian Reservation downstream to the Congressional boundary of the Cleveland National Forest (also the eastern boundary of the San Diego MSCP area). We consider other high-quality habitats along Viejas Creek and the Sweetwater River as essential, but excluded these lands from the proposed rule because they are within the approved San Diego MSCP plan area (*see* Discussion in Application of Section 4(a)(3)(B) and Exclusions Under Section 4(b)(2)).

The unit is essential to arroyo toad conservation because it consists of several primary constituent elements including open sandy river bottoms with shallow pools that support breeding populations and adjacent upland foraging and burrowing areas. This unit is also essential for the species conservation because it supports several significant populations over large stretches of rivers and streams (E. Gergus, in litt. 1992; Ervin and Griffin, in litt. 1997; Varanus Biological Services, Inc. 1999; CNDDB 2003). Maintaining suitable habitat conditions and connectivity are essential to provide for the long-term persistence of these populations. This unit also includes high quality habitat, such as low-gradient stream segments and adjacent upland terrace areas for foraging and burrowing, on the Sycuan Indian Reservation in the Sweetwater River. This area is between areas of occupied high quality habitat outside the Reservation along the Sweetwater River. Consequently, conserving habitat on the Sycuan Reservation is essential to allow for the migration of toads to support the genetic and demographic continuity within the population on this portion of the Sweetwater River. This unit may require special management considerations to address threats from adverse (*i.e.*, timing, amount) water releases from reservoirs, cattle grazing, gravel mining operations, off highway vehicular traffic, and exotic predators.

Unit 19: Cottonwood Creek Basin, San Diego County

Unit 19 includes portions of Cottonwood Creek, adjacent uplands, and portions of the following tributaries: Potrero Creek, Pine Valley Creek, Scove Canyon, Morena Creek, La Posta Creek, and Kitchen Creek of the Cottonwood Creek Basin. This large unit encompasses approximately 15,798 ac (6,393 ha), of which 55 percent is private land, 37 percent is within the Cleveland National Forest, 7 percent is on land owned by San Diego County, and 1 percent is on BLM land. The unit consists of four disjunct subunits—two sections of Cottonwood Creek and two sections of Pine Valley Creek. Subunit 19a covers 7 mi (11.2 km) of Cottonwood Creek from Buckman Springs (near Interstate 8) downstream to Morena Reservoir and includes approximately 3.7 mi (6 km) of La Posta Creek, 2.8 mi (4.5 km) of Morena Creek, and 5 mi (8 km) of Kitchen Creek upstream from the Cottonwood Creek confluence. Subunit 19b covers almost 9.9 mi (16 km) of Cottonwood Creek from approximately 2.5 mi (4 km) below Morena Reservoir downstream to State Highway 94 (excluding Barrett Reservoir) and includes 9.3 mi (15 km) of Potrero Creek from approximately the 2,466-ft (752-m) elevation benchmark downstream to the confluence with Cottonwood Creek. Subunit 19c covers about 7.5 mi (12 km) of Pine Valley Creek from the north edge of section 12 (T15S, R4E) downstream to approximately 0.6 mi (1 km) south of Interstate 8 and includes approximately 2.5 mi (4 km) of Scove Canyon and 0.6 mi (1 km) of Noble Creek. Subunit 19d encompasses 8 mi (13 km) of Pine Valley Creek from the Nelson Canyon confluence downstream to Barrett Reservoir. We consider other high-quality habitats along Cottonwood Creek as essential, but excluded them from this proposed rule because they are within the San Diego MSCP area (*see* Discussion in Application of Section 4(a)(3)(B) and Exclusions Under Section 4(b)(2)).

This unit encompasses a large number of distinct arroyo toad occurrences (E. Gergus, in litt. 1992; Varanus Biological Services, Inc. 1999; USGS, in litt. 1999b; CNDDB 2003) in an area where in-stream and/or overland dispersal between populations is probably still possible and where there is room for population expansion. It also provides an important linkage to populations occurring within the San Diego MSCP area. The unit is essential because it includes several primary constituent elements including wide, open sandy low-gradient stream segments supporting shallow pools for breeding and sparsely vegetated upland habitat for foraging and burrowing. Urbanization, grazing, Border Patrol activities, introduced plants, and exotic predators are the primary threats to this arroyo toad essential habitat that may require special management considerations.

Unit 20: Upper Santa Ana River Basin/ Cajon Wash, San Bernardino County

Unit 20 includes approximately 4.8 mi (7.7 km) of Cajon Wash and adjacent uplands, from just south of Cajon campground downstream to the San Bernardino National Forest boundary. The unit encompasses approximately 1,262 ac (511 ha), of which 52 percent is private land and 48 percent is within the San Bernardino National Forest.

This population may represent some of the last vestiges of a much greater population that historically existed along the upper Santa Ana River Basin, but was almost entirely extirpated due to urbanization of the greater Los Angeles area. Arroyo toads were located near the junction between Lone Pine Canyon and Cajon Wash in 2000 (USGS 2000). The nearest known arroyo toad population occurs approximately 3.7 mi (6 km) (straight line distance) to the east in the West Fork Mojave River (Unit 22). However, the steep terrain between these populations makes it likely that

these populations are isolated from one another. Protecting this population is important for the conservation of the species because it helps preserve an important outlier segment of the genetic, phenotyopic, and/or behavioral variation of the species. This unit is essential because it contains several primary constituent elements including low-gradient sandy stream segments supporting shallow breeding pools, adjacent upland terraces for foraging and burrowing, and a flooding regime that sufficiently corresponds to natural conditions and periodically scours riparian vegetation and reworks stream channels. Recreational usage is the primary threat to this habitat that may require special management considerations.

Desert Region

Arroyo toad populations in the following three critical habitat units are essential for the conservation of the species in the Desert Region, as described in the Recovery Plan (Service 1999). Each of these units is isolated from each other and from any other units, making the issues of inbreeding, fragmentation, and random negative impacts of great concern. However, this unit also represents unique ecological conditions for arroyo toads, and likely harbors important genetic diversity.

Unit 21: Little Rock Creek Basin, Los Angeles County

Unit 21 includes approximately 5.9 mi (9.5 km) of Little Rock Creek and adjacent uplands, from the South Fork confluence downstream to the upper end of Little Rock Reservoir (in the vicinity of Rocky Point Picnic Ground), and approximately 1.1 mi (1.8 km) of Santiago Creek and adjacent uplands upstream from the confluence with Little Rock Creek in the Little Rock Creek Basin. The unit encompasses approximately 941 ac (381 ha), all of which is within the Angeles National Forest.

Unit 21 is essential for arroyo toad conservation because it supports several primary constituent elements including low-gradient sandy stream segments that support shallow breeding pools, adjacent upland areas for foraging, and a hydrologic regime that sufficiently corresponds to natural conditions and scours the riparian vegetation, thus providing open areas for movement. This unit is important for the conservation of the species because these populations collectively comprise an isolated population on the periphery of the species' range that possibly possesses unique genetic and phenotypic variation (Forest Service, in litt. 1998; Ramirez 2002a). Protecting peripheral populations is necessary for maintaining a broad range of genetic diversity for the species. Losses of diversity can result in reduced evolutionary flexibility and declines in fitness. Threats from recreational activities may require special management considerations to preserve the area's favorable habitat conditions for the persistence of this population.

Unit 22: Upper Mojave River Basin, San Bernardino County

Unit 22 includes portions of the Mojave River, the West Fork of the Mojave River, Horsethief and Little Horsethief Creeks, Grass Valley Creek, Deep Creek, and adjacent uplands in the upper Mojave River Basin. The unit encompasses approximately 14,450 ac (5,848 ha), of which 59 percent is private land, 18 percent is managed by the U.S. Army Corps of Engineers in association with a flood control reservoir, 14 percent is within the San Bernardino National Forest, 8 percent is State land, and 1 percent is BLM land. The unit is divided into three separate subunits. Subunit 22a includes: (1) Approximately 9.3 mi (18 km) of Deep Creek from near Holcomb Creek downstream to the confluence with the West Fork, (2) approximately 4 mi (6.5 km) of Little Horsethief Creek from near the western edge of section 28 (T3N, R5W) downstream to the confluence with Horsethief Creek, (3) approximately 3.4 mi (5.5 km) of Horsethief Creek from the Little Horsethief Creek confluence downstream to the West Fork confluence, (4) just over 4.3 mi (7 km) of the West Fork of the Mojave River from the Horsethief Creek confluence downstream to Mojave River Forks Dam, (5) approximately 2.5 mi (4 km) of the Mojave River below Mojave River Forks Dam, (6) approximately 1.4 mi (2.2 km) of Grass Valley Creek upstream from the confluence with the West Fork, and (7) approximately 2.8 mi (4.5 km) of Kinley Creek upstream from the Deep Creek confluence. Subunit 22b includes approximately 11 mi (18 km) of the Mojave River from just above the Upper Narrows (section 14, T5N, R4W) downstream to approximately 3.7 mi (6 km) below the Lower Narrows (section 13, T6N, R5W). Subunit 22c includes almost 1.9 mi (3 km) of the upper West Fork of the Mojave River, above Silverwood Lake, from near the 3,613 ft (1,462 m) elevation benchmark downstream to the upper end of the lake.

This unit is essential because it contains several primary constituent elements including low-gradient sandy stream segments that support shallow breeding pools, adjacent upland areas for foraging, and a hydrologic regime that sufficiently corresponds to natural conditions and scours the riparian vegetation, thus providing open areas for movements by toads. All of the drainages proposed for designation as critical habitat in this unit are occupied by arroyo toads, although the current occupancy of the Mojave River within subunit 22b is unknown (Tierra Madre Consultants, Inc. 1995; Ramirez 2002b; CNDDB 2003; Forest Service, in litt. 2003; Ramirez 2003). Habitat conditions within subunit 22b are favorable for toads (E. Ervin, pers. comm. 2003), with low-gradient pools, sandy substrates, scattered riparian vegetation, and undeveloped uplant habitats. Arroyo toads have been confirmed from this area as late as 1982 (Campbell *et al.* 1996), and unconfirmed reports of calling arroyo toads have been made as recently as 1998 (Tim Thomas, Biologist, U.S. Fish and Wildlife Service, pers. comm.. 2003). However, it has not been extensively surveyed and recent arroyo toad observations are lacking along this reach.

Unit 22 is essential for arroyo toad conservation because it contains PCEs that support the largest population of the species on the desert side of the mountains (subunit 22a). Summit Valley, which encompasses the lower portions of Horsethief Creek and the West Fork of the Mojave River, is a broad, flat, alluvial valley that supports a substantial arroyo toad population (Ramirez 2003). Providing adequate and proper streamflows and protections for the upland alluvial habitats would increase the probability for the long-term persistence of this large toad population. If adequate streamflows and upland alluvial habitats can be maintained, this desert unit would have the most favorable conditions of any of the desert units for long-term persistence of the large toad population. The downstream portion of this unit contains the driest conditions of any unit proposed for arroyo toad critical habitat (Teale Data Center 1998; CIMS 2000), which suggests that this population may possess unique physiological adaptations, such as a reduced rate of evaporative water loss. Protection of this area is essential to maintain the range of genetic and phenotypic diversity of the species. The presence of exotic species, flood control and channel maintenance activities, and recreational activity (particularly off-road vehicle use) may create the need for special management in this unit.

Unit 23: Whitewater River Basin, Riverside County

Unit 23 includes approximately 7.2 mi (11.7 km) of the Whitewater River and adjacent uplands, from near Red Dome downstream to Interstate 10. The unit encompasses approximately 1,997 ac (808 ha), of which 52 percent is BLM land and 48 percent is private land. The current status of arroyo toads in this unit is poorly known. They were observed and photographed in the drainage in 1992 (Patten and Myers 1992) but were not detected in surveys conducted during the 2000 breeding season (Jones and Stokes, in litt. 2000). However, 2000 was generally a bad year for arroyo toad breeding activity, particularly in the southern half of the species' range, because of below average precipitation and subsequent low streamflows. In 2003, a tadpole was identified with almost complete certainty to be an arroyo toad near where the Colorado River Aqueduct crosses the river (P. Bloom, in litt. 2003). However, further surveys should be performed to confirm this finding. Given the relatively recent documentation of arroyo toads in this drainage, and the continued presence of suitable habitat in the area, we believe it is likely that this unit is still occupied.

Unit 23 supports primary constituent elements such as open sandy areas near small areas of slow moving water and adjacent sparse riparian habitat for foraging and burrowing. These essential PCEs support an isolated desert population on the easternmost periphery of the species' range in the Sonoran Desert that may possess unique phenotypic and genetic variation that are distinct from other desert populations in Units 21 and 22 in the Mohave Desert. Maintaining greater genetic diversity creates greater potential for adaptation to changing environmental conditions. Threats to this population that may require special management considerations include unsuitable water flow for breeding and off highway vehicular traffic.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, permit, or carry out do not destroy or adversely modify critical habitat. In our regulations at 50 CFR 402.02, we define destruction or adverse modification as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to: Alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical." However, in a March 15, 2001, decision of the United States Court of Appeals for the Fifth Circuit (*Sierra Club* v. *U.S. Fish and Wildlife Service et al.*, F.3d 434), the court found our definition of destruction or adverse modification to be invalid. In response to this decision, we are reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in the destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. The conservation recommendations in a conference report are advisory.

We may issue a formal conference report if requested by a Federal agency. Formal conference reports include an opinion that is prepared according to 50 CFR 402.14, as if the species were listed or critical habitat designated. We may adopt the formal conference report as the biological opinion when the species is listed or critical habitat designated, if no substantial new information or changes in the action alter the content of the opinion (*see* 50 CFR 402.10(d)).

If a species is listed or critical habitat is designated, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, we would ensure that the permitted actions do not destroy or adversely modify critical habitat.

If we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. Reasonable and prudent alternatives are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat or adversely modify or destroy proposed critical habitat.

Activities on Federal lands that may affect the arroyo toad or its critical habitat will require section 7 consultation. Activities on private or State lands requiring a permit from a Federal agency, such as a permit from the Corps under section 404 of the Clean Water Act, a section 10(a)(1)(B) permit from the Service, or some other Federal action, including funding (*e.g.*, Federal Highway Administration (FAA) or Federal Emergency Management Agency (FEMA) funding), will also continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non-Federal and private lands that are not federally funded, authorized, or permitted do not require section 7 consultation.

Section 4(b)(8) of the Act requires us to evaluate briefly and describe, in any proposed or final regulation that designates critical habitat, those activities involving a Federal action that may adversely modify such habitat or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat would be those that alter the primary constituent elements to the extent that

the value of critical habitat for the conservation of the arroyo toad is appreciably reduced. We note that such activities may also jeopardize the continued existence of the species.

Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and require that a section 7 consultation be conducted include, but are not limited to:

(1) Regulation of activities affecting waters of the United States by the Corps under section 404 of the Clean Water Act;

(2) Regulation of water flows, damming, diversion, and channelization by any Federal agency;

(3) Road construction and maintenance, right-of-way designation, and regulation of agricultural activities on Federal lands (such as those managed by the Service, Forest Service, DOD, or BLM);

(4) Regulation of grazing, mining, and recreation by the BLM, DOD, Corps, or Forest Service;

(5) Regulation of airport improvement activities by the FAA;

(6) Military training and maneuvers, facilities operations, and maintenance on Fort Hunter Liggett and other DOD lands designated as critical habitat;

(7) Licensing of construction of communication sites by the Federal Communications Commission; and,

(8) Funding of activities by the U.S. Environmental Protection Agency (EPA), Department of Energy (DOE), FEMA, Federal Highway Administration (FHA), or any other Federal agency.

If you have questions regarding whether specific activities will constitute destruction or adverse modification of critical habitat, contact the Field Supervisor, Ventura Fish and Wildlife Office or Carlsbad Fish and Wildlife Office (*see* **ADDRESSES** section). Requests for copies of the regulations on listed wildlife and inquiries about prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Branch of Endangered Species, 911 NE 11th Ave., Portland, OR 97232 (telephone 503/231–2063; facsimile 503/231–6243).

All lands proposed for designation as critical habitat are within the geographic range of the species, all are occupied by the species (based on observations made within the last 20 years), and are likely to be used by the arroyo toad, whether for foraging, breeding, growth of larvae and juveniles, intra-specific communication, dispersal, migration, genetic exchange, or sheltering. Thus, we consider all proposed critical habitat units to be occupied by the species.

We recognize that the proposed designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, we want to ensure that the public is aware that critical habitat designations do not signal that habitat outside the proposed designation is unimportant or may not be required for recovery. Areas outside the proposed critical habitat designation will continue to be subject to conservation actions that may be implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard and the prohibitions of section 9 of the Act. Critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, HCPs, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Application of Section 4(a)(3)(B) and Exclusions Under Section 4(b)(2) of the Act

The recent amendments to Section 4(a)(3) of the Endangered Species Act (Pub. L. 108–136) address the relationship of Integrated Natural Resources Management Plans (INRMPs) to critical habitat. The new provision prohibits the Service from designating as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an INRMP prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary of the Interior determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. Both Camp Pendleton and Fallbrook Naval Weapons Station have completed INRMPs. The application of section 4(a)(3) to these military lands and our decision to include them in this proposed designation are discussed below under *Relationship to Lands Managed by the DOD—Exclusions under Section 4(a)(3)(B) and 4(b)(2) of the Act*.

Section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data after taking into consideration the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of exclusion outweigh the benefits of specifying the particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species.

In our critical habitat designations, we use the provisions outlined in section 4(b)(2) of the Act to evaluate those specific areas that we are considering proposing as critical habitat as well as for those areas that are formally proposed for designation as critical habitat. We have excluded lands under section 4(b)(2) within military installations where designation could interfere with mission essential training activities or impact national security. In addition, we have excluded lands under section 4(b)(2) that are covered by the following types of plans if they provide assurances that the conservation measures they provide will be implemented and effective: (1) Legally operative HCPs that cover the species, (2) draft HCPs that cover the species and have undergone public review and comment (*i.e.*, pending HCPs), (3) Tribal conservation plans that cover the species, (4) State conservation plans that cover the species, and (5) National Wildlife Refuge System Comprehensive Conservation Plans.

We have considered, but are excluding from proposed critical habitat for the arroyo toad, the following areas under section 4(b)(2): Mission-essential training areas on Camp Pendleton and Fort Hunter-Liggett; lands within approved subarea plans of the San Diego Multiple Species Conservation Program (MSCP); and lands covered by the Orange County Central-Coastal NCCP/HCP, the San Diego Gas and Electric (SDG&E) NCCP/HCP, and the proposed Western Riverside Multiple Species Habitat Conservation Plan (MSHCP). We are proposing some lands that are managed by the DOD as critical habitat for the arroyo toad. These include nontraining and cantonment areas on Camp Pendleton, nontraining areas on Fort Hunter Liggett, and Fallbrook Naval Weapons Station. We are also proposing some Tribal lands within the Pala, Rincon, Sycuan, Mesa Grande, and the Capitan Grande Indian Reservation as critical habitat. Our evaluation of land within each of these categories under section 4(b)(2) follows.

Table 3 shows the approximate proposed critical habitat, essential area, and excluded areas. Table 4 shows the planning and preserve areas within NCCP/HCPs discussed in this proposal.

TABLE 3.—APPROXIMATE PROPOSED CRITICAL HABITAT, ESSENTIAL, AND EXCLUDED AREAS

Area considered essential	176,555 ac (71,450 ha).
Area excluded under 4(b)(2) (mission-essential training areas at Camp Pendleton and Fort Hunter Liggett; HCP plan areas consisting of San Diego MSCP, Central-Coastal Orange County NCCP/HCP, Proposed Western Riverside MSHCP, SDG&E NCCP/HCP).	37,842 ac (15,314 ha).
Proposed Critical Habitat	138,713 ac (56,133 ha).

TABLE 4.—HCP AREAS EXCLUDED FROM PROPOSED CRITICAL HABITAT

NCCP/HCP	Plan area	Preserve area
San Diego MSCP	582,000 ac (236,000 ha)	171,000 ac (69,572 ha).
Central-Coastal Orange County NCCP/HCP	208,713 ac (84,463 ha)	38,738 ac (15,667 ha).
Proposed Western Riverside MSHCP	1.3 million ac (530,0000 ha)	153,000 ac (61,919 ha).
SDG&E NCCP/HCP	Not specified [1]	240 ac (97 ha).

[1] The planning area for SDG&E's NCCP/HCP encompasses all of San Diego County west of the desert, a portion of Orange County within the existing SDG&E's service territory, and the SDG&E Moreno Compressor Station in Riverside County, California. However, the size of this planning area is not specified in SDG&E's Subregional Natural Community Conservation Plan. Based on the Plan's forecasting, it is estimated that SDG&E will impact 124 acres within 25 years following the receipt of their Section 10(a)(1)(B) permit. Since the future cannot be accurately predicted, the Service has authorized up to 400 acres (162 ha) of impact over a 55-year period under the Section 10(a)(1)(B) permit (USFWS 1995).

Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2)

Regional HCPs

Section 4(b)(2) of the Act requires us to consider other relevant impacts, in addition to economic impacts, when designating critical habitat. Section 10(a)(1)(B) of the Act authorizes us to issue permits for the take of listed wildlife species incidental to otherwise lawful activities. Development of an HCP is a prerequisite for the issuance of an incidental take permit pursuant to section 10(a)(1)(B) of the Act. An incidental take permit application must be supported by an HCP that identifies conservation measures that the permittee agrees to implement for the species to minimize and mitigate the impacts of the permitted incidental take.

HCPs vary in size and may provide for incidental take coverage and conservation management for one or many federally listed species. Additionally, more than one applicant may participate in the development and implementation of an HCP. Some areas occupied by the arroyo toad involve several very complex HCPs that address multiple species, cover large areas, and are very important to many participating permittees. Large regional HCPs expand upon the basic requirements set forth in section 10(a)(1)(B) of the Act because they reflect a voluntary, cooperative approach to large-scale habitat and species conservation planning. Many of the large regional HCPs in southern California have been, or are being, developed to provide for the conservation of numerous federally listed species and unlisted sensitive species and the habitat that provides for their biological needs. These HCPs are designed to proactively implement conservation actions to address future projects that are anticipated to occur within the planning area of the HCP. However, given the broad scope of these regional HCPs, not all projects envisioned to potentially occur may actually take place.

In the case of approved regional HCPs and accompanying Implementing Agreements (IAs) (*e.g.*, those sponsored by cities, counties, or other local jurisdictions) that provide for incidental take coverage for the arroyo toad, a primary goal of these regional plans is to provide for the protection and management of habitat essential for the species' conservation while directing development to other areas. The regional HCP development process provides an opportunity for more intensive data collection and analysis regarding the use of particular habitat areas by the arroyo toad. The process also enables us to conduct detailed evaluations of the importance of such lands to the long-term survival of the species in the context of constructing a system of interlinked habitat blocks that provide for its biological needs.

We have considered, but have not proposed as critical habitat, lands in approved subarea plans within the San Diego MSCP, the Central-Coastal NCCP/HCP in Orange County, and the SDG&E NCCP/HCP under Section 4(b)(2). These approved and legally operative HCPs include portions of five proposed critical habitat units (8, 16, 17, 18, and 19). We believe the benefits of excluding lands within these legally operative HCPs from the proposed critical habitat designations will outweigh the benefits of including them. The following represents our rationale for excluding these areas.

Portions of Unit 8 are excluded under section 4(b)(2) from proposed critical habitat because they are within the Orange County Central Coastal Subregional NCCP/HCP. The Central-Coastal NCCP/HCP in Orange County was developed in cooperation with numerous local and State jurisdictions and agencies, and participating landowners including the cities of Anaheim, Costa Mesa, Irvine, Orange, and San Juan Capistrano; Southern California Edison; Transportation Corridor Agencies; The Irvine Company; California Department of Parks and Recreation; Metropolitan Water District of Southern California; and the County of Orange. Approved in 1996, the Central-Coastal NCCP/HCP provides for the establishment of approximately 38,738 ac (15,677 ha) of reserve lands for 39 Federal or State listed and unlisted sensitive species within the 208,713 ac (84,463 ha) planning area. We issued an incidental take permit under section 10(a)(1)(B) of the Act that provides conditional incidental take authorization for the arroyo toad for all areas within the Central-Coastal Subregion except the North Ranch Policy Plan area. This take authorization only applies to smaller arroyo toad populations, reintroduced populations, or populations that have expanded due to NCCP Reserve management. It also requires implementation of a mitigation plan to relocate toads to protected areas within the Reserve, when necessary. The Central-Coastal NCCP/HCP provides for monitoring and adaptive management of the arroyo toad and its habitat within the Reserve System. Adaptive management activities may include a program to control predators, such as bullfrogs, clawed frogs, and non-native fishes. It may also include a

program of closing dirt road crossings without culverts or upgrading such crossings with concrete fords and/or culverts on publicly owned lands outside the Reserve System if baseline monitoring indicates such measures would likely be effective.

The North Ranch Policy Plan area was excluded from take authorization provided for the Central Coastal NCCP/HCP due to a lack of detailed biological information and specific conservation commitments at the time of adoption of the NCCP/HCP. We have since determined that available arroyo toad habitat within the North Ranch Policy Plan area is essential to the conservation of the arroyo toad because it helps support a viable Santa Ana Mountain arroyo toad population. In 2002, the owner, The Irvine Company granted a conservation easement over a portion of the North Ranch Policy Plan Area that covers arroyo toad proposed critical habitat areas to The Nature Conservancy. We recognize that the Irvine Company has taken steps to conserve the North Ranch Policy Area, including a $10 million management endowment. The conservation easement provides adequate protection for arroyo toad habitat within this unit. As a result, we are excluding the North Ranch Policy Plan area from proposed critical habitat.

Portions of Units 16, 17, 18, and 19 are also excluded under section 4(b)(2) from proposed critical habitat because they are within the approved San Diego MSCP/HCP in southwestern San Diego County. The San Diego MSCP plan encompasses more than 582,000 ac (236,000 ha) and reflects the cooperative efforts of the local jurisdictions, the State, the building industry, and environmentalists. The San Diego MSCP provides for the establishment over the permit term of approximately 171,000 ac (69,573 ha) of preserve areas to provide conservation benefits for 85 federally listed and sensitive species. The San Diego MSCP and its approved subarea plans provide measures to conserve known arroyo toad populations within the Sweetwater River, Otay River, Santa Ysabel Creek in San Pasqual Valley, San Vicente Creek above the San Vicente Reservoir, and Cottonwood Creek in Marron Valley. Area-specific management directives for MSCP subarea plans must address the conservation of the arroyo toad by protecting and maintaining sufficient, suitable, low-gradient sandy stream habitat to meet breeding requirements; preserving sheltering and foraging habitats within 0.6 mi (1 km) of occupied breeding habitat within designated preserve land; controlling nonnative predators; and controlling human impacts within designated preserves. Several of these management plans are currently under development, including those for Marron and San Pasqual Valleys. These lands are to be permanently maintained and managed for the benefit of the arroyo toad and other covered species.

One exception to the MSCP/HCP exclusion concerns the reach of the Sweetwater River between Loveland and Sweetwater Reservoirs within the County of San Diego's MSCP plan. This area is affected by activities (*e.g.*, reservoir water transfers) that are outside the authority of, and thus not subject to, the approved County of San Diego MSCP subarea plan. Therefore, we are including this limited reach of the Sweetwater River as proposed critical habitat.

The SDG&E NCCP/HCP encompasses San Diego County west of the desert, the portion of Orange County within SDG&E's existing service territory, and the SDG&E Moreno Compressor Station in Riverside County. The section 10(a)(1)(B) permit covers the arroyo toad and 17 other species listed at the time the plan was approved in 1995. The NCCP/HCP allows SDG&E to impact through habitat modification a maximum of 400 ac (162 ha) of natural land over a 55-year permit period. In general, impacts resulting from the operation, maintenance, and expansion of SDG&E's facilities are limited to narrow strips (typically 200 ft (61 m) wide or less) along gas and electric transmission lines, including periodic placement of substations and regulator stations with a footprint of up to 20 ac (8.1 ha). Effects of the plan are minimal because impacts would generally be small, and the Plan prioritizes avoidance, minimization, and mitigation (in that order) for any potential impacts. The Plan preserves individual toads and habitats to maximum extent practicable and preserves corridors connecting habitats. It may also reclaim and restore habitats that may include the species. Critical habitat is not proposed for the arroyo toad within these 400 ac (162 ha). However, these areas may still appear on our critical habitat maps as an artifact of mapping scale.

(1) Benefits of Inclusion

Under section 7, critical habitat designation will provide little additional benefit to the arroyo toad within the boundaries of these approved HCPs. The principal benefit of any designated critical habitat is that federally funded or authorized activities in such habitat that may affect it require consultation under section 7 of the Act. Such consultations ensure that adequate protection is provided to avoid adverse modification of critical habitat. Currently approved HCPs and NCCP/HCPs that cover the toad are designed to ensure the conservation of the species within the plan area, and incorporate special management and protection for arroyo toad habitat within plan boundaries. The adequacy of plan measures to protect the toad and its habitat has undergone thorough evaluation in the section 7 consultations completed prior to approval of the plans.

Development and implementation of these NCCCP/HCPs and HCPs has provided other important conservation benefits for the toad, including the development of biological information to guide conservation efforts and assist in the species' recovery. The educational benefits of critical habitat, including informing the public of areas that are important to the conservation of listed species, are essentially the same as those that have occurred during the process of reviewing and approving these NCCP/HCPs and HCPs. Specifically, each of these HCPs involved public participation through public notices and public comment periods, prior to being approved. For these reasons, we believe that designation of critical habitat would provide little additional benefit in areas covered by these approved HCPs. Federal actions in areas occupied by the toad will still require consultation under section 7 of the Act.

(2) Benefits of Exclusion

We have determined that the benefits of excluding lands within approved HCPs from proposed critical habitat designation are generally more substantial than including them. The benefits of excluding HCPs from critical habitat designation include relieving landowners, communities, and counties of any additional regulatory burden that might be imposed by critical habitat. Many HCPs, particularly large regional HCPs, take many years to develop and, upon completion, become regional conservation plans that are consistent with the recovery objectives for listed species that are covered within the plan area. Additionally, many of these HCPs provide conservation benefits to unlisted sensitive species. Imposing an additional regulatory review after an HCP is completed solely as a result of the designation of critical habitat may undermine conservation efforts and partnerships in many areas. In fact, it could result in the loss of species' benefits if participants abandon the

voluntary HCP process, because it may result in additional regulations requiring more of them than other parties who have not voluntarily participated in species conservation. Designation of critical habitat within the boundaries of approved HCPs could also be viewed as a disincentive to those entities currently developing HCPs or contemplating them in the future. The benefits of excluding lands within approved HCPs generally from critical habitat apply fully to the approved NCCP/HCP and HCPs discussed above that cover the arroyo toad.

A related benefit of excluding lands within approved HCPs that cover the arroyo toad from proposed critical habitat designation is the continued ability to seek new partnerships with future HCP participants, including States, Counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. If lands within approved HCP plan areas are designated as critical habitat, it would likely have a chilling effect on our ability to establish new partnerships to develop HCPs, particularly large regional HCPs that involve numerous participants and address landscape-level conservation of the toad and its habitat. By excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In general, we find that the benefits of critical habitat designation on lands within approved HCPs are small while the benefits of excluding such lands from designation of critical habitat are substantial. After weighing the small benefits of including these lands against the much greater benefits derived from excluding them, including relieving property owners of an additional layer of approvals and regulation and encouraging the pursuit of additional conservation partnerships, it is our intent to exclude lands within approved HCPs from proposed critical habitat designation. We have reviewed and evaluated the approved Orange County Central Coastal Subregional NCCP/HCP, the SDG&E NCCP/HCP, and the San Diego MSCP HCPs and NCCP/HCPs and find that the benefits of exclusion outweigh the benefits of proposing portions of Units 8, 16, 17, 18, and 19 as critical habitat.

Each of these HCPs includes the arroyo toad as a covered species and provides protection for the arroyo toad and its associated habitat in perpetuity. They also preserve the partnerships that we developed with the local jurisdictions and project proponent in the development of the HCPs and NCCP/HCPs.

The educational benefits of critical habitat, including informing the public about areas that are important for the long-term survival and conservation of the species, have been provided by the public notice and comment procedures required to establish these HCPs and NCCPs. For these reasons, we believe that proposing critical habitat on lands covered by the identified HCPs and NCCP/HCPs has little benefit and is outweighed by the more substantial benefits of excluding the lands from critical habitat. Because of the management and protection provided for the toad and its habitat within the approved plan areas, the exclusion of essential toad habitat within approved HCPs and NCCPs/HCPs will not result in the extinction of the species.

Relationship of Critical Habitat to the Draft Western Riverside Multiple Species Habitat Conservation Plan (MSHCP)

The Draft Western Riverside Multiple Species Habitat Conservation Plan (MSHCP) has been in development for several years. In contrast to the other HCPs under development, which contain essential toad habitat and are identified in Table 4, the Western Riverside MSHCP is essentially completed and the Service is very close to taking final action on the County of Riverside's incidental take permit application. Participants in this HCP include 14 cities; the County of Riverside, including the Riverside County Flood Control and Water Conservation Agency, Riverside County Transportation Commission, Riverside County Parks and Open Space District, and Riverside County Waste Department; the California Department of Parks and Recreation; and Caltrans. The Western Riverside MSHCP is also being proposed as a subregional plan under the State's NCCP and is being developed in cooperation with CDFG. Within the 1.26-million acre (510,000–ha) planning area of the MSHCP, approximately 153,000 ac (62,000 ha) of diverse habitats are proposed for conservation. The proposed conservation of 153,000 ac (62,000 ha) will complement other existing natural and open space areas (*e.g.*, State Parks, Forest Service, and County Park Lands).

The County of Riverside and the participating jurisdictions have signaled their sustained support for the Western Riverside MSHCP as evidenced by the November 5, 2002, passage of a local bond measure to fund the acquisition of land in support of the MSHCP. On November 15, 2002, we published a Notice of Availability of a Draft Environmental Impact Report (EIS/EIR) and Receipt of and Application for an Incidental Take Permit in the **Federal Register**. Public comment on these documents was accepted until January 14, 2003. Additionally, on June 17, 2003, the County of Riverside Board of Supervisors voted unanimously to support the completion of the Western Riverside MSHCP.

The Western Riverside MSHCP proposes conservation actions within the planning area, including surveying for additional populations and habitat protection, to ensure the long-term conservation of the arroyo toad. Although the MSHCP is not yet approved and implemented, significant progress has been achieved in the development of this HCP, including circulation of the final EIS/EIR, the solicitation of public review and comment, and the initiation of the intra-Service Section 7 consultation for those species identified for coverage within the draft plan. We are excluding portions of Unit 9 and 13 from proposed critical habitat pursuant to section 4(b)(2) of the Act because they are within the planning area boundary for the proposed Western Riverside MSHCP. However, we are proposing Unit 10 and other portions of Units 9 and 13 on U.S. Forest Service lands within the planning area boundary of the Western Riverside MSHCP as critical habitat because the activities of Federal agencies are not covered under a section 10(a)(1)(B) permit. Our analysis for excluding portions of Units 9 and 13 from proposed critical habitat is outlined below.

(1) Benefits of Inclusion

As stated previously, the benefits of designating critical habitat on lands within the boundaries of HCPs are normally small. HCPs generally include management measures and protections designed to protect, restore, monitor, manage, and enhance the habitat to benefit the conservation of the covered species. The draft Western Riverside MSHCP seeks to accomplish these goals for the arroyo toad through the implementation of specific conservation measures. The principal benefit of designating critical habitat is that federally authorized or funded activities that may affect a species' critical habitat would require consultation with us under section 7 of the Act. In the case of the proposed Western Riverside MSHCP, we must evaluate the impact of the plan on the species for which the

participants are seeking incidental take permits, pursuant to section 7 of the Act. Under section 7, proposed actions that would adversely modify or destroy designated critical habitat cannot go forward unless they are altered to eliminate the adverse modification or destruction of critical habitat.

An important objective of the Western Riverside MSHCP is to implement measures, including monitoring and management, necessary to conserve important habitat for the arroyo toad within the plan's boundaries. Thus, the purposes of the Western Riverside MSHCP are consistent with the purpose served by undergoing consultation under section 7, which is to ensure that critical habitat of the toad is not adversely modified by a proposed Federal action. Because issuance of an incidental take permit (ITP) under section 10 is a Federal action, prior to approving the Western Riverside MSHCP, we must complete an internal section 7 consultation for every species, including the arroyo toad proposed to be covered under the proposed plan and permit. The consultation requires us to analyze the impacts of the proposed ITP and HCP on the toad and its essential habitat within the plan boundaries, whether or not that habitat has been officially designated as critical habitat. Therefore, including essential toad habitat subject to provisions of the proposed Western Riverside MSHCP as critical habitat would provide little benefit to the arroyo toad because the potential impacts to the species' essential habitat within the MSHCP area are already addressed under the plan and will be analyzed in our internal section 7 consultation on the proposed ITP.

(2) Benefits of Exclusion

Excluding from proposed critical habitat lands within Units 9 and 13 that are covered by the within the Western Riverside MSHCP will provide several benefits. Exclusion of the lands from the final designation will allow us to continue working with the participants in a spirit of cooperation and partnership. In the past, HCP applicants and participants in voluntary conservation programs have generally viewed the designation of critical habitat as having a potential negative regulatory effect that discourages voluntary, cooperative and proactive efforts to conserve listed species and their habitats by non-Federal parties. They generally view designation of critical habitat as an indication by the Federal government that their proactive actions to protect the species and its habitat are inadequate. Excluding these areas from the perceived negative consequences of critical habitat will likely encourage other jurisdictions, private landowners, and other entities to work cooperatively with us to develop HCPs and conservation plans, which will provide the basis for future opportunities to conserve species and their essential habitat.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We believe the analysis conducted to evaluate the benefits of excluding HCPs from critical habitat versus the benefits of including these lands, which was previously discussed for the exclusion of approved HCPs, is applicable and appropriate for the exclusion of HCPs that are in the final permit decision phase, such as the Western Riverside MSHCP. In the event that the Service does not grant coverage for this species under the Western Riverside MSHCP, we will include the areas essential to the conservation of the arroyo toad in Units 9, 10, and 13 in the final designation of critical habitat. Excluding arroyo toad habitat within the plan area will preserve the partnerships that we have developed with the local jurisdictions and project proponents in the development of the HCP. Because of the permanent protection and management measures provided in the plan, exclusion of essential toad habitat within the plan area will not result in the extinction of the arroyo toad.

There are currently several other regional NCCP/HCP efforts under way in southern California that have not yet been completed but which are intended, upon approval, to provide conservation benefits to the arroyo toad. Lands within these HCPs, which are in the early stages of formulation, are not excluded from consideration for proposed critical habitat as we have yet to receive a permit application from the participants, environmental analysis of the plans has not been completed and the plans have not been released for public review and comment. The proposed Southern Subregion NCCP/HCP in Orange County encompasses approximately 128,000 ac (51,799 ha) in its planning area. Jurisdictions and private landowners within the study area include the cities of Rancho Santa Margarita, Mission Viejo, San Juan Capistrano, San Clemente, and Rancho Mission Viejo. The arroyo toad is being proposed as one of the species covered under this plan. The Coachella Valley Multiple Species HCP/NCCP in Riverside County encompasses approximately 1,200,000 ac (479,139 ha) in its planning area. Participants include the Coachella Valley Association of Governments; Federal, State, and County agencies; University of California, Riverside; Coachella Valley Mountains Conservancy; and unincorporated private lands. The arroyo toad is also being proposed as one of the covered species under this plan.

In addition to the two plans identified above, the Multiple Habitat Conservation Program (MHCP) in northwestern San Diego County encompasses approximately 112,000 ac (45,324 ha) within the study area and includes lands we are proposing as critical habitat for the arroyo toad. Currently, seven cities are participating in the development of the MHCP. However, the arroyo toad is not proposed as a covered species in this plan.

Relationship of Indian Reservations and Exclusions Under 4(b)(2)

Section 4(b)(2) of the Act requires us to gather information regarding the designation of critical habitat and the effects thereof from all relevant sources, including Indian Pueblos and Tribes. In accordance with Secretarial Order 3206, "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act" (June 5, 1997); the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments;" and Executive Order 13175, we recognize the need to consult with federally recognized Tribes on a government-to-government basis when considering the designation of critical habitat in an area that may impact Tribal trust resources, tribally-owned fee lands, or the exercise of Tribal rights. Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, we must evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands. On January 29, 2004, the Service sent letters to the Mesa Grande Band of Mission Indians, Pala Band of Mission Indians, Sycuan Band of the Kumeyaay Nation, Viejas Band of Kumeyaay Indians, Rincon Band of Mission Indians, and the Barona Indian Reservation seeking consultation on the possible proposal of critical habitat within their Reservations. On March 9, 2004, the Service met with the Pala Banda of Mission Indians to discuss areas that should or should not be proposed as critical habitat. We are currently still attempting to arrange meetings with these Tribes in order to

discuss matters regarding critical habitat.

We consider portions of the Pala, Rincon, Sycuan, Mesa Grande, and Capitan Grande (which is jointly administered by the Viejas and Barona Tribes) Indian Reservation lands to be essential, and are therefore proposing these areas as critical habitat for the arroyo toad. The following represents our rationale for including these Reservations as proposed critical habitat.

(1) Benefits of Inclusion

Essential, high-quality habitat exists on the Pala, Rincon, Sycuan, Mesa Grande, and Capitan Grande Indian Reservations. The Pala and Rincon Indian Reservations support core arroyo toad populations that are critical to maintaining the viability of toads along the San Luis Rey River. Pala, Sycuan, Mesa Grande, and Capitan Grande Reservations also include lands that are essential to maintaining the connectivity of proposed critical habitat with habitat of known arroyo toad populations outside the boundaries of the reservations. The long-term viability of these populations would be severely at risk should the habitat supporting these populations become fragmented.

The primary benefit of any critical habitat with regard to activities that require consultation pursuant to section 7 of the Act is to ensure that the activity will not destroy or adversely modify designated critical habitat. Because many activities on Tribal lands involve activities authorized, funded or carried out by a Federal agency, and in particular, the Bureau of Indian Affairs, the likelihood of future Section 7 consultations that would address loss of essential arroyo toad habitat on the reservations is high. Where Tribes have management plans in place that provide adequate protection for the species, the benefits of proposing critical habitat on Indian Reservations are minimal because implementation of a management plan should ensure the long-term survival of the covered species. However, there are currently no management plans in place that address the conservation needs of the arroyo toad and its habitat on any of the Indian Reservations considered essential for the arroyo toad. An additional benefit for including Indian Reservations as critical habitat are the educational benefits that proposing critical habitat will provide Tribes by informing them of areas that are important to the conservation of this species.

(2) Benefits of Exclusion

The benefits of excluding Indian Reservations from critical habitat designation include relieving Tribes of any additional regulatory burden that may result solely from such designation. Designation of critical habitat may undermine future conservation efforts and partnerships and discourage Tribes from developing species and habitat management plans. Designation of critical habitat could also be viewed as a disincentive by Tribes contemplating developing HCPs in the future. Excluding Tribal lands could help preserve our current partnerships and set the stage for additional conservation actions in the future.

Further, projects on Indian Reservations with a Federal nexus will trigger a consultation under section 7 of the Act if the action may affect the arroyo toad or its designated critical habitat. Through section 7 consultation, we would address the conservation of the arroyo toad and its habitat to ensure that actions undertaken, authorized, or permitted by a Federal agency would not jeopardize the continued existence of the species or adversely modify critical habitat. In light of the Federal government's trust responsibility for Tribal trust resources and lands, and the likelihood of future Federal nexuses that would trigger section 7 consultations with regard to those resources and lands, the Tribes may view the designation of Indian Reservations as critical habitat as creating an additional regulatory burden.

(3) Benefits of Inclusion Outweigh the Benefits of Exclusion

After weighing the benefits of proposing critical habitat on the Pala, Rincon, Sycuan, Mesa Grande, and the Capitan Grande Indian Reservations against the benefits of excluding them, we find the benefits of proposing these lands outweigh the benefits of excluding them primarily because these Reservation lands support important core arroyo toad populations (Rincon and Pala) and/or areas that are essential for maintaining the connectivity of occupied high quality arroyo toad habitat outside the boundaries of the Reservations (Mesa Grande, Sycuan, Pala, and Capitan Grande). Further, none of these Tribes has developed a management plan that addresses the conservation needs of the arroyo toad. We are committed to working with these Tribes to develop management plans for the arroyo toad. In the event that one or more adequate management plans are developed before the final designation of critical habitat, we will consider excluding Reservation lands covered by the plans from final critical habitat. We have restricted the amount of Reservation lands included as proposed critical habitat to the minimum essential for the conservation of the species. These essential areas consist of habitat supporting core populations or connectivity among populations.

Relationship to Lands Managed by the DOD—Exclusions Under Section 4(a)(3)(B) and 4(b)(2) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete, by November 17, 2001, an INRMP. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found there. Each INRMP includes an assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species; a statement of goals and priorities; a detailed description of management actions to be implemented to provide for these ecological needs; and a monitoring and adaptive management plan. We consult with the military on the development and implementation of INRMPs for installations with listed species.

As discussed above, Section 318 of fiscal year 2004 the National Defense Authorization Act (Pub. L. 108–136) amended the Endangered Species by adding a new section 4(a)(3)(B). This provision prohibits the Service from designating as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an INRMP prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary of the Interior determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

The bases where we identified habitat essential for the conservation of the arroyo toad are Camp Pendleton, Fallbrook Naval Weapons Station, and Fort Hunter Liggett. Critical habitat was previously designated for the arroyo toad, and was in effect from February 2001 through October 2003, on Fort Hunter Liggett, Fallbrook Naval Weapons Station, and those portions of Camp Pendleton that were leased to a third party and not used for military purposes. Camp Pendleton and Fallbrook Naval Weapons Station have approved INRMPs. We will examine those INRMPs to determine coverage for

the arroyo toad. On completion of that examination, we may exclude these areas from our final critical habitat designation under section 4(a)(3)(B). If, prior to the final designation of critical habitat for the arroyo toad, the U.S. Army (Army) completes its INRMP or Endangered Species Management Plan for the arroyo toad at Fort Hunter Liggett, these lands will be considered for exclusion under section 4(a)(3)(B).

Mission-Essential Training Areas at Marine Corps Base Camp Pendleton—Exclusions Under Section 4(b)(2)

Section 4(b)(2) of the Act as recently amended by section 318 of the National Defense Authorization Act of 2004 expressly requires the Secretary to take into account the impact on national security of specifying any particular area as critical habitat. This is in addition to the section 4(a)(3)(B) provisions relating to INRMPS referenced above. The Marine Corps operates Camp Pendleton as an amphibious training base that promotes the combat readiness of military forces and is the only West Coast Marine Corps facility where amphibious operations can be combined with air, sea, and ground assault training activities year-round.

The arroyo toad occurs primarily in three watersheds on Camp Pendleton: Santa Margarita, San Onofre, and San Mateo. Arroyo toad populations within these watersheds on Camp Pendleton are essential to the conservation of the species because these watersheds retain relatively natural hydrological processes and functions. The Santa Margarita watershed is one of the least altered major watersheds occupied by the species throughout its range. Also, the lower portions of all three watersheds represent the last remaining coastal plain areas where significant numbers of arroyo toads occur within 6 mi (10 km) of the coast and in coastal marsh zones. Elsewhere throughout the species' range, urban and agricultural development has been largely responsible for extirpating arroyo toad populations in low coastal plain areas.

The Marine Corps consults with us under section 7 of the Act for activities that may affect federally listed species on Camp Pendleton. On October 30, 1995, we issued a biological opinion regarding the Marine Corps' programmatic activities and conservation plans in riparian and estuarine/beach ecosystems on Camp Pendleton (Service 1995). At issue were the impacts that ongoing and planned training activities, infrastructure maintenance activities, several construction projects, and a Riparian and Estuarine Ecosystem Conservation Plan may have on six federally listed species, including the arroyo toad. Since then, we have requested in a letter dated February 9, 2000, that the programmatic instructions and conservation measures in the plan be revised to avoid and minimize potential adverse effects to the arroyo toad. These revisions included, but were not limited to, the "implementation of a base-wide non-native predatory species control program, removal of nonessential road crossings, modification of existing and new road crossings, removal of unnecessary structures and hardscape within arroyo toad breeding and nonbreeding habitats, and guidelines on the use of toad exclusion fencing."

Additionally, Camp Pendleton's programmatic conservation plan for riparian and estuarine/beach ecosystems does not address arroyo toads in upland habitats. On March 30, 2000, at the request of the Marine Corps, we initiated formal consultation regarding Marine Corps activities on upland areas of Camp Pendleton. The consultation covers approximately 125,000 ac (50,500 ha) of land and addresses numerous activities that currently are expected to occur within the upland areas of Camp Pendleton, including combat readiness operations, air operations, vehicle operations, facility maintenance and operations, fire management, recreational activities, and housing. The upland consultation for the arroyo toad and other species is not yet completed. We are currently working cooperatively with Camp Pendleton to facilitate the completion of the upland consultation. Upon completion, this consultation will address the 93 percent of Camp Pendleton not included in our 1995 opinion concerning riparian and estuarine/beach ecosystems (Service 1995). In order to continue its critical training mission pending completion of the consultation, the Marine Corps has implemented a set of "programmatic instructions" to minimize adverse effects to the arroyo toad.

(1) Benefits of Inclusion

The primary benefit of any critical habitat with regard to activities that require consultation pursuant to section 7 of the Act is to ensure that the activity will not destroy or adversely modify designated critical habitat. The primary benefit of proposing critical habitat for the arroyo toad on mission-essential training lands on Camp Pendleton is limited. Designating critical habitat would identify lands essential to the conservation of the species and require the Marine Corps to consult with us under section 7 to ensure proposed activities are not likely to destroy or adversely modify arroyo toad critical habitat. However, we are already in formal consultation with the Marine Corps regarding their upland activities to ensure that current and proposed actions will not jeopardize the species' continued existence, and that consultation will take into account the essential habitat requirements of the species. Therefore, we do not believe that designation of mission-essential training areas on Camp Pendleton as critical habitat will significantly benefit the arroyo toad beyond the protection already afforded the species under the Act. The educational benefits of critical habitat include informing the Marine Corps of areas that are essential to the conservation of listed species.

(2) Benefits of Exclusion

In contrast to the absence of a significant benefit resulting from designation of Camp Pendleton training areas as critical habitat, there are substantial benefits to excluding these areas from critical habitat. If we propose or designate critical habitat within these training areas, the Marine Corps may be required to conference or consult on activities that affect the proposed or designated critical habitat. The requirement to conference or consult on activities within mission-essential training areas could delay and impair the ability of the Marine Corps to conduct effective amphibious training activities and limit Camp Pendleton's unique status as the only West Coast Marine Corps facility where such amphibious training operations can be conducted year round. Such restrictions on Camp Pendleton's military training mission would negatively affect national security.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

Based on the impact on national security and the Marine Corps' need to maintain a high level of readiness and fighting capabilities, we have considered but have not proposed critical habitat on essential lands identified as mission-essential training areas on Camp Pendleton. We find that the benefits of excluding these areas from critical habitat outweigh the benefits of including them. We further find that the exclusion of these areas will not lead to the extinction of the arroyo toad because we will continue to consult with the Marine Corps under section 7 on any actions that may affect the toad to ensure that such actions are not likely to jeopardize the continued existence of the species.

Fort Hunter Liggett and Exclusion Under Section 4(b)(2)

We have considered, but have not proposed, to include mission-essential training areas on Fort Hunter Liggett as critical habitat for the arroyo toad under section 4(b)(2) of the Act, because designation of critical habitat could adversely impact national security. The Army conducts training operations using landing fields, tanks, machine guns, grenade launchers, and more at Fort Hunter Liggett. The Army has stated that it considers critical habitat to conflict with mission-essential training tasks, and that critical habitat designation would adversely affect Fort Hunter Liggett's training mission. The Army submitted a map to us of the mission-essential training areas that are found within lands we determined to be essential to the conservation of the arroyo toad (Army, in litt. 2003).

The arroyo toad occupies an approximately 17-mi (27.4-km) segment of the San Antonio River at Fort Hunter Liggett. This arroyo toad population is essential to the conservation of the species because it is the northernmost known population—approximately 100 mi (160 km) north of the nearest documented extant population. Arroyo toads in this unit may experience climatic conditions not faced by toads at sites farther south. The protection of this area is essential to maintaining the complete genetic variability of the species and the full range of ecological settings within which it is found. This stretch of the San Antonio River is undammed, provides excellent habitat for the arroyo toad, and supports probably one of the largest populations within the Northern Region.

The Army is currently consulting with us to finalize the development of an INRMP and associated Endangered Species Management Plan for the arroyo toad on Fort Hunter Liggett. The completion of these plans is projected to occur sometime in 2004. The Army recognizes the need for protection and conservation of sensitive species, including the arroyo toad, on military lands and has identified conservation measures to protect and conserve arroyo toads and their habitat. These plans include measures to minimize harm to the arroyo toad from training activities and outline actions to ensure the persistence of arroyo toads on the installation.

(1) Benefits of Inclusion

The primary benefit of any critical habitat with regard to activities that require consultation pursuant to section 7 of the Act is to ensure that the activity will not destroy or adversely modify designated critical habitat. The educational benefits of critical habitat include informing the Army of areas that are important to the conservation of listed species. However, because the Army is already working cooperatively with the Service to develop an INRMP that protects the toad and its essential habitat on Fort Hunter Liggett and we will complete a Section 7 consultation on that plan, we do not believe that designation of mission-essential training areas on the fort will significantly benefit the arroyo toad beyond the protection already afforded the species under the Act. In addition, through the INRMP development process and development of a draft Endangered Species Management Plan for the arroyo toad, the Army is already aware of essential arroyo toad habitat areas on the installation.

(2) Benefits of Exclusion

Substantial benefits are expected to result from the exclusion of mission-critical training areas on Fort Hunter Liggett from critical habitat. If we designate critical habitat within these areas, the Army would be required to engage in consultation with us on activities that may affect designated critical habitat. The requirement to consult on activities within mission-essential training areas could delay and impair the ability of the Army to conduct effective training activities and limit Fort Hunter Liggett's utility as a military training installation, thereby adversely affecting national security.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We met with the Army on December 12, 2003, at Fort Hunter Liggett to discuss essential arroyo toad habitat, and possible impacts to the base. In light of national security interests and the Army's need to maintain a high level of readiness and fighting capabilities, we have considered, but have not proposed, critical habitat on lands identified by the Army as mission-essential training areas (Army, in litt. 2003). We find that the benefits of excluding these lands from critical habitat outweigh the benefits of including them. We further find that the exclusion of these areas will not lead to the extinction of the arroyo toad because Army training activities are conducted primarily outside of the floodplain and riparian corridor where toads are concentrated and are not expected to lead to the extirpation of the San Antonio River population. Although training activities have been conducted at the base since World War II, the arroyo toad population has persisted, and has possibly even improved over the past several years after grazing was terminated in 1991. The majority of the area on Fort Hunter Liggett that we identified as essential to the conservation of the species has not been excluded and is being proposed as critical habitat.

Other developed areas that are integral to the mission of the Army, such as roads, tank trails, and river crossings, can be found within the boundary of proposed critical habitat at Fort Hunter Liggett. However, due to limitations inherent to using a 100 by 100-m grid cell size, we were not able to exclude these narrow, linear areas from the critical habitat proposal. However, established roads, river crossings, and tank trails at Fort Hunter Liggett do not contain the primary constituent elements, and their use and maintenance would not trigger a section 7 consultation with us on critical habitat.

We are soliciting public review and comment on our decision to consider areas identified as essential, but not proposed as critical habitat for the arroyo toad, on mission-essential training areas at Camp Pendleton and Fort Hunter Liggett, and within the plan areas of the San Diego MSCP, Orange County Central-Coastal NCCP, Western Riverside MSHCP, and SDG&E NCCP/HCP based on section 4(b)(2) of the Act. Maps showing lands essential to the conservation of the arroyo toad, but excluded under the provisions of section 4(b)(2), are available for public review at either the Ventura or Carlsbad Fish and Wildlife Offices (*see* **ADDRESSES** section or on the Internet at *http://ventura.fws.gov* or *http://carlsbad.fws.gov*. We will review this issue in light of all public comments received during the public review period and may reconsider our position in the final rule.

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial information available and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as part of critical habitat. We cannot exclude such areas from critical habitat if such exclusion would result in the extinction of the species.

An analysis of the economic impacts of proposing critical habitat for the

arroyo toad is being prepared. We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at *http://ventura.fws.gov*, or from the Ventura Fish and Wildlife Office (*see* **ADDRESSES** section)

Peer Review

In accordance with our joint policy published on July 1, 1994 (59 FR 34270), we will solicit the expert opinions of at least three appropriate independent specialists regarding this proposed rule. The purpose of such review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We will send these peer reviewers copies of this proposed rule immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed designation of critical habitat.

We will consider all comments and information received during the comment period on this proposed rule as we prepare our final rulemaking. Accordingly, the final decision may differ from this proposal.

Clarity of the Rule

Executive Order 12866 requires each agency to write regulations and notices that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain technical jargon that interferes with the clarity? (3) Does the format of the proposed rule (grouping and order of the sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Is the description of the notice in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposed rule? (5) What else could we do to make this proposed rule easier to understand?

Send a copy of any comments on how we could make this proposed rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may e-mail your comments to this address: *Exsec@ios.doi.gov*.

Required Determinations

Regulatory Planning and Review

This document has been reviewed by the Office of Management and Budget (OMB) in accordance with Executive Order 12866. OMB makes the final determination under Executive Order 12866. We are preparing a draft economic analysis of this proposed action, which will be available for public comment, to determine the economic consequences of designating specific areas as critical habitat. Within these areas, the types of Federal actions or authorized activities that we have identified as potential concerns are listed above in the section on Section 7 Consultation. The availability of the draft economic analysis will be announced in the **Federal Register** and in local newspapers so that it is available for public review and comment.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act (RFA) to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. However, the SBREFA does not explicitly define "substantial number" or "significant economic impact." Consequently, to assess whether a "substantial number" of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be affected in an area. The SBREFA also amended the RFA to require a certification statement.

Our assessment of economic effect will be completed prior to final rulemaking and based upon review of the draft economic analysis prepared pursuant to section 4(b)(2) of the ESA and E.O. 12866. This analysis is for the purposes of compliance with the Regulatory Flexibility Act and does not reflect our position on the type of economic analysis required by *New Mexico Cattle Growers Assn.* v. *U.S. Fish & Wildlife Service* 248 F.3d 1277 (10th Cir. 2001).

Executive Order 13211

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule to designate critical habitat for the arroyo toad is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

Under the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), if a rule will produce a Federal mandate of $100 million or greater in any one year, a statement must be prepared and a summary of that statement included in the rulemaking. In general, a Federal mandate is a provision in legislation, statute or regulation that would impose an enforceable duty upon State, local, tribal governments, or the private sector and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). If the economic analysis being prepared to analyze the economic impacts of this designation indicates that the rule will produce a Federal mandate of $100 million or more in any year, a statement will be prepared and this proposed rule will be supplemented with a summary of that statement published in the notice announcing availability of the proposed economic analysis.

This proposed rule will not "significantly or uniquely" affect small governments. A Small Government Agency Plan is not required. State lands constitute a very small amount, only 0.7%, of the total proposed designation. Given the distribution of this species, small governments will not be uniquely affected by this proposed rule. Small governments will not be affected at all unless they propose an action requiring Federal funds, permits, or other authorization. Any such activity will require that the involved Federal agency ensure that the action is not likely to adversely modify or destroy designated critical habitat. However, as discussed above, Federal agencies are currently required to ensure that any such activity

is not likely to jeopardize the species, and no further regulatory impacts from this proposed designation of critical habitat are anticipated. We will examine any potential impacts to small governments in our economic analysis, and revise our determination if necessary.

Takings

In accordance with Executive Order 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we have analyzed the potential takings implications of designating critical habitat for the arroyo toad. The takings implication assessment concludes that this proposed rule does not pose significant takings implications.

Federalism

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with the Department of Interior policies, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies in California. The proposed designation of critical habitat in areas currently occupied by the arroyo toad imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The proposed designation may have some benefit to the States and local resource agencies in that the areas essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with Executive Order 12988, the Department of the Interior's Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are proposing to designate critical habitat in accordance with the provisions of the Endangered Species Act. This proposed rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of the arroyo toad.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This proposed rule does not contain new or revised information collection for which OMB approval is required under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. 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.

National Environmental Policy Act

We have determined that we do not need to prepare an Environmental Assessment and/or an Environmental Impact Statement as defined by the National Environmental Policy Act of 1969 in connection with regulations adopted pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This final determination does not constitute a major Federal action significantly affecting the quality of the human environment.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we have coordinated with federally recognized Tribes on a Government-to-Government basis. We have determined that certain Tribal lands are essential for the conservation of the arroyo toad because they support essential populations and habitat, and activities conducted or planned on those lands may adversely affect the conservation of the arroyo toad. Therefore, we are proposing to designate critical habitat for the arroyo toad on some Tribal lands. Information relative to each reservation is included in the critical habitat unit descriptions. We have excluded some areas from proposed critical habitat upon a determination that the lands did not meet the criteria for critical habitat.

Relationship to Mexico

We are not aware of any existing national regulatory mechanism in Mexico that would protect the arroyo toad or its habitat. Although new legislation for wildlife is pending in Mexico and Mexico has laws that could provide protection for rare species, there are enforcement challenges. Even if specific protections were available and enforceable in Mexico, the portion of the arroyo toad's range in Mexico alone, in isolation, would not be adequate to ensure the long-term conservation of the species.

References Cited

A complete list of all references cited in this rulemaking is available upon request from the Field Supervisor, Ventura Fish and Wildlife Office, or the Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES** section).

Author(s)

The primary authors of this package are the Ventura Fish and Wildlife Office and Carlsbad Fish and Wildlife Office staff.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

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

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4205; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.11(h) revise the entry for "Toad, arroyo" under "AMPHIBIANS" to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h)* * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
AMPHIBIANS							
*	*	*	*	*	*		*
Toad, arroyo (=arroyo southwestern).	Bufo californicus	U.S.A. (CA), Mexico	Entire	E	568	17.95(d)	NA
*	*	*	*	*	*		*

3. Amend § 17.95(d) by revising critical habitat for the arroyo toad (*Bufo californicus*) to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(d) *Amphibians.*

* * * * *

ARROYO TOAD (*Bufo californicus*)

(1) Critical habitat units are depicted for Monterey, Santa Barbara, Ventura, Los Angeles, San Bernardino, Riverside, Orange, and San Diego Counties, CA, on the maps below.

(2) Critical habitat consists of stream and river courses, riparian habitats, and adjacent terrace and upland habitats.

(3) Within these areas, the primary constituent elements of the arroyo toad include:

(i) Rivers or streams with hydrologic regimes that supply water to provide space, food, and cover needed to sustain eggs, tadpoles, metamorphosing juveniles, and adult breeding toads. Specifically, the conditions necessary to allow for successful breeding of arroyo toads are:

(A) Breeding pools with areas less than 12 in (30 cm) deep;

(B) Areas of flowing water with current velocities less than 1.3 ft per second (40 cm per second); and

(C) Surface water that lasts for a minimum length of 2 months in most years, *i.e.*, a sufficient wet period in the spring months to allow arroyo toad larvae to hatch, mature, and metamorphose.

(ii) Low-gradient stream segments (typically less than 6 percent) with sandy or fine gravel substrates that support the formation of shallow pools and sparsely vegetated sand and gravel bars for breeding and rearing of tadpoles and juveniles.

(iii) A natural flooding regime or one sufficiently corresponding to a natural regime that will periodically scour riparian vegetation, rework stream channels and terraces, and redistribute sands and sediments, such that breeding pools and terrace habitats with scattered vegetation are maintained.

(iv) Riparian and adjacent upland habitats (particularly alluvial streamside terraces and adjacent valley bottomlands that include areas of loose soil where toads can burrow underground) to provide foraging and living areas for subadult and adult arroyo toads.

(v) Stream channels and adjacent upland habitats that allow for migration to foraging areas, overwintering sites, dispersal between populations, and recolonization of areas that contain suitable habitat.

(4) Critical habitat does not include man-made structures existing on the effective date of this rule and not containing one or more of the primary constituent elements, such as buildings, aqueducts, airports, roads, and the land on which such structures are located.

(5) Index maps of arroyo toad proposed critical habitat follow.

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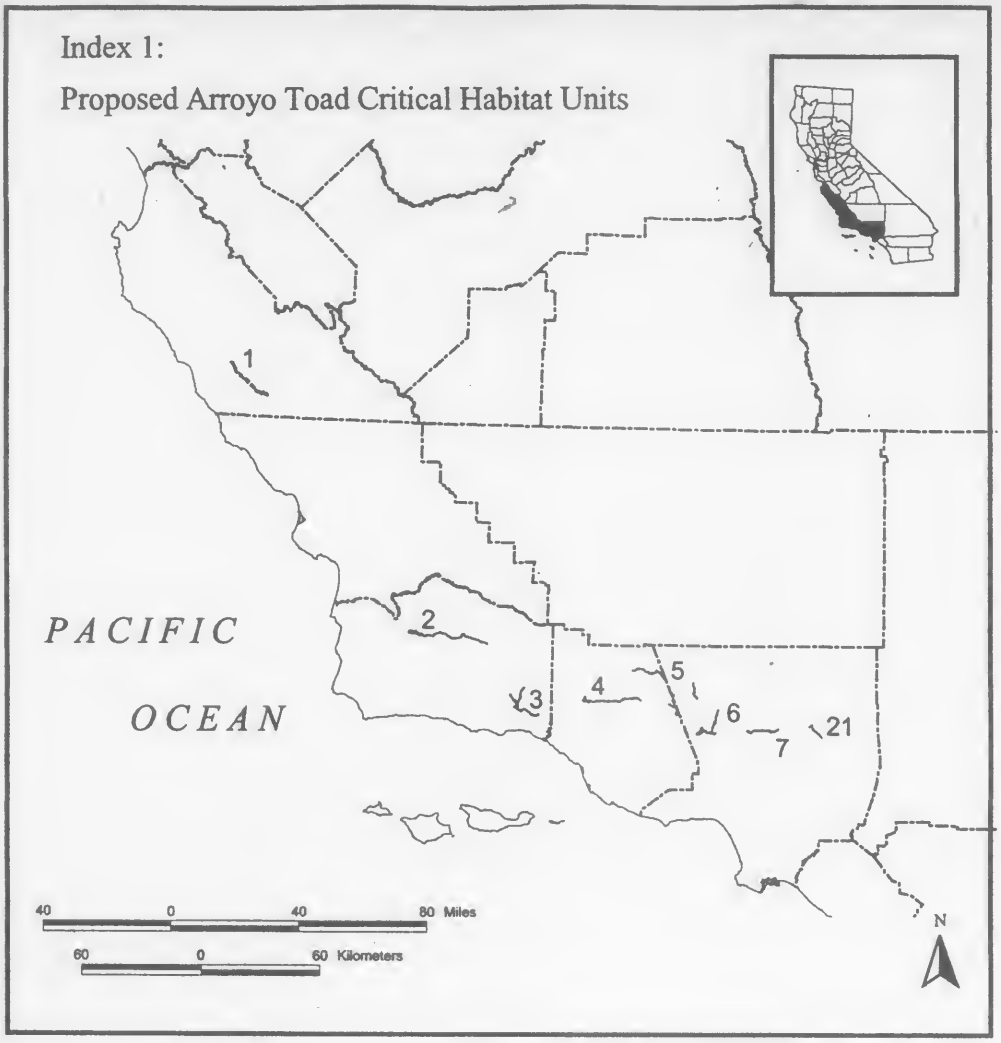
Index 1:
Proposed Arroyo Toad Critical Habitat Units
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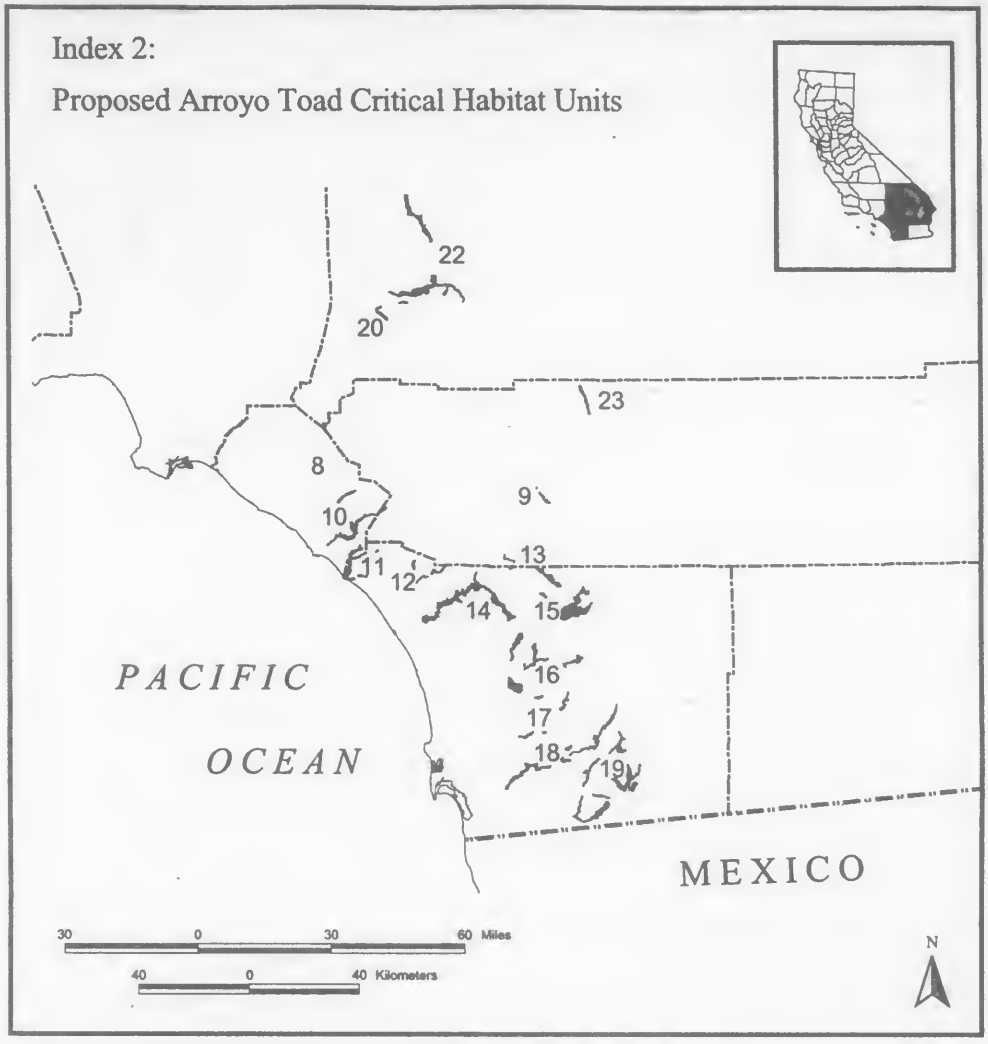

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(6) Unit 1; San Antonio River, Monterey County, California.

(i) From USGS 1:24,000 scale quadrangles Bear Canyon, Cosio Knob, Alder Peak, and Jolon, and Williams Hill. Land bounded by the following UTM zone 10, NAD27 coordinates (E, N): 656700, 3988800; 656700, 3988700; 656800, 3988700; 656800, 3988500; 656900, 3988500; 656900, 3987800; 657000, 3987800; 657000, 3987700; 657200, 3987700; 657200, 3987500; 657100, 3987500; 657100, 3987400; 657200, 3987400; 657200, 3987300; 657300, 3987300; 657300, 3987100; 657400, 3987100; 657400, 3987200; 657500, 3987200; 657500, 3987100; 657600, 3987100; 657600, 3986900; thence east to the Cantonment Area (CA) boundary at y-coordinate 3986900; thence south along the CA boundary to y-coordinate 3983700; thence south and following coordinates 660200, 3983700; 660200, 3983600; 660300, 3983600; 660300, 3983400; 660400, 3983400; 660400, 3983300; 660500, 3983300; 660500, 3983200; 660600, 3983200; 660600, 3983100; 660700, 3983100; 660700, 3983000; 660800, 3983000; 660800, 3982900; 660900, 3982900; 660900, 3982800; 661000, 3982800; 661000, 3982700; 661200, 3982700; 661200, 3982600; 661300, 3982600; 661300, 3982500; 661500, 3982500; 661500, 3982400; 661600, 3982400; 661600, 3982300; 661800, 3982300; 661800, 3982200; 662100, 3982200; thence south to the Schoonover Training Area (STA) boundary at x-coordinate 662100; thence south along the STA boundary to y-coordinate 3980900; thence due east to the Courses Training Area (CTA) boundary at to y-coordinate 3980900; thence southeast along the CTA boundary to x-coordinate 664000; thence south and following coordinates; 664000, 3980700; 664100, 3980700; 664100, 3980600; 664200, 3980600; 664200, 3980400; 664400, 3980400; 664400, 3980300; 664600, 3980300; 664600, 3980200; 664700, 3980200; thence south to the Multi-Purpose Range Complex Training Area (MPRCTA) boundary at x-coordinate 664700; thence along the MPRCTA boundary to y-coordinate 3978200; thence north and following coordinates 664900, 3978200; 664900, 3978100; 664600, 3978100; 664600, 3978200; 664500, 3978200; 664500, 3978300; 664600, 3978300; 664600, 3978400; 664700, 3978400; 664700, 3978600;

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(ii) Land bounded by the following UTM zone 10, NAD27 coordinates (E, N): 669800, 3975200; 669800, 3975100; 670000, 3975100; 670000, 3975000; 670700, 3975000; 670700, 3974900; 670800, 3974900; 670800, 3974800; 671000, 3974800; 671000, 3974700; 671100, 3974700; 671100, 3974600; 671200, 3974600; 671200, 3974300; 671300, 3974300; 671300, 3974200; 671600, 3974200; 671600, 3974100; 671700, 3974100; 671700, 3974300; 671900, 3974300; 671900, 3974200; 672000, 3974200; 672000, 3974300; 672100, 3974300; 672100, 3974500; 672300, 3974500; 672300, 3974600; 672400, 3974600; 672400, 3974700; 672500, 3974700; 672500, 3975400; 672700, 3975400; 672700, 3975100; 672800, 3975100; 672800, 3974900; 673000, 3974900; 673000, 3974800; 673100, 3974800; 673100, 3974700; 673300, 3974700; 673300, 3974600; 673400, 3974600; 673400, 3974500; 673700, 3974500; 673700, 3974400; 674000, 3974400; 674000, 3974300; 674100, 3974300; 674100, 3974400; 674400, 3974400; 674400, 3974100; 674500, 3974100; 674500, 3973900; 675000, 3973900; 675000, 3974000; 675400, 3974000; 675400, 3973500; 675300, 3973500; 675300, 3973200; 675200, 3973200; 675200, 3973000; 675100, 3973000; 675100, 3972800; 675000, 3972800; 675000, 3972700; 674900, 3972700; 674900, 3972600; 674800, 3972600; 674800, 3972500; 674700, 3972500; 674700, 3972600; 674600, 3972600; 674600, 3972700; 674300, 3972700; 674300, 3972900; 674100, 3972900; 674100, 3973000; 673900, 3973000; 673900, 3973100; 673700, 3973100; 673700, 3973000; 673600, 3973000; 673600, 3973100; 673400, 3973100; 673400, 3973200; 673200, 3973200; 673200, 3973300; 673100, 3973300; 673100, 3973400; 673000, 3973400; 673000, 3973500; 672900, 3973500; 672900, 3973700; 672500, 3973700; 672500, 3973400; 672400, 3973400; 672400, 3973300; 672300, 3973300; 672300, 3973200; 671900, 3973200; 671900, 3973100; 671800, 3973100; 671800, 3973000; 671600, 3973000; 671600, 3973300; 671300, 3973300; 671300, 3973400; 671200, 3973400; 671200, 3973500; 670900, 3973500; 670900, 3973600; 670800, 3973600; 670800, 3973700; 670600, 3973700; 670600, 3973800; 670400, 3973800; 670400, 3973700; 670300, 3973700; 670300, 3973800; 670200, 3973800; 670200, 3973900; 669600, 3973900; 669600, 3974000; 669500, 3974000; 669500, 3974100; 669200, 3974100; 669200, 3974200; 668900, 3974200; 668900, 3974400; 668800, 3974400; 668800, 3974500; 668700, 3974500; 668700, 3974600; 668400, 3974600; 668400, 3974800; 668600, 3974800; 668600, 3975000; 668500, 3975000; 668500, 3975100; 668400, 3975100; 668400, 3975200; 668300, 3975200; 668300, 3975300; 668200, 3975300; 668200, 3975400; 668100, 3975400; 668100, 3975500; 667900, 3975500; 667900, 3975600; 667800, 3975600; 667800, 3975700; 667700, 3975700; 667700, 3975800; 667600, 3975800; 667600, 3975900; 667400, 3975900; 667400, 3976000; 667200, 3976000; 667200, 3976300; 667100, 3976300; 667100, 3976400; 667000, 3976400; 667000, 3976500; 666900, 3976500; 666900, 3976600; 666800, 3976600; 666800, 3976700; 666600, 3976700; 666600, 3976900; 666200, 3976900; 666200, 3977000; 666100, 3977000; 666100, 3977100; 665900, 3977100; 665900, 3977300; 665800, 3977300; thence north to the MPRCTA boundary at x-coordinate 665800; thence northeast along the MPRCTA boundary to x-coordinate 666700; thence south and following coordinates 666700, 3978300; 666800, 3978300; 666800, 3978200; 666900, 3978200; 666900, 3978100; 667000, 3978100; 667000, 3978000; 667100, 3978000; 667100, 3977800; 667200, 3977800; 667200, 3977700; thence east to the MPRCTA boundary at y-coordinate 3977700; thence southeast along the MPRCTA boundary to x-coordinate 667800; thence south and following coordinates 667800, 3977000; 668100, 3977000; 668100, 3976900; 668300, 3976900; 668300, 3976800; 668400, 3976800; thence south to the boundary of Training Area 25 (TA25) at x-coordinate 668400; thence along the TA25 boundary to y-coordinate 3975200; thence east and returning to 669800, 3975200.

(iii) **Note:** Map of arroyo toad proposed critical habitat Unit 1 follows.

BILLING CODE 4310–55–U

BILLING CODE 4310–55–C

(7) Unit 2; Sisquoc River, Santa Barbara County, California.

(i) From USGS 1:24,000 scale quadrangles Foxen Canyon, Zaca Lake, Bald Mountain and Hurricane Deck. Land bounded by the following UTM zone 10, NAD27 coordinates (E, N): 752600, 3859300; 752600, 3859800; 752700, 3859800; 752700, 3860100; 752800, 3860100; 752800, 3860200; 752900, 3860200; 752900, 3860400; 753400, 3860400; 753400, 3860300; 753600, 3860300; 753600, 3860400; 753800, 3860400; 753800, 3860500; 754100, 3860500; 754100, 3860400; 754200, 3860400; 754200, 3860200; 755000, 3860200; 755000, 3860100; 755300, 3860100; 755300, 3860200; 756200, 3860200; 756200, 3860300; 756400, 3860300; 756400, 3860400; 756700, 3860400; 756700, 3860500; 756800, 3860500; 756800, 3860100; 756600, 3860100; 756600, 3859700; 756400, 3859700; 756400, 3859600; 756700, 3859600; 756700, 3859700; 757600, 3859700; 757600, 3859600; 757700, 3859600; 757700, 3859500; 757800, 3859500; 757800, 3859400; 757900, 3859400; 757900, 3859300; 758000, 3859300; 758000, 3859200; 758100, 3859200; 758100, 3859100; 758300, 3859100; 758300, 3858900; 758400, 3858900; 758400, 3858700; 758500, 3858700; 758500, 3858600; 758600, 3858600; 758600, 3858700; 758800, 3858700; 758800, 3859100; 758900, 3859100; 758900, 3859200; 759600, 3859200; 759600, 3859100; 759700, 3859100; 759700, 3859000; 759900, 3859000; 759900, 3858800; 760000, 3858800; 760000, 3858700; 759900, 3858700; 759900, 3858600; 760000, 3858600; 760000, 3858500; 760200, 3858500; 760200, 3858400; 760300, 3858400; 760300, 3858300; 760600, 3858300; 760600, 3858400; 760900, 3858400; 760900, 3858200; 761000, 3858200; 761000, 3858000; 761400, 3858000; 761400, 3858100; 761600, 3858100; 761600, 3858200; 761700, 3858200; 761700, 3858300; 761800, 3858300; 761800, 3858600; 762000, 3858600; 762000, 3858700; 762300, 3858700; 762300, 3858800; 762400, 3858800; 762400, 3858700; 762500, 3858700; 762500, 3858800; 762900, 3858800; 762900, 3858700; 763600, 3858700; 763600, 3858600; 763800, 3858600; 763800, 3858500; 763900, 3858500; 763900, 3858300; 764700, 3858300; 764700, 3858400; 765100, 3858400; 765100, 3858500; 765200, 3858500; 765200, 3858600; 765300, 3858600; 765300, 3858700; 765400, 3858700; 765400, 3858800; 765600, 3858800; 765600, 3859000; 765700, 3859000; 765700, 3859100; 765800, 3859100; 765800, 3859200; 766000, 3859200; 766000, 3859300; 766100, 3859300; 766100, 3859400; 766200, 3859400; 766200, 3859500; 766600, 3859500; 766600, 3859600; 766700, 3859600; 766700, 3859700; 767000, 3859700; 767000, 3859800; 767300, 3859800; 767300, 3859900; 767700, 3859900; 767700, 3860000; 767900, 3860000; 767900, 3860200; 767800, 3860200; 767800, 3860300; 767900, 3860300; 767900, 3860400; 768000, 3860400; 768000, 3860500; 768100, 3860500; 768100, 3860400; 768300, 3860400; 768300, 3860500; 768400, 3860500; 768400, 3860600; 768800, 3860600; 768800, 3860500; 768900, 3860500; 768900, 3860400; 769000, 3860400; 769000, 3860200; 769200, 3860200; 769200, 3860300; 769300, 3860300; 769300, 3860200; 769400, 3860200; 769400, 3860000; 769500, 3860000; 769500, 3860100; 769800, 3860100; 769800, 3860200; 770000, 3860200; 770000, 3860100; 770200, 3860100; 770200, 3860000; 770300, 3860000; 770300, 3860100; 770500, 3860100; 770500, 3860000; 770700, 3860000; 770700, 3859900; 770900, 3859900; 770900, 3859800; 771400, 3859800; 771400, 3859700;

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(8) Unit 3; Upper Santa Ynez River Basin, Santa Barbara County, California.

(i) From USGS 1:24,000 scale quadrangles Carpinteria, Hildreth Peak, Little Pine Mountain, and Santa Barbara. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 262000, 3833000; 262400, 3833000; 262400, 3832900; 262500, 3832900; 262500, 3832800; 262300, 3832800; 262300, 3832700; 262100, 3832700; 262100, 3832400; 261900, 3832400; 261900, 3832000; 261800, 3832000; 261800, 3831700; 261700, 3831700; 261700, 3831600; 261500, 3831600; 261500, 3831300; 261300, 3831300; 261300, 3831100; 261000, 3831100; 261000, 3830900; 260800, 3830900; 260800, 3830800; 260700, 3830800; 260700, 3830700; 260800, 3830700; 260800, 3830300; 260700, 3830300; 260700, 3830000; 260800, 3830000; 260800, 3829700; 260700, 3829700; 260700, 3829500; 260600, 3829500; 260600, 3829300; 260500, 3829300; 260500, 3829200; 260400, 3829200; 260400, 3829100; 260500, 3829100; 260500, 3828800; 260400, 3828800; 260400, 3828700; 260300, 3828700; 260300, 3828600; 260400, 3828600; 260400, 3828500; 260500, 3828500; 260500, 3828400; 260600, 3828400; 260600, 3828300; 260800, 3828300; 260800, 3828200; 260700, 3828200; 260700, 3828100; 260400, 3828100; 260400, 3827600; 260500, 3827600; 260500, 3827300; 260300, 3827300; 260300, 3827100; 260400, 3827100; 260400, 3826900; 260300, 3826900; 260300, 3826800; 260200, 3826800; 260200, 3826700; 260100, 3826700; 260100, 3826600; 259900, 3826600; 259900, 3826500; 259700, 3826500; 259700, 3826400; 259800, 3826400; 259800, 3826000; 259500, 3826000; 259500, 3825700; 259600, 3825700; 259600, 3825500; 259300, 3825500; 259300, 3825300; 259400, 3825300; 259400, 3825200; 259500, 3825200; 259500, 3824800; 258800, 3824800; 258800, 3824700; 258900, 3824700; 258900, 3824600; 259000, 3824600; 259000, 3824500; 259100, 3824500; 259100, 3824200; 259000, 3824200; 259000, 3824000; 258800, 3824000; 258800, 3823900; 258900, 3823900; 258900, 3823700; 259000, 3823700; 259000, 3823600; 259100, 3823600; 259100, 3823200; 259200, 3823200; 259200, 3823000; 259100, 3823000; 259100, 3822900; 258900, 3822900; 258900, 3822800; 258600, 3822800; 258600, 3822700; 258700, 3822700; 258700, 3822500; 258500, 3822500; 258500, 3822200; 258600, 3822200; 258600, 3822100; 258800, 3822100; 258800, 3822000; 259200, 3822000; 259200, 3821900; 259300, 3821900; 259300, 3821800; 259700, 3821800; 259700, 3821900; 259800, 3821900; 259800, 3822000; 260000, 3822000; 260000, 3821900; 260100, 3821900; 260100, 3821800; 260200, 3821800; 260200, 3821700; 260400, 3821700; 260400, 3821600; 260700, 3821600; 260700, 3821700; 261000, 3821700; 261000, 3821800; 261100, 3821800; 261100, 3822000; 261400, 3822000; 261400, 3822200; 261600, 3822200; 261600, 3822100; 262000, 3822100; 262000, 3822300; 262200, 3822300; 262200, 3822200; 262400, 3822200; 262400, 3822100; 262500, 3822100; 262500, 3822000; 262600, 3822000; 262600, 3822100; 262800, 3822100; 262800, 3822000; 263000, 3822000; 263000, 3821900; 263500, 3821900; 263500, 3822000; 263700, 3822000; 263700, 3821800; 263600, 3821800; 263600, 3821700; 263700, 3821700; 263700, 3821300; 263800, 3821300; 263800, 3821100; 264000, 3821100; 264000, 3821000; 264300, 3821000; 264300, 3820900; 264500, 3820900; 264500, 3820800; 264700, 3820800; 264700, 3820700; 264900, 3820700; 264900, 3820500; 265000, 3820500; 265000, 3820400; 265100, 3820400; 265100, 3819900; 265500, 3819900; 265500, 3820000; 265600, 3820000; 265600, 3820100; 265700, 3820100; 265700, 3819800; 265800, 3819800; 265800, 3819600; 266000, 3819600; 266000, 3819500; 266500, 3819500; 266500, 3819400; 266600, 3819400; 266600, 3819200; 266700, 3819200; 266700, 3819100; 266900, 3819100; 266900, 3819200; 267100, 3819200; 267100, 3819100; 267600, 3819100; 267600, 3819000; 268600, 3819000; 268600, 3819100; 268700, 3819100; 268700, 3819200; 268800, 3819200; 268800, 3819400; 268700, 3819400; 268700, 3819700; 269300, 3819700; 269300, 3819600; 269400, 3819600; 269400, 3819500; 269500, 3819500; 269500, 3819300; 269300, 3819300; 269300, 3819400; 269200, 3819400; 269200, 3819500; 269100, 3819500; 269100, 3819100; 269200, 3819100; 269200, 3818900; 269100, 3818900; 269100, 3818800; 268800, 3818800; 268800, 3818600; 268200, 3818600; 268200, 3818500; 267800, 3818500; 267800, 3818600; 266600, 3818600;

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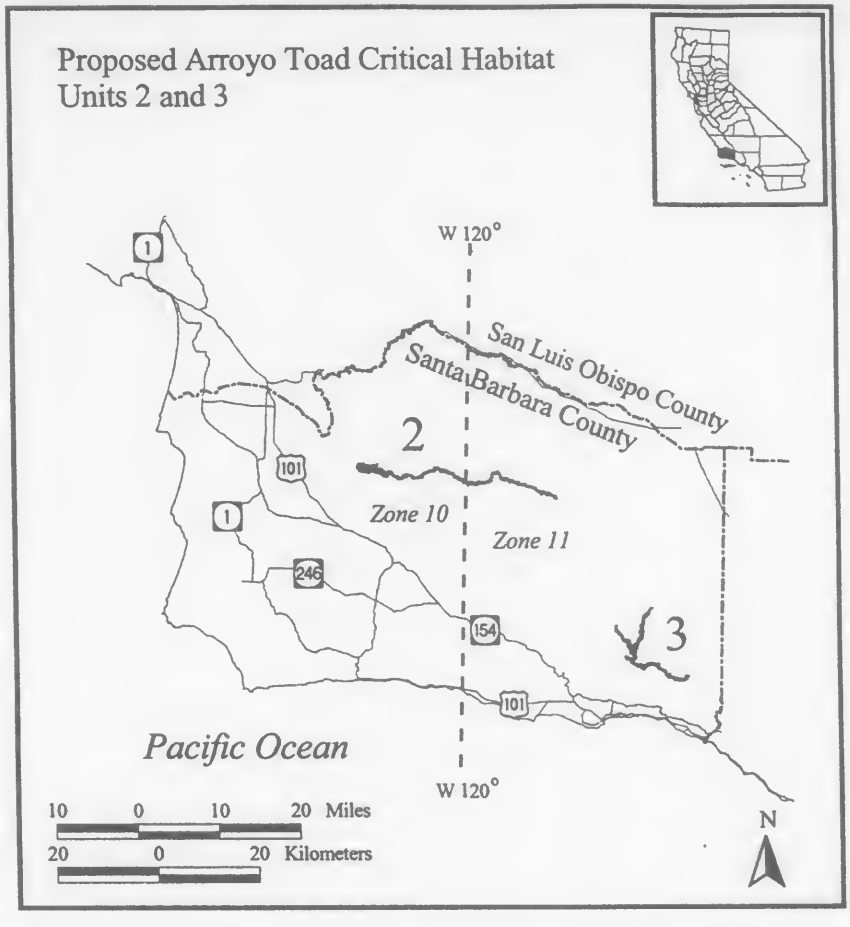
(ii) **Note:** Map of arroyo toad proposed critical habitat Units 2 and 3 follows.

BILLING CODE 4310–55–U



BILLING CODE 4310–55–C

(9) Unit 4; Sespe Creek, Ventura County, California.

(i) From USGS 1:24,000 scale quadrangles Wheeler Springs, Lion Canyon, Topatopa Mountains, and Devils Heart Peak. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 292900, 3828400; 293100, 3828400; 293100, 3828100; 293000, 3828100; 293000, 3827900; 293100, 3827900; 293100, 3827700; 293000, 3827700; 293000, 3827500; 292900, 3827500; 292900, 3827400; 292800, 3827400; 292800, 3827100; 292700, 3827100; 292700, 3826900; 292600, 3826900; 292600, 3826700; 292700, 3826700; 292700, 3826600; 292600, 3826600; 292600, 3826400; 292500, 3826400; 292500, 3826300; 292400, 3826300; 292400, 3826200; 292700, 3826200; 292700, 3826300; 292900, 3826300; 292900, 3826400; 293000, 3826400; 293000, 3826500; 293400, 3826500; 293400, 3826600; 293500, 3826600; 293500, 3826700; 293900, 3826700; 293900, 3826500; 294100, 3826500; 294100, 3826400; 294300, 3826400; 294300, 3826500; 294800, 3826500; 294800, 3826400; 294700, 3826400; 294700, 3826300; 294600, 3826300; 294600, 3826200; 294500, 3826200; 294500, 3826100; 294600, 3826100; 294600, 3826000; 294700, 3826000; 294700, 3825900; 294800, 3825900; 294800, 3825800; 295000, 3825800; 295000, 3825900; 295300, 3825900; 295300, 3826100; 295200, 3826100; 295200, 3826500; 295400, 3826500; 295400, 3826300; 295700, 3826300; 295700, 3826400; 296000, 3826400; 296000, 3826200; 296300, 3826200; 296300, 3826100; 296400, 3826100; 296400, 3826000; 296500, 3826000; 296500, 3825900; 296600, 3825900; 296600, 3825800; 296700, 3825800; 296700, 3825600; 296800, 3825600; 296800, 3825900; 296900, 3825900; 296900, 3826000; 297000, 3826000; 297000, 3826100; 297300, 3826100; 297300, 3826000; 297600, 3826000; 297600, 3826100; 297800, 3826100; 297800, 3826000; 297900, 3826000; 297900, 3825900; 298000, 3825900; 298000, 3826100; 298100, 3826100; 298100, 3826200; 298400, 3826200; 298400, 3826300; 298500, 3826300; 298500, 3826400; 298700, 3826400; 298700, 3826500; 298900, 3826500; 298900, 3826400; 299000, 3826400; 299000, 3826300; 299600, 3826300; 299600, 3826200; 299700, 3826200; 299700, 3826000; 299800, 3826000; 299800, 3826100; 299900, 3826100; 299900, 3826300; 300000, 3826300; 300000, 3826400; 300100, 3826400; 300100, 3826500; 300200, 3826500; 300200, 3826600; 300500, 3826600; 300500, 3826500; 300900, 3826500; 300900, 3826600; 301700, 3826600; 301700, 3826500; 301900, 3826500; 301900, 3826400; 302000, 3826400; 302000, 3826200; 302400, 3826200; 302400, 3826400; 302700, 3826400; 302700, 3826100; 303000, 3826100; 303000, 3826200; 303100, 3826200; 303100, 3826300; 303600, 3826300; 303600, 3826100; 303800, 3826100; 303800, 3826000; 304000, 3826000; 304000, 3826100; 304100, 3826100; 304100, 3826200;

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(ii) **Note:** Map of arroyo toad proposed critical habitat Unit 4 follows.

BILLING CODE 4310–55–U

BILLING CODE 4310–55–C

(10) Unit 5; Piru Creek, Ventura and Los Angeles Counties, California.

(i) Subunit 5a: From USGS 1:24,000 scale quadrangles Lockwood Valley, Alamo Mountain, and Black Mountain. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 319100, 3842600; 319500, 3842600; 319500, 3842400; 319900, 3842400; 319900, 3842500; 320000, 3842500; 320000, 3842600; 320200, 3842600; 320200, 3842500; 320400, 3842500; 320400, 3842600; 320600, 3842600; 320600, 3842400; 320700, 3842400; 320700, 3842500; 320800, 3842500; 320800, 3842400; 321000, 3842400; 321000, 3842200; 321800, 3842200; 321800, 3842300; 321900, 3842300; 321900, 3842200; 322000, 3842200; 322000, 3842100; 322300, 3842100; 322300, 3842200; 322500, 3842200; 322500, 3842100; 322600, 3842100; 322600, 3841800; 322800, 3841800; 322800, 3841700; 322900, 3841700; 322900, 3841600; 323000, 3841600; 323000, 3841300; 323100, 3841300; 323100, 3841000; 323400, 3841000; 323400, 3840800; 323700, 3840800; 323700, 3840900; 324100, 3840900; 324100, 3840800; 324200, 3840800; 324200, 3840700; 324300, 3840700; 324300, 3840800; 325000, 3840800; 325000, 3840700; 325100, 3840700; 325100, 3840400; 325200, 3840400; 325200, 3840300; 325100, 3840300; 325100, 3840100; 325300, 3840100; 325300, 3840000; 325600, 3840000; 325600, 3840300; 326100, 3840300; 326100, 3840400; 326200, 3840400; 326200, 3840300; 326400, 3840300; 326400, 3840200; 326600, 3840200; 326600, 3840300; 327000, 3840300; 327000, 3840200; 327100, 3840200; 327100, 3840300; 327200, 3840300; 327200, 3840400; 327400, 3840400; 327400, 3840200; 327500, 3840200; 327500, 3840400; 327600, 3840400; 327600, 3840500; 327900, 3840500; 327900, 3840600; 328200, 3840600; 328200, 3840700; 328300, 3840700; 328300, 3840800; 328200, 3840800; 328200, 3841000; 328300, 3841000; 328300, 3841100; 328500, 3841100; 328500, 3841200; 328400, 3841200; 328400, 3841400; 328600, 3841400; 328600, 3841600; 328900, 3841600; 328900, 3841800; 329200, 3841800; 329200, 3841600; 329300, 3841600; 329300, 3841500; 329200, 3841500; 329200, 3841300; 329300, 3841300; 329300, 3841100; 329400, 3841100; 329400, 3840900; 329500, 3840900; 329500, 3840800; 329600, 3840800; 329600, 3840600; 329700, 3840600; 329700, 3840700; 330000, 3840700;

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(ii) Subunit 5b: From USGS 1:24,000 scale quadrangles Cobblestone Mountain and Whitaker Peak. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 335300, 3831000; 335400, 3831000; 335400, 3830900; 335500, 3830900; 335500, 3830800; 335600, 3830800; 335600, 3830600; 335500, 3830600; 335500, 3830500; 335700, 3830500; 335700, 3830300; 335800, 3830300; 335800, 3830000; 335900, 3830000; 335900, 3830100; 336200, 3830100; 336200, 3830200; 336500, 3830200; 336500, 3830100; 336600, 3830100; 336600, 3830000; 336500, 3830000; 336500, 3829900; 336800, 3829900; 336800, 3829800; 336900, 3829800; 336900, 3829600; 337200, 3829600; 337200, 3829400; 337400, 3829400; 337400, 3829200; 337600, 3829200; 337600, 3829100; 337700, 3829100; 337700, 3828900; 337800, 3828900; 337800, 3828400; 337600, 3828400; 337600, 3828300; 337400, 3828300; 337400, 3828400; 337200, 3828400; 337200, 3828300; 337100, 3828300; 337100, 3828000; 337200, 3828000; 337200, 3827900; 337300, 3827900; 337300, 3827700; 337200, 3827700; 337200, 3827600; 337300, 3827600; 337300, 3827400; 337400, 3827400; 337400, 3827300; 337300, 3827300; 337300, 3827000; 337400, 3827000; 337400, 3826900; 337500, 3826900; 337500, 3826500; 337000, 3826500; 337000, 3826400; 337200, 3826400; 337200, 3826300; 337300, 3826300; 337300, 3826200; 337400, 3826200; 337400, 3825800; 337500, 3825800; 337500, 3825500; 337400, 3825500; 337400, 3825400; 337300, 3825400; 337300, 3824800; 337400, 3824800; 337400, 3824500; 337300, 3824500; 337300, 3824200; 337400, 3824200; 337400, 3824100; 337500, 3824100; 337500, 3824200; 337800, 3824200; 337800, 3824100; 338200, 3824100; 338200, 3824000; 338300, 3824000; 338300, 3823800; 338400, 3823800; 338400, 3823700; 338600, 3823700; 338600, 3823500; 338700, 3823500; 338700, 3823400; 338800, 3823400; 338800, 3823300; 338900, 3823300; 338900, 3823200; 339000, 3823200; 339000, 3822600; 338900, 3822600; 338900, 3822400; 339000, 3822400; 339000, 3822300; 339200, 3822300; 339200, 3822000; 339000, 3822000; 339000, 3821300; 339100, 3821300; 339100, 3820600; 339300, 3820600; 339300, 3820400; 339500, 3820400; 339500, 3820200; 339400, 3820200; 339400, 3820100; 339200, 3820100; 339200, 3820000; 339100, 3820000; 339100, 3819900; 339000, 3819900; 339000, 3819800; 338900, 3819800; 338900, 3819700; 339000, 3819700; 339000, 3819500; 339100, 3819500; 339100, 3818900; 338700, 3818900; 338700, 3819200; 338400, 3819200; 338400, 3819300; 338500, 3819300; 338500,

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(iii) **Note:** Map of arroyo toad proposed critical habitat Unit 5 follows.

BILLING CODE 4310–55–U

BILLING CODE 4310–55–C

(11) Unit 6; Upper Santa Clara River Basin, Los Angeles County, California.

(i) Subunit 6a: From USGS 1:24,000 scale quadrangles Liebre Mountain and Whitaker Peak. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 347000, 3835600; 347100, 3835600; 347100, 3835500;

347200, 3835500; 347200, 3835200; 347300, 3835200; 347300, 3834800; 347400, 3834800; 347400, 3834700; 347300, 3834700; 347300, 3834400; 347200, 3834400; 347200, 3833800; 347600, 3833800; 347600, 3833700; 347700, 3833700; 347700, 3833400; 347800, 3833400; 347800, 3833300; 347700, 3833300; 347700, 3832800; 347800, 3832800; 347800, 3832700; 348000, 3832700; 348000, 3832100; 347900, 3832100; 347900, 3831900; 348000, 3831900; 348000, 3831700; 348100, 3831700; 348100, 3831500; 348200, 3831500; 348200, 3831300; 348100, 3831300; 348100, 3831200; 348000, 3831200; 348000, 3831100; 347900, 3831100; 347900, 3831000; 347700, 3831000; 347700, 3830700; 347500, 3830700; 347500, 3830400; 348000, 3830400; 348000, 3830500; 348100, 3830500; 348100, 3830600; 348200, 3830600; 348200, 3830700; 348300, 3830700; 348300, 3830500; 348400, 3830500; 348400, 3830400; 348300, 3830400; 348300, 3830200; 348200, 3830200; 348200, 3830100; 347900, 3830100; 347900, 3830000; 347800, 3830000; 347800, 3829900; 347700, 3829900; 347700, 3829800; 347600, 3829800; 347600, 3829600; 347700, 3829600; 347700, 3829500; 347800, 3829500; 347800, 3829300; 347900, 3829300; 347900, 3829000; 348000, 3829000; 348000, 3828900; 348200, 3828900; 348200, 3828800; 348300, 3828800; 348300, 3828700; 348500, 3828700; 348500, 3828600; 348600, 3828600; 348600, 3828400; 348700, 3828400; 348700, 3828300; 348800, 3828300; 348800, 3828200; 348900, 3828200; 348900, 3827900; 349000, 3827900; 349000, 3827800; 349100, 3827800; 349100, 3827700; 349200, 3827700; 349200, 3827500; 349300, 3827500; 349300, 3827400; 349200, 3827400; 349200, 3827200; 349100, 3827200; 349100, 3827100; 349000, 3827100; 349000, 3827000; 348800, 3827000; 348800, 3827100; 348700, 3827100; 348700, 3827400; 348600, 3827400; 348600, 3827700; 348500, 3827700; 348500, 3827800; 348400, 3827800; 348400, 3827900; 348200, 3827900; 348200, 3828200; 348100, 3828200; 348100, 3828300; 347900, 3828300; 347900, 3828400; 347700, 3828400; 347700, 3828500; 347600, 3828500; 347600, 3828600; 347500, 3828600; 347500, 3828800; 347300, 3828800; 347300, 3829200; 347200, 3829200; 347200, 3829400; 347100, 3829400; 347100, 3830000; 347200, 3830000; 347200, 3830300; 347000, 3830300; 347000, 3830400; 347100, 3830400; 347100, 3830500; 347200, 3830500; 347200, 3830600; 347300, 3830600; 347300, 3830900; 347500, 3830900; 347500, 3831100; 347600, 3831100; 347600, 3831300; 347900, 3831300; 347900, 3831500; 347800, 3831500; 347800, 3831700; 347700, 3831700; 347700, 3831800; 347600, 3831800; 347600, 3832100; 347700, 3832100; 347700, 3832400; 347800, 3832400; 347800, 3832500; 347700, 3832500; 347700, 3832600; 347600, 3832600; 347600, 3832700; 347400, 3832700; 347400, 3832800; 347300, 3832800; 347300, 3833100; 347400, 3833100; 347400, 3833300; 347300, 3833300; 347300, 3833400; 347200, 3833400; 347200, 3833500; 347000, 3833500; 347000, 3833700; 346900, 3833700; 346900, 3833800; 346800, 3833800; 346800, 3833900; 346900, 3833900; 346900, 3834000; 346800, 3834000; 346800, 3834200; 347000, 3834200; returning to 347000, 3835600.

(ii) Subunit 6b: From USGS 1:24,000 scale quadrangles Warm Springs Mountain, Newhall, and Val Verde. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 351000, 3812600; 351000, 3812800; 351300, 3812800; 351300, 3813000; 351400, 3813000; 351400, 3813100; 351500, 3813100; 351500, 3813200; 351600, 3813200; 351600, 3813300; 351800, 3813300; 351800, 3812900; 351900, 3812900; 351900, 3812700; 351800, 3812700; 351800, 3812500; 351900, 3812500; 351900, 3812200; 352000, 3812200; 352000, 3811900; 352100, 3811900; 352100, 3811800; 352300, 3811800; 352300, 3811900; 352400, 3811900; 352400, 3811700; 352600, 3811700; 352600, 3811800; 352800, 3811800; 352800, 3811900; 353200, 3811900; 353200, 3811800; 353300, 3811800; 353300, 3811700; 353400, 3811700; 353400, 3811600; 353500, 3811600; 353500, 3811400; 353600, 3811400; 353600, 3811300; 353700, 3811300; 353700, 3811100; 353800, 3811100; 353800, 3810900; 353900, 3810900; 353900, 3810700; 354400, 3810700; 354400, 3810600; 355000, 3810600; 355000, 3810700; 355400, 3810700; 355400, 3810800; 355800, 3810800; 355800, 3810600; 356100, 3810600; 356100, 3810700; 356200, 3810700; 356200, 3810800; 356300, 3810800; 356300, 3811000; 356400, 3811000; 356400, 3811200; 356500, 3811200; 356500, 3811500; 356600, 3811500; 356600, 3811700; 356500, 3811700; 356500, 3812100; 356600, 3812100; 356600, 3812700; 356700, 3812700; 356700, 3812900; 356600, 3812900; 356600, 3813100; 356800, 3813100; 356800, 3813200; 356900, 3813200; 356900, 3813600; 357000, 3813600; 357000, 3813900; 357100, 3813900; 357100, 3814200; 357300, 3814200; 357300, 3814400; 357200, 3814400; 357200, 3814600; 357300, 3814600; 357300, 3814900; 357400, 3814900; 357400, 3815200; 357500, 3815200; 357500, 3815600; 357400, 3815600; 357400, 3816000; 357500, 3816000; 357500, 3816300; 357700, 3816300; 357700, 3816400; 357800, 3816400; 357800, 3816500; 358100, 3816500; 358100, 3816800; 358200, 3816800; 358200, 3817000; 358000, 3817000; 358000, 3817200; 358100, 3817200; 358100, 3817600; 358000, 3817600; 358000, 3817800; 358100, 3817800; 358100, 3818100; 358300, 3818100; 358300, 3818300; 358400, 3818300; 358400, 3818400; 358200, 3818400; 358200, 3818600; 358400, 3818600; 358400, 3818800; 358500, 3818800; 358500, 3818900; 358700, 3818900; 358700, 3819000; 358600, 3819000; 358600, 3819400; 358700, 3819400; 358700, 3819500; 358800, 3819500; 358800, 3819600; 358700, 3819600; 358700, 3819800; 358800, 3819800; 358800, 3819900; 358900, 3819900; 358900, 3820100; 359000, 3820100; 359000, 3820300; 358900, 3820300; 358900, 3820500; 359000, 3820500; 359000, 3821000; 359300, 3821000; 359300, 3821200; 359200, 3821200; 359200, 3821400; 359100, 3821400; 359100, 3821700; 359200, 3821700; 359200, 3821900; 359500, 3821900; 359500, 3821800; 359600, 3821800; 359600, 3821700; 359800, 3821700; 359800, 3821600; 359900, 3821600; 359900, 3821500; 360000, 3821500; 360000, 3821400; 359600, 3821400; 359600, 3820900; 359500, 3820900; 359500, 3820500; 359600, 3820500; 359600, 3820400; 359500, 3820400; 359500, 3820200; 359400, 3820200; 359400, 3820000; 359300, 3820000; 359300, 3819600; 359200, 3819600; 359200, 3819300; 359100, 3819300; 359100, 3819100; 359000, 3819100; 359000, 3818700; 358900, 3818700; 358900, 3818500; 358800, 3818500; 358800, 3818200; 358700, 3818200; 358700, 3818100; 358600, 3818100; 358600, 3817900; 358500, 3817900; 358500, 3817100; 358700, 3817100; 358700, 3816900; 358600, 3816900; 358600, 3816700; 358400, 3816700; 358400, 3816500; 358600, 3816500; 358600, 3816100; 358500, 3816100; 358500, 3816000; 358600, 3816000; 358600, 3815900; 358500, 3815900; 358500, 3815700; 358300, 3815700; 358300, 3815600; 358500, 3815600; 358500, 3815400; 358600, 3815400; 358600, 3815200; 358400, 3815200; 358400, 3815100; 358200, 3815100; 358200, 3815200; 358000, 3815200; 358000, 3814800; 357900, 3814800; 357900, 3814600; 357800, 3814600; 357800, 3814300;

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(iii) Subunit 6c: From USGS 1:24,000 scale quadrangles Agua Dulce and Acton. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 389600, 3812500; 389800, 3812500; 389800, 3812400; 389900, 3812400; 389900, 3812300; 390000, 3812300; 390000, 3812200; 389900, 3812200; 389900, 3812100; 389800, 3812100; 389800, 3812000; 389500, 3812000; 389500, 3812100; 389400, 3812100; 389400, 3812000; 389300, 3812000; 389300, 3811900; 389500, 3811900; 389500, 3811800; 389700, 3811800; 389700, 3811500; 389400, 3811500; 389400, 3811600; 389300, 3811600; 389300, 3811700; 389200, 3811700; 389200, 3811600; 389100, 3811600; 389100, 3811500; 389000, 3811500; 389000, 3811200; 388800, 3811200; 388800, 3811000; 388600, 3811000; 388600, 3810900; 388400, 3810900; 388400, 3810800; 388200, 3810800; 388200, 3810900; 388100, 3810900; 388100, 3810600; 387900, 3810600; 387900, 3810500; 387600, 3810500; 387600, 3810700; 387200, 3810700; 387200, 3810500; 387100, 3810500; 387100, 3810600; 387000, 3810600; 387000, 3810700; 386700, 3810700; 386700, 3810600; 386300, 3810600; 386300, 3810800; 386000, 3810800; 386000, 3810900; 385900, 3810900; 385900, 3810500; 386000, 3810500; 386000, 3810300; 385700, 3810300; 385700, 3810400; 385600, 3810400; 385600, 3810500; 385400, 3810500; 385400, 3811000; 385300, 3811000; 385300, 3811200; 385100, 3811200; 385100, 3811300; 384900, 3811300; 384900, 3811200; 384800, 3811200; 384800, 3811100; 384500, 3811100; 384500, 3811200; 384200, 3811200; 384200, 3811100; 383900, 3811100; 383900, 3811000; 383200, 3811000; 383200, 3811100; 382700, 3811100; 382700, 3811200; 382600, 3811200; 382600, 3811100; 382500, 3811100; 382500, 3811000; 382400, 3811000; 382400, 3811100; 382300, 3811100; 382300, 3811200; 382200, 3811200; 382200, 3811300; 381900, 3811300; 381900, 3811100; 381700, 3811100; 381700, 3811200; 381300, 3811200; 381300, 3811100; 381100, 3811100; 381100, 3811200; 380900, 3811200; 380900, 3811300; 380800, 3811300; 380800, 3811200; 380400, 3811200; 380400, 3811100; 380300, 3811100; 380300, 3811200; 380200, 3811200; 380200, 3811300; 380000, 3811300; 380000, 3811500; 379900, 3811500; 379900, 3811400; 379500, 3811400; 379500, 3811300; 379300, 3811300; 379300, 3811200; 379000, 3811200; 379000, 3811100; 378500, 3811100; 378500, 3811300; 378300, 3811300; 378300, 3811200; 378000, 3811200; 378000, 3811100; 377800, 3811100; 377800, 3811200; 377700, 3811200; 377700, 3811100; 377500, 3811100; 377500, 3811000; 377300, 3811000; 377300, 3810900; 377200, 3810900; 377200, 3811000; 377100, 3811000; 377100, 3810800; 376500, 3810800; 376500, 3810700; 376400, 3810700; 376400, 3810500; 376300, 3810500; 376300, 3810200; 376400, 3810200; 376400, 3810000; 375900, 3810000; 375900, 3810100; 375800, 3810100; 375800, 3810300; 375600, 3810300; 375600, 3810200; 375200, 3810200; 375200, 3810600; 374700, 3810600;

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(12) Unit 7; Upper Los Angeles Basin, Los Angeles County, California.

(i) Subunit 7a: From USGS 1:24,000 scale quadrangles Condor Peak and Sunland. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 383800, 3796500; 384300, 3796500; 384300, 3796400; 384400, 3796400; 384400, 3796300; 384500, 3796300; 384500, 3796400; 384600, 3796400; 384600, 3796200; 384900, 3796200; 384900, 3796100; 385000, 3796100; 385000, 3796000; 385100, 3796000; 385100, 3795900; 385200, 3795900; 385200, 3795700; 385700, 3795700; 385700, 3795600; 385900, 3795600; 385900, 3795500; 386000, 3795500; 386000, 3795400; 386100, 3795400; 386100, 3795300; 386200, 3795300; 386200, 3795200; 386500, 3795200; 386500, 3795000; 386700, 3795000; 386700, 3794800; 386800, 3794800; 386800, 3794700; 387200, 3794700; 387200, 3794600; 387300, 3794600; 387300, 3794400; 387500, 3794400; 387500, 3794300; 387600, 3794300; 387600, 3794200; 387700, 3794200; 387700, 3794100; 387800, 3794100; 387800, 3793900; 387900, 3793900; 387900, 3793800; 388100, 3793800; 388100, 3793700; 388200, 3793700; 388200, 3793500; 388300, 3793500; 388300, 3793600; 388500, 3793600; 388500, 3793500; 388600, 3793500; 388600, 3793600; 388700, 3793600; 388700, 3793700; 388800, 3793700; 388800, 3793800; 388900, 3793800; 388900, 3793700; 389100, 3793700; 389100, 3793600; 389300, 3793600; 389300, 3794000; 389700, 3794000; 389700, 3794100; 389800, 3794100; 389800, 3794200; 389900, 3794200; 389900, 3794300; 390000, 3794300; 390000, 3794700; 390100, 3794700; 390100, 3794800; 390200, 3794800; 390200, 3794900; 390300, 3794900; 390300, 3795000; 390600, 3795000; 390600, 3794800; 390500, 3794800; 390500, 3794700; 390300, 3794700; 390300, 3794100; 390200, 3794100; 390200, 3794000; 390000, 3794000; 390000, 3793800; 389900, 3793800; 389900, 3793700; 389600, 3793700; 389600, 3793600; 389500, 3793600; 389500, 3793500; 389400, 3793500; 389400, 3793400; 389200, 3793400; 389200, 3793300; 389000, 3793300; 389000, 3793500; 388900, 3793500; 388900, 3793400; 388800, 3793400; 388800, 3793200; 388400, 3793200; 388400, 3793100; 388200, 3793100; 388200, 3793000; 388100, 3793000; 388100, 3793100; 388000, 3793100; 388000, 3793200; 387900, 3793200; 387900, 3793400; 387600, 3793400; 387600, 3793600; 387500, 3793600; 387500, 3793900; 387400, 3793900; 387400, 3794000; 387200, 3794000; 387200, 3794100; 387100, 3794100; 387100, 3794200; 387000, 3794200; 387000, 3794300; 386800, 3794300; 386800, 3794400; 386600, 3794400; 386600, 3794500; 386400, 3794500; 386400, 3794700; 386300, 3794700; 386300, 3794900; 386000, 3794900; 386000, 3795000; 385800, 3795000; 385800, 3795100; 385700, 3795100; 385700, 3795200; 385600, 3795200; 385600, 3795300; 385400, 3795300; 385400, 3795400; 385200, 3795400; 385200, 3795500; 385000, 3795500; 385000, 3795600; 384900, 3795600; 384900, 3795700; 384800, 3795700; 384800, 3795900; 384600, 3795900; 384600, 3796000; 384000, 3796000; 384000, 3795700; 383600, 3795700; 383600, 3795800; 383400, 3795800; 383400, 3795900; 382900, 3795900; 382900, 3795800; 382700, 3795800; 382700, 3795900; 382600, 3795900; 382600, 3795800; 382500, 3795800; 382500, 3795700; 382400, 3795700; 382400, 3795600; 382200, 3795600; 382200, 3795500; 382100, 3795500; 382100, 3795300; 382000, 3795300; 382000, 3795200; 381900, 3795200; 381900, 3795100; 381800, 3795100; 381800, 3795000; 381600, 3795000; 381600, 3794500; 381500, 3794500; 381500, 3794300; 381400, 3794300; 381400, 3793700; 381200, 3793700; 381200, 3793600; 380800, 3793600; 380800, 3793500; 380700, 3793500; 380700, 3793400; 380600, 3793400; 380600, 3793300; 380500, 3793300; 380500, 3793200; 380200, 3793200; 380200, 3793100; 380000, 3793100; 380000, 3793200; 379900, 3793200; 379900, 3793300; 379500, 3793300; 379500, 3793100; 379300, 3793100; 379300, 3792900; 379200, 3792900; 379200, 3792800; 379000, 3792800; 379000, 3792700; 378800, 3792700; 378800, 3792500; 378600, 3792500; 378600, 3792400; 378500, 3792400; 378500, 3792500; 378400, 3792500; 378400, 3792300; 378200, 3792300; 378200, 3792200; 377900, 3792200; 377900, 3792100; 377700, 3792100; 377700, 3792000; 377200, 3792000; 377200, 3792100; 377100, 3792100; 377100, 3792200;

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(ii) Subunit 7b: From USGS 1:24,000 scale quadrangles Chilao Flat and Condor Peak. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 398000, 3801000; 398100, 3801000; 398100, 3800900; 398300, 3800900; 398300, 3800700; 398200, 3800700; 398200, 3800200; 398300, 3800200; 398300, 3800100; 398200, 3800100; 398200, 3800000; 398300, 3800000; 398300, 3799600; 398200, 3799600; 398200, 3799500; 397800, 3799500; 397800, 3799300; 397700, 3799300; 397700, 3799200; 397600, 3799200; 397600, 3799000; 397500, 3799000; 397500, 3798900; 397100, 3798900; 397100, 3798700; 397000, 3798700; 397000, 3798600; 396900, 3798600; 396900, 3798500; 396800, 3798500; 396800, 3798400; 396600, 3798400; 396600, 3798100; 396500, 3798100; 396500, 3798000; 396400, 3798000; 396400, 3797900; 396200, 3797900; 396200, 3797700; 396100, 3797700; 396100, 3797600; 396000, 3797600; 396000, 3797500; 395600, 3797500; 395600, 3797400; 395400, 3797400; 395400, 3797300; 395200, 3797300; 395200, 3797400; 395100, 3797400; 395100, 3797300; 395000, 3797300; 395000, 3797100; 395200, 3797100; 395200, 3797000; 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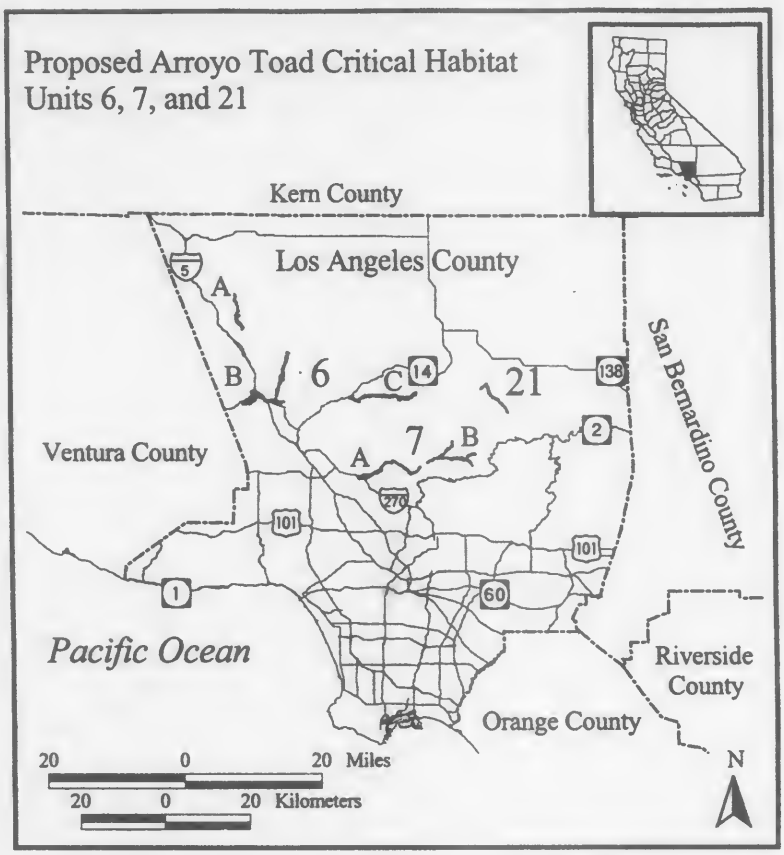
(iii) **Note:** Map of arroyo toad proposed critical habitat Units 6, 7 and 21 follows.

BILLING CODE 4310–55–U



BILLING CODE 4310–55–C

(13) Unit 8; Lower Santa Ana River Basin/Black Star and Baker Creeks, Orange County, California.

(i) From USGS 1:24,000 scale quadrangle Black Star Canyon. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 438900, 3738800; 439000, 3738800; 439000, 3738400; 438900, 3738400; 438900, 3738300; 438600, 3738300; 438600, 3738400; 438500, 3738400; 438500, 3738100; 438400, 3738100; 438400, 3737800; 438300, 3737800; thence south to the Cleveland National Forest (CNF) boundary at x-coordinate 438300; thence north along the CNF boundary to y-coordinate 3738600; thence east and following coordinates 438400, 3738600; 438400, 3738700; 438500, 3738700; 438500, 3738600; 438800, 3738600; 438800, 3738700; 438900, 3738700; returning to 438900, 3738800.

(ii) Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 439200, 3736900; 439200, 3736800; 439300, 3736800; 439300, 3736200; 439200, 3736200; 439200, 3736100; 439100, 3736100; 439100, 3736000; 439000, 3736000; 439000, 3735900; 438900, 3735900; 438900, 3735700; 439000, 3735700; 439000, 3735400; 438900, 3735400; thence south to the Cleveland National Forest (CNF) boundary at x-coordinate 438900; thence northwest along the CNF boundary to x-coordinate 438700; thence north and following coordinates 438700, 3736000; 438800, 3736000; 438800, 3736200; 438900, 3736200; 438900, 3736300; 439000, 3736300; 439000, 3736600; 439100, 3736600; returning to 439100, 3736900.

(iii) **Note:** Map of arroyo toad proposed critical habitat Units 8 and 10 follows.

BILLING CODE 4310–55–U

BILLING CODE 4310–55–C

(14) Unit 9; San Jacinto River Basin/ Bautista Creek, Riverside County, California.

(i) From USGS 1:24,000 scale quadrangle Blackburn Canyon. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 514400, 3727100; thence north to the San Bernardino National Forest (SBNF) boundary at x-coordinate 514400; thence east and south along SBNF boundary to y-coordinate 3726400; thence west and following coordinates 514700, 3726400; 514700, 3726700; 514600, 3726700; 514600, 3726800; 514500, 3726800; 514500, 3727100; returning to 514400, 3727100.

(ii) Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 515800, 3725000; 515900, 3725000; 515900, 3724900; 516200, 3724900; 516200, 3724700; 516300, 3724700; 516300, 3724500; 516600, 3724500; 516600, 3724400; 516800, 3724400; 516800, 3724200; 516900, 3724200; 516900, 3724100; 517000, 3724100; 517000, 3723800; 517200, 3723800; 517200, 3723400; 517300, 3723400; thence south to the SBNF boundary at x-coordinate 517300; thence west, southeast and northwest along the SBNF boundary, passing x-coordinate 517500, to y-coordinate 3723100; thence east and following coordinates 518000, 3723100; 518000, 3723000; 518100, 3723000; 518100, 3722900; 518300, 3722900; 518300, 3722700; 518200, 3722700; 518200, 3722600; 518300, 3722600; 518300, 3722500; 518400, 3722500; 518400, 3722400; 518500, 3722400; 518500, 3722300; 518600, 3722300; 518600, 3722100; 518700, 3722100; 518700, 3721900; 518800, 3721900; 518800, 3722000; 518900, 3722000; 518900, 3722100; 519000, 3722100; 519000, 3722000; 519200, 3722000; 519200, 3721800; 519400, 3721800; 519400, 3721700; 519500, 3721700; 519500, 3721500; 519400, 3721500; 519400, 3721400; 519500, 3721400; 519500, 3721200; 519300, 3721200; 519300, 3721300; 518800, 3721300; 518800, 3721400; 518300, 3721400; 518300, 3721500; 518200, 3721500; 518200, 3721600; 518100, 3721600; 518100, 3721700; 517900, 3721700; 517900, 3721900; 517700, 3721900; 517700, 3722000; 517600, 3722000; 517600, 3722100; 517500, 3722100; 517500, 3722300; 517200, 3722300; 517200, 3722400; 517100, 3722400; 517100, 3722800; 517000, 3722800; 517000, 3722900; 516900, 3722900; 516900, 3723000; 516800, 3723000; 516800, 3723500; 516500, 3723500; 516500, 3723700; 516600, 3723700; 516600, 3723900; 516500, 3723900; 516500, 3724100; 516300, 3724100; 516300, 3724200; 515900, 3724200; 515900, 3724500; 515800, 3724500; 515800, 3724600; 515600, 3724600; 515600, 3724700; 515500, 3724700; 515500, 3725400; 515400, 3725400; thence north to the SBNF boundary at x-coordinate 515400; thence east along the SBNF boundary to x-coordinate 515800; returning to point of beginning.

(iii) **Note:** Map of arroyo toad proposed critical habitat Units 9 and 23 follows.

BILLING CODE 4310–55–U

BILLING CODE 4310–55–C

(15) Unit 10; San Juan Creek Basin, Orange and Riverside Counties, California.

(i) Subunit 10a: From USGS 1:24,000 scale quadrangles Canada Gobernadora, Dana Point, San Juan Capistrano, and Sitton Peak. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 460200, 3719900; 460300, 3719900; 460300, 3719500; 460200, 3719500; 460200, 3719300; 460100, 3719300; 460100, 3719200; 460000, 3719200; 460000, 3719100; 459900, 3719100; 459900, 3718900; 459600, 3718900; 459600, 3718700; 459500, 3718700; 459500, 3718600; 459400, 3718600; 459400, 3718500; 459200, 3718500; 459200, 3718400; 459100, 3718400; 459100, 3718300; 458700, 3718300; 458700, 3718200; 458600, 3718200; 458600, 3718000; 458500, 3718000; 458500, 3717900; 457900, 3717900; 457900, 3718000; 457800, 3718000; 457800, 3717900; 457600, 3717900; 457600, 3717800; 3717800; 457500, 3717800; 457500, 3717600; 457400, 3717600; 457400, 3717400; 457300, 3717400; 457300, 3717200; 457100, 3717200; 457100, 3717000; 457000, 3717000; 457000, 3716900; 456600, 3716900; 456600, 3716700; 456200, 3716700; 456200, 3716800; 455900, 3716800; 455900, 3716700; 455800, 3716700; 455800, 3716800; 455700, 3716800; 455700, 3716900; 455600, 3716900; 455600, 3717000; 455500, 3717000; 455500, 3717100; 455200, 3717100; 455200, 3717000; 454800, 3717000; 454800, 3716900; 454500, 3716900; 454500, 3716800; 454000, 3716800; 454000, 3716700; 453900, 3716700; 453900, 3716600; 453600, 3716600; 453600, 3716500; 453400, 3716500; 453400, 3716400; 453300, 3716400; 453300, 3716500; 453100, 3716500; 453100, 3716600; 453000, 3716600; 453000, 3716500; 452800, 3716500; 452800, 3716600; 452600, 3716600; 452600, 3716400; 452500, 3716400; 452500, 3716300; 452300, 3716300; 452300, 3716100; 451800, 3716100; 451800, 3715800; 451600, 3715800; 451600, 3715500; 451500, 3715500; 451500, 3715400; 451400, 3715400; 451400, 3715300; 451300, 3715300; 451300, 3715200; 451200, 3715200; 451200, 3715100; 451100, 3715100; 451100, 3714900; 450700, 3714900; 450700, 3714800; 450500, 3714800; 450500, 3714700; 449900, 3714700; 449900, 3714600; 450000, 3714600; 450000, 3714400; 449900, 3714400; 449900, 3714200; 449800, 3714200; 449800, 3714000; 449700, 3714000; 449700, 3713700; 449600, 3713700; 449600, 3713500; 449500, 3713500; 449500, 3713400; 449400, 3713400; 449400, 3713100; 449500, 3713100; 449500, 3713200; 449800, 3713200; 449800, 3713100; 449700, 3713100; 449700, 3713000; 449600, 3713000; 449600, 3712900; 449500, 3712900; 449500, 3712800; 449400, 3712800; 449400, 3712600; 449300, 3712600; 449300, 3712500; 449400, 3712500; 449400, 3712000; 449300, 3712000; 449300, 3711900; 449400, 3711900; 449400, 3711700; 449300, 3711700; 449300, 3711500; 449400, 3711500; 449400, 3711000; 449300, 3711000; 449300, 3710600; 449700, 3710600; 449700, 3710500; 449800, 3710500; 449800, 3710400; 449600, 3710400; 449600, 3710300; 449400, 3710300; 449400, 3710200; 449500, 3710200; 449500, 3710100; 449100, 3710100; 449100, 3710000; 449000, 3710000; 449000, 3709900; 448900, 3709900; 448900, 3709800; 448800, 3709800; 448800, 3709500; 448700, 3709500; 448700, 3709300; 448800, 3709300; 448800, 3709200; 448600, 3709200; 448600, 3708800; 448500, 3708800; 448500, 3708600; 448300, 3708600; 448300, 3708700; 448100, 3708700; 448100, 3708600; 447900, 3708600; 447900, 3708100; 447800, 3708100; 447800,

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(ii) Subunit 10b: From USGS 1:24,000 scale quadrangle Santiago Peak. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 449100, 3726000; 449300, 3726000; 449300, 3725700; 449100, 3725700; 449100, 3725600; 448700, 3725600; 448700, 3725500; 448400, 3725500; 448400, 3725400; 448300, 3725400; 448300, 3725300; 448200, 3725300; 448200, 3725200; 448100, 3725200; 448100, 3725100; 447900, 3725100; 447900, 3725000; 447800, 3725000; 447800, 3724900; 447500, 3724900; 447500, 3724800; 447300, 3724800; 447300, 3724700; 447200, 3724700; 447200, 3724600; 447000, 3724600; 447000, 3724500; 446800, 3724500; 446800, 3724400; 446600, 3724400; 446600, 3724300; 446400, 3724300; 446400, 3724200; 445800, 3724200; 445800, 3724100; 445500, 3724100; 445500, 3723900; 445300, 3723900; 445300, 3723800; 445200, 3723800; 445200, 3723700; 445100, 3723700; 445100, 3723600; 445000, 3723600; 445000, 3723500; 444900, 3723500; 444900, 3723400; 444800, 3723400; 444800, 3723300; 444700, 3723300; 444700, 3723200; 444500, 3723200; 444500, 3723000; 444400, 3723000; 444400, 3722900; 444300, 3722900; 444300, 3722800; 444200, 3722800; 444200, 3722700; 444100, 3722700; 444100, 3722600; 443900, 3722600; 443900, 3722500; 443800, 3722500; 443800, 3722400; 443700, 3722400; 443700, 3722300; 443600, 3722300; 443600, 3722100; 443400, 3722100; 443400, 3722000; 443300, 3722000; 443300, 3721900; 443200, 3721900; 443200, 3721500; 443100, 3721500; 443100, 3721400; 443000, 3721400; 443000, 3721300; 442700, 3721300; 442700, 3721400; 442600, 3721400; 442600, 3721500; 442500, 3721500; 442500, 3721600; 442400, 3721600; 442400, 3721800; 442500, 3721800; 442500, 3721900; 442600, 3721900; 442600, 3722100; 442700, 3722100; 442700, 3722200; 442800, 3722200; 442800, 3722400; 442900, 3722400; 442900, 3722500; 443000, 3722500; 443000, 3722700; 443300, 3722700; 443300, 3722900; 443400, 3722900; 443400, 3723000; 443600, 3723000; 443600, 3723100; 443700, 3723100; 443700, 3723200; 443800, 3723200; 443800, 3723300; 443900, 3723300; 443900, 3723400; 444000, 3723400; 444000, 3723500; 444200, 3723500; 444200, 3723800; 444300, 3723800; 444300, 3723900; 444400, 3723900; 444400, 3724000; 444500, 3724000; 444500, 3723900; 444800, 3723900; 444800, 3724100; 444900, 3724100; 444900, 3724300; 445100, 3724300; 445100, 3724400; 445200, 3724400; 445200, 3724500; 445300, 3724500; 445300, 3724800; 445400, 3724800; 445400, 3724900; 445500, 3724900; 445500, 3724600; 445700, 3724600; 445700, 3724800; 445900, 3724800; 445900, 3724900; 446000, 3724900; 446000, 3724700; 446100, 3724700; 446100, 3724800; 446200, 3724800; 446200, 3725000; 446400, 3725000; 446400, 3725100; 446500, 3725100; 446500, 3724800; 446600, 3724800; 446600, 3724900; 446700, 3724900; 446700, 3725000; 446800, 3725000; 446800, 3725100; 446900, 3725100; 446900, 3725200; 447100, 3725200; 447100, 3725300; 447200, 3725300; 447200, 3725400; 447500, 3725400; 447500, 3725500; 447700, 3725500; 447700, 3725600; 448000, 3725600; 448000, 3725700; 448100, 3725700; 448100, 3725800; 448200, 3725800; 448200, 3725900; 448400, 3725900; 448400, 3725800; 449000, 3725800; 449000, 3725900; 449100, 3725900; returning to 449100, 3726000.

(iii) Refer to paragraph 13(iii) for map of arroyo toad proposed critical habitat Units 8 and 10.

(16) Unit 11; San Mateo Creek Basin, Orange and San Diego Counties, California.

(i) Subunit 11a: From USGS 1:24,000 scale quadrangle San Clemente. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 446800, 3700800; 446800, 3701200; 446900, 3701200; 446900, 3701400; 446800, 3701400; 446800, 3701500; 446700, 3701500; 446700, 3701600; 446800, 3701600; 446800, 3701700; 446700, 3701700; 446700, 3701800; 446800, 3701800; 446800, 3701900; 446900, 3701900; 446900, 3702100; 446800, 3702100; 446800, 3702300; 446900, 3702300; 446900, 3702400; 446800, 3702400; 446800, 3702600; 446900, 3702600; 446900, 3702700; 447000, 3702700; 447000, 3702800; 447100, 3702800; 447100, 3703200; 447300, 3703200; 447300, 3703400; 447500, 3703400; 447500, 3703600; 447400, 3703600; 447400, 3703700; 447600, 3703700; 447600, 3703900; 447500, 3703900; 447500, 3704100; 447700, 3704100; 447700, 3704300; 447900, 3704300; 447900, 3704100; 448000, 3704100; 448000, 3704000; 448100, 3704000; 448100, 3703900; 448000, 3703900; 448000, 3703600; 448200, 3703600; 448200, 3703700; 448400, 3703700; 448400, 3703800; 448500, 3703800; 448500, 3703900; 448700, 3703900; 448700, 3704000; 448800, 3704000; 448800, 3704200; 448700, 3704200; 448700, 3704400; 448900, 3704400; 448900, 3704300; 449000, 3704300; 449000, 3704200; 449100, 3704200; 449100, 3704100; 449200, 3704100; 449200, 3704200; 449300, 3704200; 449300, 3704400; 449500, 3704400; 449500, 3704500; 449700, 3704500; 449700, 3704600; 449800, 3704600; 449800, 3704700; 449900, 3704700; 449900, 3704900; 450300, 3704900; 450300, 3705900; 450500, 3705900; 450500, 3706200; 450700, 3706200; 450700, 3705800; 450900, 3705800; 450900, 3705600; 450800, 3705600; 450800, 3705500; 450700, 3705500; 450700, 3705400; 450800, 3705400; 450800, 3705300; 450700, 3705300; 450700, 3704700; 450900, 3704700; 450900, 3704800; 451100, 3704800; 451100, 3704900; 451300, 3704900; 451300, 3705000; 451400, 3705000; 451400, 3705100; 451500, 3705100; 451500, 3705200; 451700, 3705200; 451700, 3705100; 451600, 3705100; 451600, 3704800; 451500, 3704800; 451500, 3704700; 451600, 3704700; 451600, 3704600; 451500, 3704600; 451500, 3704500; 451400, 3704500; 451400, 3704400; 451100, 3704400; 451100, 3704300; 450600, 3704300; 450600, 3704200; 450400, 3704200; 450400, 3704300; 450300, 3704300; 450300, 3704400; 450100, 3704400; 450100, 3704200; 449900, 3704200; 449900, 3704100; 449700, 3704100; 449700, 3704000; 449600, 3704000; 449600, 3703900; 449500, 3703900; 449500, 3703800; 449400, 3703800; 449400, 3703700; 449300, 3703700; 449300, 3703600; 449200, 3703600; 449200, 3703500; 449000, 3703500; 449000, 3703400; 448900, 3703400; 448900, 3703300; 448700, 3703300; 448700, 3703200; 448500, 3703200; 448500, 3703100; 448300, 3703100; 448300, 3702700; 448100, 3702700; 448100, 3702800; 447900, 3702800; 447900, 3702900; 447700, 3702900; 447700, 3702800; 447600, 3702800; 447600, 3702600; 447500, 3702600; 447500, 3702300; 447400, 3702300; 447400, 3702200; 447500, 3702200; 447500, 3701800; 447400, 3701800; 447400, 3701700; 447500, 3701700; 447500, 3701400; 447700, 3701400; 447700, 3701500; 447800, 3701500; 447800, 3701600; 447900, 3701600; 447900, 3701700; 449500, 3701700; 449500, 3701800; 449600, 3701800; 449600, 3701900; 449900, 3701900; 449900, 3702000; 450100, 3702000; 450100, 3702100; 450200, 3702100; 450200, 3702200; 450300, 3702200; 450300, 3702300; 450500,

3702300; 450500, 3702400; 450700, 3702400; 450700, 3702500; 451000, 3702500; 451000, 3702600; 451300, 3702600; 451300, 3702700; 451500, 3702700; 451500, 3702800; 451600, 3702800; 451600, 3702900; 451900, 3702900; 451900, 3703000; 452000, 3703000; 452000, 3703200; 452100, 3703200; 452100, 3703300; 452300, 3703300; 452300, 3703500; 452500, 3703500; 452500, 3703700; thence east to the Marine Corps Base Camp Pendleton (MCBCP) boundary at y-coordinate 3703700; thence southwest along the MCBCP boundary to the Bravo Two (B2) boundary; thence west along the B2 boundary to y-coordinate 3701100; thence west and following coordinates 447500, 3701100; 447500, 3701000; 447300, 3701000; 447300, 3700400; 447400, 3700400; 447400, 3700300; thence east to the B2 boundary at y-coordinate 3700300; thence south along the B2 boundary to the 64 Area (64A) boundary; thence south along the 64A boundary to the Bravo Three (B3) boundary; thence south along the B3 boundary, passing y-coordinate 3696400, to x-coordinate 447200; thence south and following coordinates 447200, 3696000; 447100, 3696000; 447100, 3695900; 447000, 3695900; 447000, 3695700; 446900, 3695700; 446900, 3695500; 446800, 3695500; 446800, 3695400; 446700, 3695400; 446700, 3695100; 446500, 3695100; 446500, 3694800; 446400, 3694800; 446400, 3694700; 446300, 3694700; 446300, 3694600; 446200, 3694600; 446200, 3694500; 446100, 3694500; 446100, 3694400; 446000, 3694400; 446000, 3694200; 445900, 3694200; 445900, 3693800; 445800, 3693800; 445800, 3693700; 445600, 3693700; 445600, 3693800; 445500, 3693800; 445500, 3693900; 445300, 3693900; 445300, 3694000; 445200, 3694000; 445200, 3694100; 445000, 3694100; 445000, 3694200; 444800, 3694200; 444800, 3694300; 444700, 3694300; 444700, 3694500; 444800, 3694500; 444800, 3694600; 444900, 3694600; 444900, 3694700; 445000, 3694700; 445000, 3695200; 445100, 3695200; 445100, 3695600; 445200, 3695600; 445200, 3695700; 445300, 3695700; 445300, 3696000; 445400, 3696000; 445400, 3696200; 445500, 3696200; 445500, 3696600; 445600, 3696600; 445600, 3696700; 445700, 3696700; 445700, 3696800; 445800, 3696800; 445800, 3697000; 445900, 3697000; 445900, 3697100; 446000, 3697100; 446000, 3697800; 446300, 3697800; 446300, 3697900; 446400, 3697900; 446400, 3698100; 446500, 3698100; 446500, 3698400; 446700, 3698400; 446700, 3698800; 446600, 3698800; 446600, 3699100; 446500, 3699100; 446500, 3699300; 446700, 3699300; 446700, 3699500; 446800, 3699500; 446800, 3699600; 446700, 3699600; 446700, 3699700; 446600, 3699700; 446600, 3699900; 446700, 3699900; 446700, 3700000; 446800, 3700000; 446800, 3700300; 446700, 3700300; 446700, 3700400; 446600, 3700400; 446600, 3700500; 446700, 3700500; 446700, 3700800; returning to 446800, 3700800; excluding land bounded by 446800, 3700800; 446800, 3700700; 446900, 3700700; 446900, 3700800; 446800, 3700800.

(ii) Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 447600, 3694300; 447600, 3694500; thence east to the Bravo Three (B3) boundary at y-coordinate 3694500; thence south along the B3 boundary to the Alfa Two (A2) boundary; thence south along the A2 boundary to y-coordinate 3693600; thence west and following coordinates 448400, 3693600; 448400, 3693500; 448200, 3693500; 448200, 3693400; 448000, 3693400; 448000, 3693300; 447800, 3693300; 447800, 3693200; 447300, 3693200; 447300, 3693300; 447100, 3693300; 447100, 3693400; 446900, 3693400; 446900, 3693500; 446700, 3693500; 446700, 3693600; 446500, 3693600; 446500, 3693700; 446300, 3693700; 446300, 3693900; 446400, 3693900; 446400, 3694000; 446500, 3694000; 446500, 3694100; 446900, 3694100; 446900, 3694200; 447100, 3694200; 447100, 3694000; 447600, 3694000; 447600, 3694100; 447700, 3694100; 447700, 3694300; returning to 447600, 3694300.

(iii) Subunit 11b: From USGS 1:24,000 scale quadrangle Margarita Peak. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 456800, 3704200; 456900, 3704200; thence south to the MCBCP boundary at y-coordinate 3704200; thence southeast along the MCBCP boundary to x-coordinate 457000; thence east and following coordinates 457000, 3704100; 457000, 3704400; 457300, 3704400; thence south to the MCBCP boundary at x-coordinate 457300; thence west along the MCBCP boundary, passing x-coordinate 456000, to y-coordinate 3703500; thence east and following coordinates 456400, 3703500; 456400, 3703600; 456500, 3703600; 456500, 3703800; 456600, 3703800; 456600, 3703900; 456700, 3703900; 456700, 3704100; 456800, 3704100; returning to 456800, 3704200.

(iv) Subunit 11c: From USGS 1:24,000 scale quadrangle San Clemente. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 450900, 3695100; 451100, 3695100; 451100, 3695200; 451800, 3695200; 451800, 3695100; 451900, 3695100; 451900, 3695000; 452100, 3695000; 452100, 3694900; 452300, 3694900; 452300, 3694700; 452400, 3694700; 452400, 3694600; 452700, 3694600; 452700, 3694700; 452800, 3694700; 452800, 3694900; 452700, 3694900; 452700, 3695100; 452800, 3695100; 452800, 3695200; 452900, 3695200; thence east to the 52 Area (52A) boundary; thence south and west along the 52A boundary, passing x-coordinate 450000, to y-coordinate 3695000; thence east and following coordinates 449900, 3695000; 449900, 3695300; 450100, 3695300; 450100, 3695200; 450200, 3695200; 450200, 3695300; 450500, 3695300; 450500, 3695400; 450600, 3695400; 450600, 3695500; 450800, 3695500; 450800, 3695400; 450900, 3695400; returning to 450900, 3695100; excluding land bounded by 450900, 3695100; 450800, 3695100; 450800, 3695000; 450900, 3695000; 450900, 3695100.

(17) Unit 12; Lower Santa Margarita River Basin, San Diego County, California.

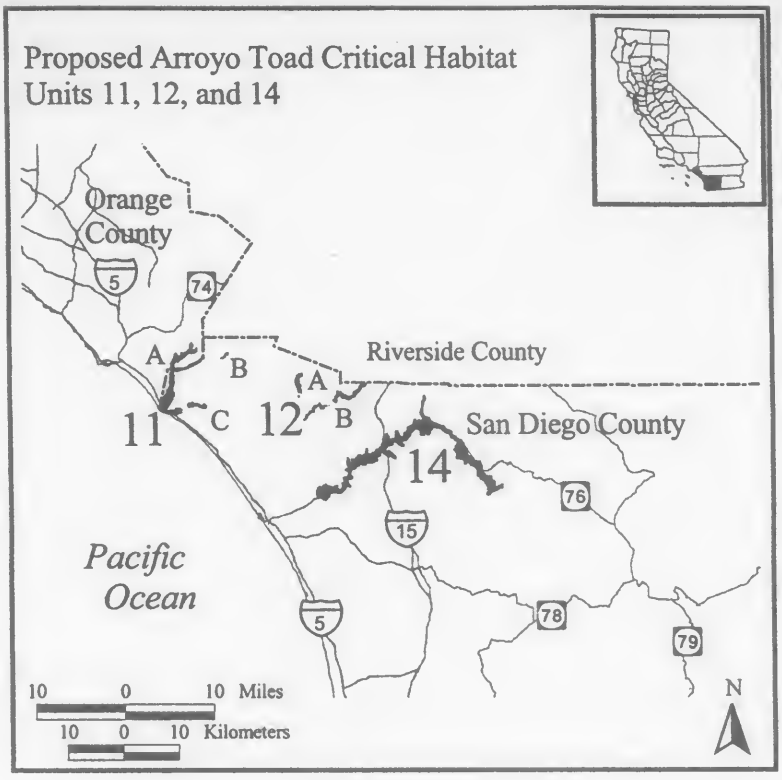
(i) Subunit 12a: From USGS 1:24,000 scale quadrangle Fallbrook. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 470500, 3700700; 470700, 3700700; 470700, 3700100; 470400, 3700100; 470400, 3700000; 470300, 3700000; 470300, 3699900; 470100, 3699900; 470100, 3699500; 470200, 3699500; 470200, 3699200; 470100, 3699200; 470100, 3699100; 470200, 3699100; 470200, 3699000; 470100, 3699000; 470100, 3698700; 470500, 3698700; 470500, 3698400; 470400, 3698400; 470400, 3698200; 470300, 3698200; 470300, 3698000; 470400, 3698000; 470400, 3697800; 470500, 3697800; 470500, 3697700; 470600, 3697700; 470600, 3697600; 470500, 3697600; 470500, 3697500; 470400, 3697500; 470400, 3697400; 470500, 3697400; thence south to the Marine Corps Base Camp Pendleton (MCBCP) boundary at x-coordinate 470500; thence east along the MCBCP boundary to y-coordinate 3697200; thence east and following coordinates 470600, 3697200; 470600, 3697100; thence west to the MCBCP boundary at y-coordinate 3697100; thence north and west along the MCBCP boundary to y-coordinate 3696300; thence west and following coordinates 470000, 3696300; 470000, 3696800; thence east to the MCBCP boundary at y-coordinate 3696800; thence north along the MCBCP boundary to x-coordinate 470100; thence north and following coordinates 470100, 3697200; 470000, 3697200; 470000, 3697600; 469900, 3697600; 469900, 3697800; 470000, 3697800; 470000, 3697900;

469900, 3697900; 469900, 3698100; 469800, 3698100; 469800, 3698200; 469700, 3698200; 469700, 3698500; 469600, 3698500; 469600, 3698600; 469500, 3698600; 469500, 3698800; 469600, 3698800; 469600, 3699000; 469400, 3699000; 469400, 3699300; 469500, 3699300; 469500, 3699400; 469400, 3699400; 469400, 3699700; 469500, 3699700; 469500, 3699800; 469600, 3699800; 469600, 3699900; 469700, 3699900; 469700, 3700300; 469800, 3700300; 469800, 3700400; 469900, 3700400; 469900, 3700300; 470000, 3700300; 470000, 3700600; 470200, 3700600; 470200, 3700500; 470400, 3700500; 470400, 3700600; 470500, 3700600; returning to 470500, 3700700.

(ii) Subunit 12b: From USGS 1:24,000 scale quadrangles Fallbrook, Morro Hill, and Temecula. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 481700, 3699000; 481900, 3699000; 481900, 3698800; 482200, 3698800; 482200, 3698700; 482100, 3698700; 482100, 3698600; 482000, 3698600; 482000, 3698400; 481900, 3698400; 481900, 3698300; 481500, 3698300; 481500, 3698100; 481400, 3698100; 481400, 3697800; 481200, 3697800; 481200, 3697700; 481100, 3697700; 481100, 3697500; 481000, 3697500; 481000, 3697400; 480800, 3697400; 480800, 3697200; 480600, 3697200; 480600, 3697000; 480400, 3697000; 480400, 3696800; 480300, 3696800; 480300, 3696400; 480100, 3696400; 480100, 3696500; 480000, 3696500; 480000, 3696400; 479800, 3696400; 479800, 3696300; 479700, 3696300; 479700, 3696200; 479500, 3696200; 479500, 3696100; 479400, 3696100; 479400, 3696000; 479100, 3696000; 479100, 3695900; 479000, 3695900; 479000, 3696000; 478600, 3696000; 478600, 3696100; 478500, 3696100; 478500, 3696300; 478200, 3696300; 478200, 3696100; 478000, 3696100; 478000, 3696200; 477800, 3696200; 477800, 3696300; 477700, 3696300; 477700, 3696800; 477400, 3696800; 477400, 3696700; 477300, 3696700; 477300, 3696600; 477200, 3696600; 477200, 3696500; 477100, 3696500; 477100, 3696300; 477000, 3696300; 477000, 3695600; 476900, 3695600; 476900, 3695400; 476700, 3695400; 476700, 3695500; 476600, 3695500; 476600, 3695600; thence west to the MCBCP boundary at y-coordinate 3695600; thence southwest along the MCBCP boundary to x-coordinate 475700; thence south and following coordinates 475700, 3694800; 475400, 3694800; thence north to the MCBCP boundary at x-coordinate 475400; thence west along the MCBCP boundary to x-coordinate 475200; thence south and following coordinates 475200, 3694800; 475100, 3694800; 475100, 3694700; 474600, 3694700; 474600, 3694400; 474500, 3694400; 474500, 3694300; 473900, 3694300; 473900, 3694600; 474000, 3694600; 474000, 3694800; 473900, 3694800; 473900, 3695000; 473800, 3695000; 473800, 3694900; 473700, 3694900; 473700, 3694800; 473400, 3694800; 473400, 3694700; 473300, 3694700; 473300, 3694600; 473100, 3694600; 473100, 3694500; 472800, 3694500; 472800, 3694300; 472700, 3694300; 472700, 3694200; 472800, 3694200; 472800, 3693700; 472400, 3693700; 472400, 3693600; 472000, 3693600; 472000, 3693300; 471900, 3693300; 471900, 3693200; 471700, 3693200; 471700, 3693100; 471600, 3693100; 471600, 3692700; 471500, 3692700; 471500, 3692500; 471400, 3692500; 471400, 3692400; 471200, 3692400; 471200, 3692300; 471100, 3692300; 471100, 3692200; thence west to the MCBCP boundary at y-coordinate 3692200; thence northeast along the MCBCP boundary to y-coordinate 3695900; thence east and following coordinates 476600, 3695900; 476600, 3696100; 476700, 3696100; 476700, 3696300; 476600, 3696300; 476600, 3696400; 476700, 3696400; 476700, 3696600; 476800, 3696600; 476800, 3696800; 477000, 3696800; 477000, 3696900; 477200, 3696900; 477200, 3697000; 477100, 3697000; 477100, 3697100; 477000, 3697100; 477000, 3697500; 477200, 3697500; 477200, 3697300; 477500, 3697300; 477500, 3697400; 477700, 3697400; 477700, 3697300; 477800, 3697300; 477800, 3697100; 478100, 3697100; 478100, 3696900; 478200, 3696900; 478200, 3696800; 478100, 3696800; 478100, 3696700; 478400, 3696700; 478400, 3696800; 478600, 3696800; 478600, 3696600; 478700, 3696600; 478700, 3696700; 478800, 3696700; 478800, 3696400; 479000, 3696400; 479000, 3696500; 479100, 3696500; 479100, 3696400; 479300, 3696400; 479300, 3696500; 479400, 3696500; 479400, 3696600; 479600, 3696600; 479600, 3696700; 479800, 3696700; 479800, 3696900; 479900, 3696900; 479900, 3697100; 480000, 3697100; 480000, 3697400; 480200, 3697400; 480200, 3697500; 480500, 3697500; 480500, 3697800; 480800, 3697800; 480800, 3698000; 480900, 3698000; 480900, 3698200; 481000, 3698200; 481000, 3698400; 481100, 3698400; 481100, 3698500; 481200, 3698500; 481200, 3698600; 481400, 3698600; 481400, 3698700; 481700, 3698700; returning to 481700, 3699000.

(iii) **Note:** Map of arroyo toad proposed critical habitat Units 11, 12 and 14 follows.

BILLING CODE 4310–55–U



BILLING CODE 4310–55–C

(18) Unit 13; Upper Santa Margarita River Basin, Riverside and San Diego Counties, California.

(i) Subunit 13a: From USGS 1:24,000 scale quadrangle Vail Lake. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 503100, 3701300; 503300, 3701300; 503300, 3701400; 503800, 3701400; 503800, 3701500; 504000, 3701500; 504000, 3701600; 504200, 3701600; 504200, 3701500; 504400, 3701500; 504400, 3701400; 504500, 3701400; 504500, 3701100; 504600, 3701100; 504600, 3701000; 504800, 3701000; 504800, 3700900; 505200, 3700900; 505200, 3700800; 505300, 3700800; 505300, 3700700; 505600, 3700700; 505600, 3700600; 505700, 3700600; 505700, 3700700; 505900, 3700700; 505900, 3700800; thence east to the Cleveland National Forest (CNF) boundary at y-coordinate 3700800; thence south and west along the CNF boundary to x-coordinate 505200; thence north and following coordinates 505200, 3700500; 505100, 3700500; 505100, 3700600; 504800, 3700600; 504800, 3700700; 504400, 3700700; 504400, 3700900; 504300, 3700900; 504300, 3701000; 504200, 3701000; 504200, 3701300; 504000, 3701300; 504000, 3701200; 503900, 3701200; 503900, 3701100; 503400, 3701100; 503400, 3701000; 503100, 3701000; 503100, 3700900; 503000, 3700900; 503000, 3701000; 502800, 3701000; 502800, 3701200; 502700, 3701200; 502700, 3701600; 502600, 3701600; thence north to the CNF boundary at x-coordinate 502600; thence northeast along the CNF boundary to x-coordinate 503100; thence south and following coordinates 503100, 3702400; 502900, 3702400; 502900, 3701900; 503100, 3701900; returning to 503100, 3701300; excluding land bounded by 503100, 3701300; 503000, 3701300; 503000, 3701200; 503100, 3701200; 503100, 3701300.

(ii) Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 506600, 3700600; 506500, 3700600; 506500, 3700400; 506400, 3700400; 506400, 3700300; 506500, 3700300; 506500, 3699900; 506600, 3699900; thence south to the CNF boundary at x-coordinate 506600; thence west and north along CNF boundary to y-coordinate 3700800; thence east and following coordinates 506600, 3700800; returning to 506600, 3700600.

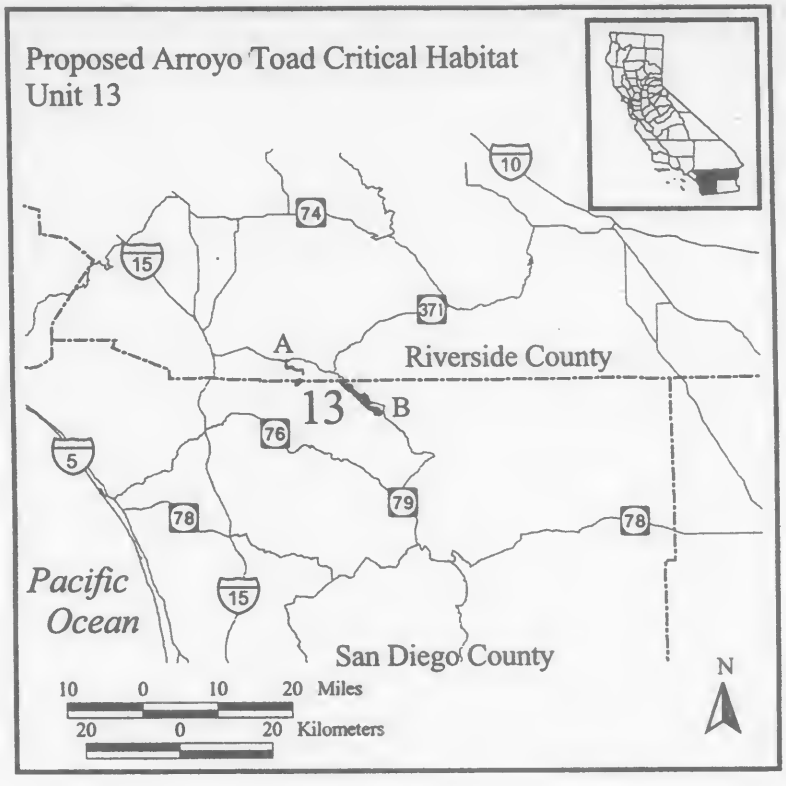
(iii) Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 505500, 3698800; thence north to the CNF boundary at x-coordinate 505500; thence east and south along the CNF boundary to the Riverside/San Diego county line; thence east along the county line to x-coordinate 506000; thence south and following coordinates 506000, 3698400; 506100, 3698400; 506100, 3698000; 506000, 3698000; 506000, 3697900; 505700, 3697900; 505700, 3697700; 505600, 3697700; 505600, 3697600; 505400, 3697600; 505400, 3697500; 505300, 3697500; 505300, 3697400; 504800, 3697400; 504800, 3697500; 504900, 3697500; 504900, 3697700; 504800, 3697700; 504800, 3697800; 504900, 3697800; 504900, 3698100; 505100, 3698100; 505100, 3698200; 505200, 3698200; 505200, 3698300; 505400, 3698300; 505400, 3698400; 505500, 3698400; 505500, 3698500; 505600, 3698500; 505600, 3698600; 505400, 3698600; 505400, 3698800; returning to 505500, 3698800.

(iv) Subunit 13b: From USGS 1:24,000 scale quadrangles Aguanga, Palomar Observatory, and Warner Springs. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 513900, 3698400; thence north to the Riverside/San Diego county line at x-coordinate 513900; thence east along the county line to x-coordinate 514400; thence south and following coordinates

514400, 3698400; 514500, 3698400; 514500, 3698100; 514700, 3698100; 514700, 3697900; 514800, 3697900; 514800, 3697800; 515000, 3697800; 515000, 3697700; 515100, 3697700; 515100, 3697600; 515200, 3697600; 515200, 3697500; 515500, 3697500; 515500, 3697400; 515600, 3697400; 515600, 3697300; 515800, 3697300; 515800, 3697500; 516200, 3697500; 516200, 3697600; 516700, 3697600; 516700, 3697500; 516800, 3697500; 516800, 3697400; 517000, 3697400; 517000, 3697200; 517100, 3697200; 517100, 3697000; 517000, 3697000; 517000, 3696700; 517100, 3696700; 517100, 3696500; 517000, 3696500; 517000, 3696100; 517200, 3696100; 517200, 3696000; 517400, 3696000; 517400, 3695900; 517500, 3695900; 517500, 3695700; 517600, 3695700; 517600, 3695600; 517800, 3695600; 517800, 3695400; 517900, 3695400; 517900, 3695300; 518000, 3695300; 518000, 3695200; 518200, 3695200; 518200, 3695600; 518400, 3695600; 518400, 3695500; 518600, 3695500; 518600, 3695400; 518700, 3695400; 518700, 3695300; 518800, 3695300; 518800, 3695400; 518900, 3695400; 518900, 3695500; 519300, 3695500; 519300, 3695600; 519400, 3695600; 519400, 3695700; 519700, 3695700; 519700, 3695600; 519800, 3695600; 519800, 3695400; 520000, 3695400; 520000, 3695300; 520100, 3695300; 520100, 3695200; 520200, 3695200; 520200, 3695100; 520300, 3695100; 520300, 3694900; 520400, 3694900; 520400, 3694500; 520500, 3694500; 520500, 3694100; 520600, 3694100; 520600, 3693900; 521000, 3693900; 521000, 3693400; 520200, 3693400; 520200, 3693300; 520100, 3693300; 520100, 3693200; 520400, 3693200; 520400, 3693000; 520500, 3693000; 520500, 3692900; 520800, 3692900; 520800, 3692800; 521300, 3692800; 521300, 3692700; 521700, 3692700; 521700, 3692600; 522100, 3692600; 522100, 3692700; 522200, 3692700; 522200, 3692600; 522400, 3692600; 522400, 3692500; 522600, 3692500; 522600, 3692400; 522700, 3692400; 522700, 3692000; 522800, 3692000; 522800, 3691900; 522900, 3691900; 522900, 3691800; 523300, 3691800; 523300, 3691400; 523200, 3691400; 523200, 3691300; 523100, 3691300; 523100, 3691100; 522900, 3691100; 522900, 3691000; 522300, 3691000; 522300, 3691100; 521900, 3691100; 521900, 3691000; 521700, 3691000; 521700, 3691100; 521600, 3691100; 521600, 3691200; 521500, 3691200; 521500, 3691600; 521600, 3691600; 521600, 3691700; 521500, 3691700; 521500, 3691800; 521300, 3691800; 521300, 3691900; 521200, 3691900; 521200, 3692000; 520900, 3692000; 520900, 3692100; 520800, 3692100; 520800, 3692200; 520700, 3692200; 520700, 3692300; 520200, 3692300; 520200, 3692500; 520100, 3692500; 520100, 3692600; 519900, 3692600; 519900, 3692800; 519800, 3692800; 519800, 3692900; 519600, 3692900; 519600, 3693000; 519500, 3693000; 519500, 3693100; 519300, 3693100; 519300, 3693300; 519200, 3693300; 519200, 3693400; 519000, 3693400; 519000, 3693500; 518900, 3693500; 518900, 3693600; 518800, 3693600; 518800, 3693700; 518700, 3693700; 518700, 3693900; 518600, 3693900; 518600, 3694100; 518500, 3694100; 518500, 3694200; 518300, 3694200; 518300, 3694300; 518200, 3694300; 518200, 3694400; 518100, 3694400; 518100, 3694500; 518000, 3694500; 518000, 3694600; 517900, 3694600; 517900, 3694800; 517700, 3694800; 517700, 3694900; 517600, 3694900; 517600, 3695000; 517500, 3695000; 517500, 3695100; 517400, 3695100; 517400, 3695200; 517200, 3695200; 517200, 3695400; 517100, 3695400; 517100, 3695700; 517000, 3695700; 517000, 3695800; 516900, 3695800; 516900, 3695900; 516700, 3695900; 516700, 3696000; 516500, 3696000; 516500, 3696100; 516400, 3696100; 516400, 3696000; 516100, 3696000; 516100, 3696100; 516000, 3696100; 516000, 3696200; 515900, 3696200; 515900, 3696400; 515800, 3696400; 515800, 3696600; 515500, 3696600; 515500, 3696800; 515400, 3696800; 515400, 3696900; 515300, 3696900; 515300, 3697000; 515100, 3697000; 515100, 3697200; 515000, 3697200; 515000, 3697300; 514900, 3697300; 514900, 3697400; 514800, 3697400; 514800, 3697500; 514700, 3697500; 514700, 3697600; 514500, 3697600; 514500, 3697700; 514400, 3697700; 514400, 3697900; 514300, 3697900; 514300, 3698100; 514200, 3698100; 514200, 3698300; 514100, 3698300; 514100, 3698400; 513900, 3698400; returning to 514400, 3698400.

(v) **Note:** Map of arroyo toad proposed critical habitat Unit 13 follows.

BILLING CODE 4310–55–U



BILLING CODE 4310–55–C

(19) Unit 14; Lower and Middle San Luis Rey River Basin, San Diego County, California.

(i) From USGS 1:100,000 scale quadrangles Borrego Valley and Oceanside. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 475500, 3679100; 475500, 3678500; 475400, 3678500; 475400, 3678300; 475300, 3678300; 475300, 3678400; 475100, 3678400; 475100, 3678500; 475000, 3678500; 475000, 3678600; 474900, 3678600; 474900, 3678400; 475000, 3678400; 475000, 3678200; 475100, 3678200; 475100, 3678100; 475000, 3678100; 475000, 3678000; 474900, 3678000; 474900, 3677900; 474800, 3677900; 474800, 3677800; 474700, 3677800; 474700, 3677700; 474600, 3677700; 474600, 3677800; 474400, 3677800; 474400, 3677900; 474200, 3677900; 474200, 3678000; 474100, 3678000; 474100, 3678100; 474000, 3678100; 474000, 3678200; 473900, 3678200; 473900, 3678300; 473800, 3678300; 473800, 3678400; 473700, 3678400; 473700, 3678300; 473300, 3678300; 473300, 3678400; 473200, 3678400; 473200, 3678500; 473100, 3678500; 473100, 3678800; 473000, 3678800; 473000, 3679600; 473100, 3679600; 473100, 3679700; 473200, 3679700; 473200, 3680100; 473300, 3680100; 473300, 3680000; 473500, 3680000; 473500, 3680300; 473700, 3680300; 473700, 3680200; 473800, 3680200; 473800, 3680100; 474000, 3680100; 474000, 3680200; 474100, 3680200; 474100, 3680300; 474200, 3680300; 474200, 3680500; 474600, 3680500; 474600, 3680700; 474900, 3680700; 474900, 3680500; 475000, 3680500; 475000, 3680400; 475200, 3680400; 475200, 3680300; 475600, 3680300; 475600, 3680100; 475700, 3680100; 475700, 3680200; 476300, 3680200; 476300, 3680400; 477000, 3680400; 477000, 3680000; 476900, 3680000; 476900, 3679900; 477000, 3679900; 477000, 3679800; 477200, 3679800; 477200, 3679700; 477400, 3679700; 477400, 3679800; 477600, 3679800; 477600, 3680100; 477800, 3680100; 477800, 3680500; 477700, 3680500; 477700, 3680700; 477600, 3680700; 477600, 3680900; 477900, 3680900; 477900, 3681000; 478000, 3681000; 478000, 3681500; 477900, 3681500; 477900, 3681900; 478100, 3681900; 478100, 3682000; 478400, 3682000; 478400, 3682100; 478500, 3682100; 478500, 3682200; 478700, 3682200; 478700, 3682300; 478800, 3682300; 478800, 3682500; 479000, 3682500; 479000, 3682900; 478800, 3682900; 478800, 3683000; 478700, 3683000; 478700, 3683100; 478500, 3683100; 478500, 3683200; 478300, 3683200; 478300, 3683400; 478500, 3683400; 478500, 3683500; 478600, 3683500; 478600, 3683600; 478800, 3683600; 478800, 3683500; 479000, 3683500; 479000, 3683700; 479100, 3683700; 479100, 3683800; 479000, 3683800; 479000, 3683900; 478800, 3683900; 478800, 3684200; 478600, 3684200; 478600, 3684300; 478700, 3684300; 478700, 3684400; 478600, 3684400; 478600, 3684900; 478700, 3684900; 478700, 3685100; 478600, 3685100; 478600, 3685400; 478700, 3685400; 478700, 3685500; 478800, 3685500; 478800, 3685400; 478900, 3685400; 478900, 3685300; 479000, 3685300; 479000, 3684900; 479100, 3684900; 479100, 3684700; 479200, 3684700; 479200, 3684500; 479100, 3684500; 479100, 3684400; 479200, 3684400; 479200, 3684300; 479300, 3684300; 479300, 3683900; 479500, 3683900; 479500, 3684000; 479400, 3684000; 479400, 3684500; 479500, 3684500; 479500, 3684600; 479600, 3684600; 479600, 3684500; 479700, 3684500; 479700, 3684700; 479600, 3684700; 479600, 3684900; 479500, 3684900; 479500, 3685000; 479400, 3685000;

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the reservation boundary to y-coordinate 3680000; thence west and following coordinates 506100, 3680000; 506100, 3679800; 505900, 3679800; 505900, 3679700; 505700, 3679700; 505700, 3679600; 505500, 3679600; 505500, 3679500; 505400, 3679500; 505400, 3679400; 505100, 3679400; 505100, 3679300; 504900, 3679300; 504900, 3679200; 504700, 3679200; 504700, 3678900; 504500, 3678900; 504500, 3678800; 504300, 3678800; 504300, 3678700; 504100, 3678700; 504100, 3678800; 503900, 3678800; 503900, 3679200; 504000, 3679200; 504000, 3679300; 504200, 3679300; 504200, 3679400; 504400, 3679400; 504400, 3679500; 504300, 3679500; 504300, 3679600; 504200, 3679600; 504200, 3679700; 504000, 3679700; 504000, 3680000; 504100, 3680000; 504100, 3680300; 503900, 3680300; 503900, 3680500; 503800, 3680500; 503800, 3680700; 503700, 3680700; 503700, 3680800; 503600, 3680800; 503600, 3680900; 503500, 3680900; 503500, 3681200; 503300, 3681200; 503300, 3681300; 503200, 3681300; 503200, 3681400; 503100, 3681400; 503100, 3681500; 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(ii) Refer to paragraph 17 (iii) for map of arroyo toad proposed critical habitat Units 11, 12, and 14.

(20) Unit 15; Upper San Luis Rey River Basin, San Diego County, California.

(i) Subunit 15a: From USGS 1:24,000 scale quadrangles Palomar Observatory and Warner Springs. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 516600, 3689000; 516700, 3689000; 516700, 3688900; 516800, 3688900; 516800, 3689000; 516900, 3689000; 516900, 3688900; 517000, 3688900; 517000, 3688800; 517100, 3688800; 517100, 3688600; 517200, 3688600; 517200, 3687900; 517500, 3687900; 517500, 3687700; 517800, 3687700; 517800, 3687600; 518100, 3687600; 518100, 3687100; 517800, 3687100; 517800, 3687000; 517600, 3687000; 517600, 3687100; 517500, 3687100; 517500, 3687200; 517300, 3687200; 517300, 3687300; 517200, 3687300; 517200, 3687400; 517100, 3687400; 517100, 3687500; 517000, 3687500; 517000, 3687600; 516900, 3687600; 516900, 3687700; 516800, 3687700; 516800, 3687800; 516600, 3687800; 516600, 3687900; 516400, 3687900; 516400, 3688000; 516200, 3688000; 516200, 3688100; 515900, 3688100; 515900, 3688200; 515800, 3688200; 515800, 3688300; 515600, 3688300; 515600, 3688500; 515800, 3688500; 515800, 3688700; 516500, 3688700; 516500, 3688900; 516600, 3688900; returning to 516600, 3689000.

(ii) Subunit 15b: From USGS 1:24,000 scale quadrangle Palomar Observatory. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 526500, 3684700; 526500, 3684800; 526600, 3684800; 526600, 3684900; 527200, 3684900; 527200, 3685200; 527500, 3685200; 527500, 3685100; 527700, 3685100; 527700, 3685000; 527900, 3685000; 527900, 3684900; 528100, 3684900; 528100, 3685000; 528200, 3685000; 528200, 3685100; 528300, 3685100; 528300, 3685200; 528400, 3685200; 528400, 3685300; 528300, 3685300; 528300, 3686000; 528200, 3686000; 528200, 3686300; 528100, 3686300; 528100, 3686500; 528000, 3686500; 528000, 3686700; 527900, 3686700; 527900, 3686800; 527800, 3686800; 527800, 3687200; 527900, 3687200; 527900, 3687300; 528100, 3687300; 528100, 3687200; 528200, 3687200; 528200, 3687100; 528300, 3687100; 528300, 3687000; 528400, 3687000; 528400, 3687100; 528500, 3687100; 528500, 3687400; 528600, 3687400; 528600, 3687500; 528800, 3687500; 528800, 3687600; 528900, 3687600; 528900, 3687700; 529100, 3687700; 529100, 3688100; 529200, 3688100; 529200, 3688200; 529400, 3688200; 529400, 3688300; 529500, 3688300; 529500, 3688400; 529600, 3688400; 529600, 3688500; 529700, 3688500; 529700, 3688700; 529800, 3688700; 529800, 3688900; 529900, 3688900; 529900, 3689000; 530000, 3689000; 530000, 3689100; 530100, 3689100; 530100, 3689200; 530200, 3689200; 530200, 3689500; 530300, 3689500; 530300, 3689700; 530700, 3689700; 530700, 3689800; 530600, 3689800; 530600, 3690000; 531000, 3690000; 531000, 3690600; 530900, 3690600; 530900, 3690900; 531100, 3690900; 531100, 3691000; 531200, 3691000; 531200, 3691100; 531500, 3691100; 531500, 3690600; 531600, 3690600; 531600, 3690100; 531500, 3690100; 531500, 3690000; 531900, 3690000; 531900, 3689600; 531700, 3689600; 531700, 3689500; 531800, 3689500; 531800, 3689400; 531900, 3689400; 531900, 3689300; 532000, 3689300; 532000, 3689400; 532300, 3689400; 532300, 3689500; 532800, 3689500; 532800, 3689600; 533000, 3689600; 533000, 3689700; 533400, 3689700; 533400, 3689500; 533300, 3689500; 533300, 3689300; 533400, 3689300; 533400, 3688800; 533300, 3688800; 533300, 3688600; 533200, 3688600; 533200, 3688400; 533100, 3688400; 533100, 3688200; 533000, 3688200; 533000, 3688100; 532800, 3688100; 532800, 3688200; 532700, 3688200; 532700, 3688400; 532600, 3688400; 532600, 3688300; 532400, 3688300; 532400, 3688200; 532200, 3688200; 532200, 3688300; 532100, 3688300; 532100, 3688400; 532000, 3688400; 532000, 3688500; 531900, 3688500; 531900, 3688600; 531800, 3688600; 531800, 3689100; 531600, 3689100; 531600, 3689200; 531500, 3689200; 531500, 3689300; 531200, 3689300; 531200, 3689100; 531100, 3689100; 531100, 3688900; 531000, 3688900; 531000, 3688800; 530800, 3688800; 530800, 3688700; 530900, 3688700; 530900, 3688600; 531000, 3688600; 531000, 3688400; 530700, 3688400; 530700, 3688500; 530500, 3688500; 530500, 3688700; 530300, 3688700; 530300, 3688800; 530200, 3688800; 530200, 3688700; 530100, 3688700; 530100, 3688600; 530000, 3688600; 530000, 3688300; 529900, 3688300; 529900, 3688100; 529700, 3688100; 529700, 3687600; 529800, 3687600; 529800, 3687300; 529900, 3687300; 529900, 3687200; 530000, 3687200; 530000, 3686800; 530100, 3686800; 530100, 3686600; 530200, 3686600; 530200, 3686500;

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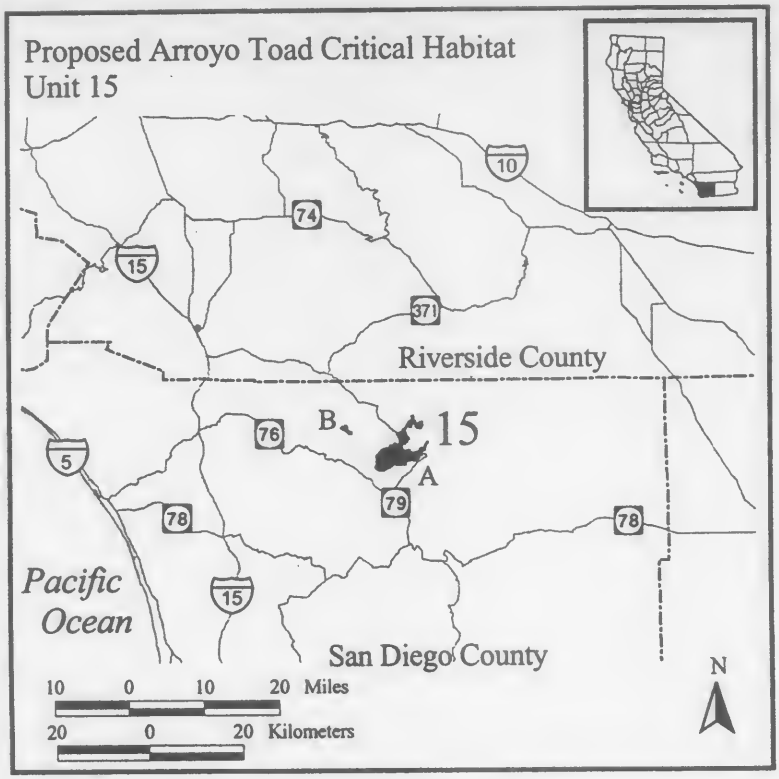
(iii) **Note:** Map of arroyo toad proposed critical habitat Unit 15 follows.

BILLING CODE 4310–55–U



BILLING CODE 4310–55–C

(21) Unit 16; Santa Ysabel Creek Basin, San Diego County, California.

(i) Subunit 16a: From USGS 1:24,000 scale quadrangles Mesa Grande, Ramona, and San Pasqual. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 514100, 3670900; 514200, 3670900; 514200, 3670800; 514300, 3670800; 514300, 3670500; 514200, 3670500; 514200, 3670200; 514100, 3670200; 514100, 3669500; 514000, 3669500; 514000, 3669300; 514100, 3669300; 514100, 3668600; 514200, 3668600; 514200, 3668500; 514300, 3668500; 514300, 3668400; 514800, 3668400; 514800, 3667900; 514700, 3667900; 514700, 3667700; 514500, 3667700; 514500, 3667500; 514600, 3667500; 514600, 3667100; 514500, 3667100; 514500, 3666900; 514300, 3666900; 514300, 3666400; 514200, 3666400; 514200, 3666300; 514000, 3666300; 514000, 3666200; 514200, 3666200; 514200, 3665800; 514100, 3665800; 514100, 3665600; 514000, 3665600; 514000, 3665500; 514100, 3665500; 514100, 3665400; 514200, 3665400; 514200, 3665300; 514300, 3665300; 514300, 3665100; 514200, 3665100; 514200, 3664600; 514300, 3664600; 514300, 3664500; 514400, 3664500; 514400, 3664400; 514700, 3664400; 514700, 3664500; 514800, 3664500; 514800, 3664600; 514900, 3664600; 514900, 3664700; 515000, 3664700; 515000, 3664800; 515100, 3664800; 515100, 3665000; 515300, 3665000; 515300, 3665100; 515600, 3665100; 515600, 3665000; 515900, 3665000; 515900, 3665100; 517000, 3665100; 517000, 3664600; 517100, 3664600; 517100, 3664800; 517200, 3664800; 517200, 3664900; 517500, 3664900; 517500, 3664800; 517700, 3664800; 517700, 3664700; 517900, 3664700; 517900, 3665100; 518000, 3665100; 518000, 3665200; 518300, 3665200; 518300, 3665300; 518400, 3665300; 518400, 3665400; 518600, 3665400; 518600, 3665100; 518500, 3665100; 518500, 3665000; 518600, 3665000; 518600, 3664600; 518400, 3664600; 518400, 3664700; 518300, 3664700; 518300, 3664800; 518200, 3664800; 518200, 3664700; 518100, 3664700; 518100, 3664400; 517700, 3664400; 517700, 3664500; 517300, 3664500; 517300, 3664300; 517200, 3664300; 517200, 3664200; 516900, 3664200; 516900, 3664400; 516800, 3664400; returning to 516800, 3664600; 516700, 3664600; 516700, 3664800; 516100, 3664800; 516100, 3664700; 515400, 3664700; 515400, 3664600; 515200, 3664600; 515200, 3664500; 515100, 3664500; 515100, 3664300; 515000, 3664300; 515000, 3664200; 514900, 3664200; 514900, 3664100; 514800, 3664100; 514800, 3664000; 514300, 3664000; 514300, 3664100; 514200, 3664100; 514200, 3664000; 513900, 3664000; 513900, 3663500; 513800, 3663500; 513800, 3663400; 513900, 3663400; 513900, 3663200; 513800, 3663200; 513800, 3663100; 514000, 3663100; 514000, 3663000; 514100, 3663000; 514100, 3662800; 513900, 3662800; 513900, 3662700; 513800, 3662700; 513800, 3662600; 513600, 3662600; 513600, 3662500; 513500, 3662500; 513500, 3662400; 513200, 3662400; 513200, 3662600; 513100, 3662600; 513100, 3662700; 512900, 3662700; 512900, 3662800; 512800, 3662800; 512800, 3662700; 512700, 3662700; 512700, 3662800; 512500, 3662800; 512500, 3662700; 512400, 3662700; 512400, 3662500; 512300, 3662500; 512300, 3662400; 512200, 3662400; 512200, 3662300; 511800, 3662300; 511800, 3662200; 511700, 3662200; 511700, 3662100; 511600, 3662100; 511600, 3662000; 511500, 3662000; 511500, 3661800; 511300, 3661800; 511300, 3661700; 511200, 3661700; 511200, 3661500; 511100, 3661500; 511100, 3661400; 510600, 3661400;

510600, 3661300; 510300, 3661300; 510300, 3661000; 510200, 3661000; 510200, 3660900; thence west to the Cleveland National Forest (CNF) boundary at y-coordinate 3660900; thence north along the CNF boundary to x-coordinate 510100; thence north and following coordinates 510100, 3661500; 510100, 3661600; 510200, 3661600; 510200, 3661500; 510400, 3661500; 510400, 3661600; 510500, 3661600; 510500, 3661700; 510700, 3661700; 510700, 3661800; 511000, 3661800; 511000, 3662000; 511100, 3662000; 511100, 3662100; 511200, 3662100; 511200, 3662200; 511300, 3662200; 511300, 3662400; 511400, 3662400; 511400, 3662500; 511700, 3662500; 511700, 3662600; 512000, 3662600; 512000, 3662700; 512100, 3662700; 512100, 3662800; 512200, 3662800; 512200, 3663000; 512300, 3663000; 512300, 3663100; 512600, 3663100; 512600, 3663200; 513100, 3663200; 513100, 3663100; 513200, 3663100; 513200, 3663400; 513300, 3663400; 513300, 3664200; 513400, 3664200; 513400, 3664700; 513500, 3664700; 513500, 3664800; 513600, 3664800; 513600, 3664900; 513500, 3664900; 513500, 3665000; 513300, 3665000; 513300, 3665200; 513400, 3665200; 513400, 3665300; 513200, 3665300; 513200, 3665400; 513300, 3665400; 513300, 3666200; 513200, 3666200; 513200, 3666300; 513400, 3666300; 513400, 3666500; 513500, 3666500; 513500, 3666800; 513400, 3666800; 513400, 3667000; 513500, 3667000; 513500, 3667100; 513400, 3667100; 513400, 3667200; 513300, 3667200; 513300, 3667400; 513500, 3667400; 513500, 3667500; 513600, 3667500; 513600, 3667600; 513700, 3667600; 513700, 3667700; 513600, 3667700; 513600, 3667900; 513800, 3667900; 513800, 3668000; 513700, 3668000; 513700, 3668100; 513600, 3668100; 513600, 3668200; 513500, 3668200; 513500, 3668300; 513300, 3668300; 513300, 3668500; 513000, 3668500; 513000, 3669000; 512900, 3669000; 512900, 3669200; 513000, 3669200; 513000, 3669300; 512900, 3669300; 512900, 3669400; 512700, 3669400; 512700, 3669600; 512900, 3669600; 512900, 3669800; 513000, 3669800; 513000, 3669900; 513100, 3669900; 513100, 3670000; 513200, 3670000; 513200, 3670200; 513300, 3670200; 513300, 3670300; 513400, 3670300; 513400, 3670400; 513500, 3670400; 513500, 3670500; 513600, 3670500; 513600, 3670600; 513700, 3670600; 513700, 3670700; 513800, 3670700; 513800, 3670800; 514100, 3670800; returning to 514100, 3670900.

(ii) Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 510100, 3663200; 510100, 3663000; 510300, 3663000; 510300, 3662500; thence west to the CNF boundary at y-coordinate 3662500; thence north along the CNF boundary to x-coordinate 510400; thence south and following coordinates 510400, 3663100; 510200, 3663100; 510200, 3663200; returning to 510100, 3663200.

(iii) Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 510200, 3662200; 510100, 3662200; 510100, 3662100; thence west to the CNF boundary at y-coordinate 3662100; thence north along the CNF boundary to x-coordinate 510200; returning to 510200, 3662200.

(iv) Subunit 16b: From USGS 1:24,000 scale quadrangles Rodriguez Mountain and San Pasqual. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 508600, 3674600; 508700, 3674600; 508700, 3674500; 508900, 3674500; 508900, 3674400; 509000, 3674400; 509000, 3674300; 509100, 3674300; 509100, 3674500; 509400, 3674500; 509400, 3674100; 509300, 3674100; 509300, 3673900; 509200, 3673900; 509200, 3673200; 509600, 3673200; 509600, 3673000; 509700, 3673000; 509700, 3672900; 509600, 3672900; 509600, 3672600; 509500, 3672600; 509500, 3672400; 509300, 3672400; 509300, 3672200; 508700, 3672200; 508700, 3672100; 508300, 3672100; 508300, 3672200; 508200, 3672200; 508200, 3672100; 508100, 3672100; 508100, 3672000; 508000, 3672000; 508000, 3671900; 507900, 3671900; 507900, 3671800; 507500, 3671800; 507500, 3671700; 508000, 3671700; 508000, 3671600; 508300, 3671600; 508300, 3671500; 508500, 3671500; 508500, 3671300; 508400, 3671300; 508400, 3671200; 508100, 3671200; 508100, 3671100; 508300, 3671100; 508300, 3671000; 508400, 3671000; 508400, 3670800; 507900, 3670800; 507900, 3670700; 507700, 3670700; 507700, 3670400; 507600, 3670400; 507600, 3670200; 507200, 3670200; 507200, 3670100; 507000, 3670100; 507000, 3670000; 506900, 3670000; 506900, 3669600; 506800, 3669600; 506800, 3669300; 506700, 3669300; 506700, 3669100; 506600, 3669100; 506600, 3668900; 506400, 3668900; 506400, 3668800; 506300, 3668800; 506300, 3668600; 506000, 3668600; 506000, 3668400; 505700, 3668400; 505700, 3668300; 505600, 3668300; 505600, 3668200; 505400, 3668200; 505400, 3668100; 505500, 3668100; 505500, 3667500; 505600, 3667500; 505600, 3667400; 505700, 3667400; 505700, 3667300; 505800, 3667300; 505800, 3666600; 506000, 3666600; 506000, 3666300; 506200, 3666300; 506200, 3666000; 506300, 3666000; 506300, 3665900; 506400, 3665900; 506400, 3665800; 506300, 3665800; 506300, 3665700; 506200, 3665700; 506200, 3665600; 506000, 3665600; 506000, 3665500; 505900, 3665500; 505900, 3664900; 505700, 3664900; 505700, 3664800; 505600, 3664800; 505600, 3664700; 505500, 3664700; 505500, 3664400; 505200, 3664400; 505200, 3664300; thence west to the Multiple Species Conservation Program (MSCP) boundary at y-coordinate 3664300; thence northwest along the MSCP boundary to y-coordinate 3664500; thence east and following coordinates 505000, 3664500; 505000, 3664600; 505100, 3664600; 505100, 3664700; 505200, 3664700; 505200, 3664800; 505300, 3664800; 505300, 3665000; 505400, 3665000; 505400, 3665700; 505500, 3665700; 505500, 3666200; 505600, 3666200; 505600, 3666300; 505700, 3666300; 505700, 3666400; 505600, 3666400; 505600, 3666500; 505500, 3666500; 505500, 3666600; 505400, 3666600; 505400, 3666800; 505300, 3666800; 505300, 3667000; 505400, 3667000; 505400, 3667100; 505300, 3667100; 505300, 3667200; 505100, 3667200; 505100, 3667700; 505000, 3667700; 505000, 3667900; 504900, 3667900; 504900, 3668200; 505000, 3668200; 505000, 3668600; 505100, 3668600; 505100, 3668800; 505200, 3668800; 505200, 3669000; 505400, 3669000; 505400, 3668900; 505500, 3668900; 505500, 3669000; 505600, 3669000; 505600, 3669300; 506000, 3669300; 506000, 3669700; 506100, 3669700; 506100, 3670000; 506000, 3670000; 506000, 3670100; 505900, 3670100; 505900, 3670200; 505800, 3670200; 505800, 3670600; 506100, 3670600; 506100, 3670500; 506200, 3670500; 506200, 3670600; 506300, 3670600; 506300, 3670900; 506400, 3670900; 506400, 3671100; 506500, 3671100; 506500, 3671200; 506600, 3671200; 506600, 3671300; 506700, 3671300; 506700, 3671400; 506900, 3671400; 506900, 3671800; 507100, 3671800; 507100, 3672000; 507000, 3672000; 507000, 3672200; 506900, 3672200; 506900, 3672400; 507100, 3672400; 507100, 3672500; 507200, 3672500; 507200, 3672700; 507400, 3672700; 507400, 3672600; 507600, 3672600; 507600, 3672700; 507700, 3672700; 507700, 3672900; 507600, 3672900; 507600, 3673200; 507700, 3673200; 507700, 3673400; 507600, 3673400; 507600, 3673500; 507700, 3673500; 507700, 3673600; 507800, 3673600; 507800, 3673800; 507700, 3673800; 507700, 3673900; 507800, 3673900;

507800, 3674100; 508000, 3674100; 508000, 3674200; 508100, 3674200; 508100, 3674300; 508200, 3674300; 508200, 3674400; 508400, 3674400; 508400, 3674500; 508600, 3674500; returning to 508600, 3674600.

(v) Subunit 16c: From USGS 1:24,000 scale quadrangle San Pasqual. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 504800, 3658200; 504900, 3658200; 504900, 3657900; 505000, 3657900; 505000, 3657800; 505100, 3657800; 505100, 3657500; 505200, 3657500; 505200, 3657600; 505300, 3657600; 505300, 3657800; 505500, 3657600; 505600, 3657600; 505600, 3657200; 506100, 3657200; 506100, 3657100; 506200, 3657100; 506200, 3656200; 506400, 3656200; 506400, 3655900; 506800, 3655900; 506800, 3656200; 506900, 3656200; 506900, 3656100; 507000, 3656100; 507000, 3656000; 507200, 3656000; 507200, 3655900; 507600, 3655900; 507600, 3655800; 507700, 3655800; 507700, 3655900; 507900, 3655900; 507900, 3656000; 508400, 3656000; 508400, 3656100; 508900, 3656100; 508900, 3655900; 509000, 3655900; 509000, 3655600; 509200, 3655600; 509200, 3655400; 509500, 3655400; 509500, 3655000; 509300, 3655000; 509300, 3654400; 509100, 3654400; 509100, 3654300; 509300, 3654300; 509300, 3653700; 509400, 3653700; 509400, 3653500; 509300, 3653500; 509300, 3653400; 509200, 3653400; 509200, 3653300; 509100, 3653300; 509100, 3653200; 509000, 3653200; 509000, 3653100; 508700, 3653100; 508700, 3653000; 508600, 3653000; 508600, 3652900; 508700, 3652900; 508700, 3652800; 508800, 3652800; 508800, 3652700; 508600, 3652700; 508600, 3652600; 508300, 3652600; 508300, 3652700; 508100, 3652700; 508100, 3652800; 507500, 3652800; 507500, 3652900; 507300, 3652900; 507300, 3653000; 507100, 3653000; 507100, 3653100; 506800, 3653100; 506800, 3653300; 506700, 3653300; 506700, 3653700; 506400, 3653700; 506400, 3653900; 506300, 3653900; 506300, 3653300; 506000, 3653300; 506000, 3654100; 505000, 3654100; 505000, 3654700; 504700, 3654700; 504700, 3654600; 504500, 3654600; 504500, 3654500; 504400, 3654500; 504400, 3654400; 504200, 3654400; 504200, 3654500; 504100, 3654500; 504100, 3654700; 504300, 3654700; 504300, 3654800; 504200, 3654800; 504200, 3654900; 504300, 3654900; 504300, 3655000; 504500, 3655000; 504500, 3655100; 504100, 3655100; 504100, 3655400; 504300, 3655400; 504300, 3655500; 504400, 3655500; 504400, 3655900; 504300, 3655900; 504300, 3656100; 504200, 3656100; 504200, 3656300; 504500, 3656300; 504500, 3656400; 504400, 3656400; 504400, 3656500; 504300, 3656500; 504300, 3656600; 504200, 3656600; 504200, 3657000; 504500, 3657000; 504500, 3656900; 504600, 3656900; 504600, 3657000; 504800, 3657000; 504800, 3657200; 504700, 3657200; 504700, 3657300; 504600, 3657300; 504600, 3657200; 504500, 3657200; 504500, 3657300; 504400, 3657300; 504400, 3657400; 504300, 3657400; 504300, 3657700; 504400, 3657700; 504400, 3658100; thence west to the MSCP boundary at y-coordinate 3658100; thence northeast along the MSCP boundary to y-coordinate 3658300; thence east and following coordinates 504800, 3658300; returning to 504800, 3658200; excluding land bounded by 508400, 3655800; 508400, 3655700; 508200, 3655700; 508200, 3655600; 508000, 3655600; 508000, 3655500; 507600, 3655500; 507600, 3655400; 508000, 3655400; 508000, 3655300; 508400, 3655300; 508400, 3655200; 508500, 3655200; 508500, 3655300; 508700, 3655300; 508700, 3655500; 508600, 3655500; 508600, 3655600; 508500, 3655600; 508500, 3655800; 508400, 3655800; land bounded by 507900, 3653700; 507900, 3653600; 507700, 3653600; 507700, 3653400; 507500, 3653400; 507500, 3653300; 507400, 3653300; 507400, 3653200; 507500, 3653200; 507500, 3653100; 507600, 3653100; 507600, 3653200; 507700, 3653200; 507700, 3653300; 507900, 3653300; 507900, 3653400; 508300, 3653400; 508300, 3653500; 508100, 3653500; 508100, 3653600; 508000, 3653600; 508000, 3653700; 507900, 3653700.

(vi) Subunit 16d: From USGS 1:24,000 scale quadrangles Santa Ysabel and Warners Ranch. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 529100, 3666600; 529200, 3666600; 529200, 3666500; 529400, 3666500; 529400, 3666600; 529500, 3666600; 529500, 3666500; 529700, 3666500; 529700, 3666400; 529800, 3666400; 529800, 3666300; 530000, 3666300; 530000, 3666100; 529800, 3666100; 529800, 3666000; 530000, 3666000; 530000, 3665900; 530200, 3665900; 530200, 3665700; 530300, 3665700; 530300, 3665600; 530900, 3665600; 530900, 3665700; 531200, 3665700; 531200, 3665600; 531300, 3665600; 531300, 3665700; 531400, 3665700; 531400, 3665400; 531100, 3665400; 531100, 3665300; 531000, 3665300; 531000, 3665000; 530700, 3665000; 530700, 3665100; 530500, 3665100; 530500, 3665200; 530400, 3665200; 530400, 3664800; 530500, 3664800; 530500, 3664400; 530400, 3664400; 530400, 3664100; 530300, 3664100; 530300, 3663900; 530100, 3663900; 530100, 3663700; 530000, 3663700; 530000, 3663600; 529800, 3663600; 529800, 3663700; 529700, 3663700; 529700, 3663600; 529500, 3663600; 529500, 3663500; 529300, 3663500; 529300, 3663200; 529100, 3663200; 529100, 3663500; 529000, 3663500; 529000, 3663600; 528700, 3663600; 528700, 3663700; 528600, 3663700; 528600, 3663800; 528200, 3663800; 528200, 3663900; 528000, 3663900; 528000, 3663800; 527700, 3663800; 527700, 3663600; 527400, 3663600; 527400, 3663500; 526700, 3663500; 526700, 3663200; 526200, 3663200; 526200, 3663300; 526100, 3663300; 526100, 3663200; 525900, 3663200; 525900, 3663300; 525500, 3663300; 525500, 3663200; 525200, 3663200; 525200, 3663100; 525100, 3663100; 525100, 3663000; 525000, 3663000; 525000, 3662900; 524700, 3662900; 524700, 3662700; 524800, 3662700; 524800, 3662600; 524900, 3662600; 524900, 3662500; 525000, 3662500; 525000, 3662400; 525100, 3662400; 525100, 3662000; 524700, 3662000; 524700, 3662100; 524600, 3662100; 524600, 3662200; 524500, 3662200; 524500, 3662300; 524400, 3662300; 524400, 3662400; 524300, 3662400; 524300, 3662500; 524200, 3662500; 524200, 3662600; 524100, 3662600; 524100, 3662700; 524200, 3662700; 524200, 3663100; 524100, 3663100; 524100, 3663200; 524000, 3663200; 524000, 3663500; 524400, 3663500; 524400, 3663300; 524500, 3663300; 524500, 3663200; 524900, 3663200; 524900, 3663400; 525200, 3663400; 525200, 3663500; 525300, 3663500; 525300, 3663600; 525800, 3663600; 525800, 3663700; 526000, 3663700; 526000, 3663500; 526200, 3663500; 526200, 3663600; 526400, 3663600; 526400, 3663900; 526600, 3663900; 526600, 3664000; 526700, 3664000; 526700, 3663900; 526800, 3663900; 526800, 3663800; 526900, 3663800; 526900, 3663900; 527300, 3663900; 527300, 3664300; 527400, 3664300; 527400, 3664400; 527600, 3664400; 527600, 3664600; 527800, 3664600; 527800, 3664700; 528000, 3664700; 528000, 3664500; 528100, 3664500; 528100, 3664600; 528300, 3664600; 528300, 3664500; 528400, 3664500; 528400, 3664400; 528500, 3664400; 528500, 3664300; 528600, 3664300; 528600, 3664800; 528700, 3664800; 528700, 3664900; 528800, 3664900; 528800, 3665000; 528900, 3665000; 528900, 3665100; 529000, 3665100; 529000, 3665700;

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(vii) Note: Map of arroyo toad proposed critical habitat Unit 16 follows.

BILLING CODE 4310–55–U

BILLING CODE 4310–55–C

(22) Unit 17; San Diego River Basin/San Vicente Creek, San Diego County, California.

(i) Subunit 17a: From USGS 1:24,000 scale quadrangles El Cajon Mountain, Santa Ysabel, and Tule Springs. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 525500, 3653000; 525900, 3653000; 525900, 3652900; 525800, 3652900; 525800, 3652600; 525900, 3652600; 525900, 3652300; 525800, 3652300; 525800, 3651900; 525700, 3651900; 525700, 3651600; 525600, 3651600; 525600, 3651400; 525500, 3651400; 525500, 3651300; 525400, 3651300; 525400, 3651100; 525300, 3651100; 525300, 3650800; 525200, 3650800; 525200, 3650400; 525100, 3650400; 525100, 3650300; 525000, 3650300; 525000, 3650200; 524900, 3650200; 524900, 3650100; 525100, 3650100; 525100, 3650000; 525200, 3650000; 525200, 3650100; 525300, 3650100; 525300, 3650200; 525400, 3650200; 525400, 3650300; 526000, 3650300; 526000, 3650000; 525600, 3650000; 525600, 3649900; 525300, 3649900; 525300, 3649700; 525000, 3649700; 525000, 3649800; 524800, 3649800; 524800, 3649700; 524700, 3649700; 524700, 3649800; 524600, 3649800; 524600, 3649600; 524500, 3649600; 524500, 3649500; 524400, 3649500; 524400, 3649300; 524300, 3649300; 524300, 3649200; 524200, 3649200; 524200, 3649000; 524300, 3649000; 524300, 3648900; 524400, 3648900; 524400, 3648800; 524600, 3648800; 524600, 3648600; 524900, 3648600; 524900, 3648500; 525100, 3648500; 525100, 3648300; 524800, 3648300; 524800, 3648200; 524700, 3648200; 524700, 3647900; 524600, 3647900; 524600, 3647400; 524500, 3647400; 524500, 3647300; 524200, 3647300; 524200, 3647400; 524000, 3647400; 524000, 3647200; 523900, 3647200; 523900, 3647000; 523800, 3647000; 523800, 3646800; 523700, 3646800; 523700, 3646700; 523500, 3646700; 523500, 3646500; 523300, 3646500; 523300, 3646400; 523100, 3646400; 523100, 3646500; 523000, 3646500; 523000, 3646600; 522900, 3646600; 522900, 3646700; 522800, 3646700; 522800, 3646900; 522700, 3646900; 522700, 3647000; 522600, 3647000; 522600, 3647200; 522700, 3647200; 522700, 3647100; 523300, 3647100; 523300, 3647200; 523400, 3647200; 523400, 3647400; 523500, 3647400; 523500, 3647500; 523600, 3647500; 523600, 3647600; 523700, 3647600; 523700, 3647800; 524100, 3647800; 524100, 3647700; 524200, 3647700; 524200, 3648100; 524300, 3648100; 524300, 3648400; 524200, 3648400; 524200, 3648500; 524100, 3648500; 524100, 3648600; 524000, 3648600; 524000, 3648700; 523900, 3648700; 523900, 3648800; 523700, 3648800; 523700, 3648900; 523800, 3648900; 523800, 3649400; 523900, 3649400; 523900, 3649500; 524000, 3649500; 524000, 3650000; 524100, 3650000; 524100, 3650200; 524300, 3650200; 524300, 3650400; 524600, 3650400; 524600, 3650600; 524900, 3650600; 524900, 3650900; 525000, 3650900; 525000, 3651100; 525100, 3651100; 525100,

3651300; 525200, 3651300; 525200, 3651500; 525300, 3651500; 525300, 3651600; 525400, 3651600; 525400, 3651900; 525500, 3651900; 525500, 3652300; 525600, 3652300; 525600, 3652400; 525500, 3652400; 525500, 3653000.

(ii) Subunit 17b: From USGS 1:24,000 scale quadrangle El Cajon Mountain. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 517400, 3638700; 517700, 3638700; 517700, 3638600; 517800, 3638600; 517800, 3638500; 518100, 3638500; 518100, 3638400; 517900, 3638400; 517900, 3638300; 517800, 3638300; 517800, 3638100; 517600, 3638100; 517600, 3638000; 517100, 3638000; 517100, 3638100; 517000, 3638100; 517000, 3638000; 516800, 3638000; 516800, 3638100; 516600, 3638100; 516600, 3638200; thence west to the Cleveland National Forest (CNF) boundary at y-coordinate 3638200; thence north along the CNF boundary to y-coordinate 3638600; thence east and following coordinates 516700, 3638600; 516700, 3638500; 517200, 3638500; 517200, 3638600; 517400, 3638600; returning to 517400, 3638700.

(iii) Subunit 17c: From USGS 1:24,000 scale quadrangles El Cajon, El Cajon Mountain, and San Vicente Reservoir. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 510600, 3637300; 510600, 3637400; thence east to the Helix Water District (HWD) boundary; thence northeast and southwest along the HWD boundary to y-coordinate 3636900; thence west and following coordinates 511200, 3636900; 511200, 3636800; 511000, 3636800; thence south to the HWD boundary at x-coordinate 511000; thence southwest along the HWD boundary to y-coordinate 3636500; thence west and following coordinates 510700, 3636500; 510700, 3636400; 510300, 3636400; 510300, 3636300; 510200, 3636300; 510200, 3636100; thence west to the HWD boundary at y-coordinate 3636100; thence west and east along the HWD boundary, passing x-coordinate 510000 twice, to y-coordinate 3637000; thence east and following coordinates 510400, 3637000; 510400, 3637200; 510500, 3637200; 510500, 3637300; returning to 510600, 3637300.

(iv) Subunit 17d: From USGS 1:24,000 scale quadrangles El Cajon Mountain and Ramona. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 515200, 3651200; 515400, 3651200; 515400, 3651300; 515700, 3651300; 515700, 3651400; 515900, 3651400; 515900, 3651600; 516000, 3651600; 516000, 3651700; 516100, 3651700; 516100, 3651600; 516300, 3651600; 516300, 3651700; 516700, 3651700; 516700, 3651600; 516800, 3651600; 516800, 3651300; 516700, 3651300; 516700, 3651200; 516600, 3651200; 516600, 3651100; 516500, 3651100; 516500, 3651000; 516300, 3651000; 516300, 3650900; 516100, 3650900; 516100, 3650800; 515700, 3650800; 515700, 3650700; 515500, 3650700; 515500, 3650600; 515200, 3650600; 515200, 3650500; 515100, 3650500; 515100, 3650400; 515000, 3650400; thence south to the Barona Reservation boundary at x-coordinate 515000; thence west along the reservation boundary to the Multiple Species Conservation Program (MSCP) boundary; thence north along the MSCP boundary to x-coordinate 513800; thence north and following coordinates 513800, 3651000; 514000, 3651000; 514000, 3651100; 514100, 3651100; 514100, 3651000; 514200, 3651000; 514200, 3651100; 514400, 3651100; 514400, 3651200; 514500, 3651200; 514500, 3651300; 514600, 3651300; 514600, 3651400; 514900, 3651400; 514900, 3651500; 515100, 3651500; 515100, 3651400; 515200, 3651400; returning to 515200, 3651200; excluding land bounded by 515200, 3651200; 515000, 3651200; 515000, 3651100; 515100, 3651100; 515100, 3651000; 515200, 3651000; 515200, 3651200.

(v) **Note:** Map of arroyo toad proposed critical habitat Unit 17 follows.

BILLING CODE 4310–55–U

BILLING CODE 4310–55–C

(23) Unit 18; Sweetwater River Basin, San Diego County, California.

(i) Subunit 18a: From USGS 1:24,000 scale quadrangles Cuyamaca Peak, Descanso, and Viejas Mountain. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 543300, 3648600; 543400, 3648600; 543400, 3648500; 543500, 3648500; 543500, 3648400; 543600, 3648400; 543600, 3648200; 543400, 3648200; 543400, 3647300; 543300, 3647300; 543300, 3646600; 543200, 3646600; 543200, 3646400; 543100, 3646400; 543100, 3646300; 543200, 3646300; 543200, 3646100; 543100, 3646100; 543100, 3645900; 543000, 3645900; 543000, 3645700; 542900, 3645700; 542900, 3645400; 542800, 3645400; 542800, 3645200; 542700, 3645200; 542700, 3644900; 542600, 3644900; 542600, 3644800; 542500, 3644800; 542500, 3644600; 542400, 3644600; 542400, 3643900; 542500, 3643900; 542500, 3643600; 542300, 3643600; 542300, 3643700; 542200, 3643700; 542200, 3643600; 542100, 3643600; 542100, 3643500; 542000, 3643500; 542000, 3643300; 541900, 3643300; 541900, 3643100; 541800, 3643100; 541800, 3643000; 541600, 3643000; 541600, 3642900; 541500, 3642900; 541500, 3642800; 541400, 3642800; 541400, 3642300; 541300, 3642300; 541300, 3642200; 541200, 3642200; 541200, 3642100; 541000, 3642100; 541000, 3642200; 540900, 3642200; 540900, 3642000; 540800, 3642000; 540800, 3641900; 540700, 3641900; 540700, 3641800; 540800, 3641800; 540800, 3641700; 540900, 3641700; 540900, 3641600; 540600, 3641600; 540600, 3641500; 540500, 3641500; 540500, 3641400; 540400, 3641400; 540400, 3641300; 540300, 3641300; 540300, 3641200; 540200, 3641200; 540200, 3641100; 540000, 3641100; 540000, 3641000; 539900, 3641000; 539900, 3640800; 539700, 3640800; 539700, 3640900; 539500, 3640900; 539500, 3640800; 539400, 3640800; 539400, 3640500; 539500, 3640500; 539500, 3640300; 539400, 3640300; 539400, 3639800; 539200, 3639800; 539200, 3639900; 539100, 3639900; 539100, 3640000; 539000, 3640000; 539000, 3639800; 538300, 3639800; 538300, 3639500; 538000, 3639500; 538000, 3639400; 537900, 3639400; 537900, 3638800; 537700, 3638800; 537700, 3638700; 537600, 3638700; 537600, 3638500; 537700, 3638500; 537700, 3637900; 537400, 3637900; 537400, 3637800; 537300, 3637800; 537300, 3637500; 537200, 3637500; 537200, 3637400; 537100, 3637400; 537100, 3637300; 537000, 3637300; 537000, 3637200; 536900, 3637200; 536900, 3637000; 536800, 3637000; 536800, 3636700; 536700, 3636700; 536700, 3636500; 536400, 3636500; 536400, 3636600; 536200, 3636600; 536200, 3636700; 536100, 3636700; 536100, 3636800; 536000, 3636800; 536000, 3636900; 535900, 3636900; 535900, 3637000; 535800, 3637000; 535800, 3637100; 535700, 3637100; 535700, 3636700; 535600, 3636700; 535600, 3636600; 535500, 3636600; 535500, 3636100; 535600, 3636100; 535600, 3636200; 535800, 3636200; 535800, 3636300; 536200, 3636300; 536200, 3636200; 536500, 3636200; 536500, 3635800; 536600, 3635800; 536600, 3635600; 536700, 3635600; 536700, 3635500; 537000, 3635500; 537000, 3635200; 536900, 3635200; 536900, 3635100; 536800, 3635100; 536800, 3635000; 536900, 3635000; 536900, 3634700; 536700, 3634700; 536700, 3634800; 536500, 3634800; 536500, 3634500; 536600, 3634500; 536600, 3634300; 536500, 3634300; 536500, 3634100; 536400, 3634100; 536400, 3633900; 536500, 3633900; 536500, 3633800; 536600, 3633800; 536600, 3633700; 536700, 3633700; 536700, 3633500; 536400, 3633500; 536400,

3633400; 536300, 3633400; 536300, 3633300; 536200, 3633300; 536200, 3633200; 536100, 3633200; 536100, 3633100; 535900, 3633100; 535900, 3633000; 535800, 3633000; 535800, 3632900; 535700, 3632900; 535700, 3632700; 535600, 3632700; 535600, 3632500; 535500, 3632500; 535500, 3632300; 535400, 3632300; 535400, 3632200; 535300, 3632200; 535300, 3632300; 535200, 3632300; 535200, 3632500; 535000, 3632500; 535000, 3632600; 534900, 3632600; 534900, 3632800; 534700, 3632800; 534700, 3632700; 534300, 3632700; 534300, 3632800; 534200, 3632800; 534200, 3633000; 533900, 3633000; 533900, 3632800; 533700, 3632800; 533700, 3632900; 533600, 3632900; 533600, 3632500; 533500, 3632500; 533500, 3632300; 533400, 3632300; 533400, 3632200; 532900, 3632200; 532900, 3632300; 532500, 3632300; 532500, 3632500; 532400, 3632500; 532400, 3632600; 532300, 3632600; 532300, 3632700; 532200, 3632700; 532200, 3632600; 531900, 3632600; 531900, 3632500; 531800, 3632500; 531800, 3632400; 531700, 3632400; 531700, 3632300; 531600, 3632300; 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526700, 3630600; 526800, 3630600; 526800, 3630800; 526900, 3630800; 526900, 3630900; 527000, 3630900; 527000, 3631000; 527100, 3631000; 527100, 3631100; 527300, 3631100; 527300, 3631200; 527500, 3631200; 527500, 3631300; 527600, 3631300; 527600, 3631500; 529000, 3631500; 529000, 3631400; 529100, 3631400; 529100, 3631500; 529300, 3631500; 529300, 3631600; 529500, 3631600; 529500, 3631500; 529700, 3631500; 529700, 3631600; 529800, 3631600; 529800, 3631700; 530000, 3631700; 530000, 3631800; 530200, 3631800; 530200, 3631900; 530300, 3631900; 530300, 3632000; 530500, 3632000; 530500, 3632100; 530600, 3632100; 530600, 3632200; 530500, 3632200; 530500, 3632600; 530700, 3632600; 530700, 3632500; 530800, 3632500; 530800, 3632600; 531400, 3632600; 531400, 3632700; 531600, 3632700; 531600, 3632800; 531900, 3632800; 531900, 3632900; 532100, 3632900; 532100, 3633000; 532300, 3633000; 532300, 3633100; 532500, 3633100; 532500, 3633000; 532600, 3633000; 532600, 3632700; 532700, 3632700; 532700, 3632600; 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(ii) Subunit 18b: From USGS 1:24,000 scale quadrangles Alpine and Viejas Mountain. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 524200, 3629500; 523900, 3629500; 523900, 3629300; 524000, 3629300; 524000, 3629100; 523900, 3629100; 523900, 3629000; 523800, 3629000; 523800, 3628900; 523700, 3628900; 523700, 3628800;

523800, 3628800; 523800, 3628600; 524000, 3628600; 524000, 3628500; 525100, 3628500; 525100, 3628600; 525400, 3628600; 525400, 3628500; 526000, 3628500; 526000, 3628400; 526100, 3628400; 526100, 3628500; 526300, 3628500; 526300, 3628600; 526500, 3628600; 526500, 3628500; 526700, 3628500; 526700, 3628300; 526300, 3628300; 526300, 3628200; 526400, 3628200; 526400, 3628000; 526100, 3628000; 526100, 3628100; 525300, 3628100; 525300, 3628200; 525200, 3628200; 525200, 3628300; 525000, 3628300; 525000, 3628100; 524300, 3628100; 524300, 3627900; 524400, 3627900; 524400, 3627800; 524500, 3627800; 524500, 3627500; 524300, 3627500; 524300, 3627600; 524000, 3627600; 524000, 3627700; 523900, 3627700; 523900, 3627800; 523700, 3627800; 523700, 3627900; 523200, 3627900; 523200, 3628400; 523100, 3628400; 523100, 3628500; 523000, 3628500; 523000, 3628800; 523100, 3628800; 523100, 3628900; 523300, 3628900; 523300, 3629000; 523500, 3629000; 523500, 3629100; 523700, 3629100; thence north to the CNF boundary at x-coordinate 523700; thence west along the CNF boundary to x-coordinate 524200; thence south and returning to 524200, 3629500.

(iii) Subunit 18c: From USGS 1:24,000 scale quadrangles Alpine, El Cajon, and Jamul Mountains. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 514200, 3625700; 513700, 3625700; 513700, 3626200; 513600, 3626200; 513600, 3626300; 513300, 3626300; 513300, 3626400; 512900, 3626400; 512900, 3626300; 512800, 3626300; 512800, 3626100; 512700, 3626100; 512700, 3626000; 512500, 3626000; 512500, 3626100; 512000, 3626100; 512000, 3626200; 511700, 3626200; 511700, 3626300; 511300, 3626300; 511300, 3626400; 511200, 3626400; 511200, 3626200; 511500, 3626200; 511500, 3626000; 511600, 3626000; 511600, 3625900; 511700, 3625900; 511700, 3625200; 511500, 3625200; 511500, 3625100; 511400, 3625100; 511400, 3624900; 511300, 3624900; 511300, 3624700; 511200, 3624700; 511200, 3624600; 510900, 3624600; 510900, 3624500; 510700, 3624500; 510700, 3624400; 510400, 3624400; 510400, 3624300; 510300, 3624300; 510300, 3624100; 510200, 3624100; 510200, 3623900; 509800, 3623900; 509800, 3623800; 509700, 3623800; 509700, 3623700; 509600, 3623700; 509600, 3623600; 509500, 3623600; 509500, 3623500; 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(iv) Subunit 18d: From USGS 1:24,000 scale quadrangle Viejas Mountain. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 527000, 3633600; 527000, 3633800; thence east to the Viejas Reservation boundary at y-coordinate 3633800; thence south along the reservation boundary to x-coordinate 527200; thence south and following coordinates 527200, 3633100; 526900, 3633100; 526900, 3633000; 526800, 3633000; 526800, 3632900; 526600, 3632900; 526600, 3632800; 526500, 3632800; 526500, 3632500; 526200, 3632500; 526200, 3632000; 525700, 3632000; 525700, 3631900; 525600, 3631900; 525600, 3631800; 525500, 3631800; 525500, 3631900; 525400, 3631900; 525400, 3632000; 525300, 3632000; 525300, 3632200; 525000, 3632200; 525000, 3632100; thence west to the CNF boundary at y-coordinate 3632100; thence north along the CNF boundary to y-coordinate 3632900; thence east and following coordinates 524800, 3632900; 524800, 3632800; 525000, 3632800; 525000, 3632700; 525100, 3632700; 525100, 3632800; 525400, 3632800; 525400, 3632900; 525700, 3632900; 525700, 3633000; 525800, 3633000; 525800, 3633100; 525900, 3633100; 525900, 3633200; 526300, 3633200; 526300, 3633300; 526400, 3633300; 526400, 3633400; 526500, 3633400; 526500, 3633500; 526800, 3633500; 526800, 3633600; returning to 527000, 3633600.

(v) **Note:** Map of arroyo toad proposed critical habitat Unit 18 follows.

BILLING CODE 4310–55–U

BILLING CODE 4310–55–C

(24) Unit 19; Cottonwood Creek Basin, San Diego County, California.

(i) Subunit 19a: From USGS 1:24,000 scale quadrangles Cameron Corners, Morena Reservoir, and Mount Laguna, Land bounded by the following UTM zone 11, NAD27 coordinates (E, N):
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(ii) Subunit 19b: From USGS 1:24,000 scale quadrangles Barrett Lake, Morena Reservoir, Potrero, and Tecate. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 534500, 3616200; 535000, 3616200; 535000, 3616100; 535100, 3616100; 535100, 3616000; 535300, 3616000; 535300, 3615900; 535800, 3615900; 535800, 3615800; 535900, 3615800; 535900, 3615900; 536100, 3615900; 536100, 3615800; 536400, 3615800; 536400, 3615900; 536500, 3615900; 536500, 3616000; 536600, 3616000; 536600, 3615900; 536700, 3615900; 536700, 3615700; 537000, 3615700; 537000, 3615800; 537200, 3615800; 537200, 3615900; 537300, 3615900; 537300, 3615800; 538200, 3615800; 538200, 3615700; 538300, 3615700; 538300, 3615600; 538500, 3615600; 538500, 3615500; 538700, 3615500; 538700, 3615400; 539400, 3615400; 539400, 3615300; 539600, 3615300; 539600, 3615200; 539800, 3615200; 539800, 3615100; 539900, 3615100; 539900, 3615000; 540700, 3615000; 540700, 3614700; 540600, 3614700; 540600, 3614600; 540200, 3614600; 540200, 3614700; 540000, 3614700; 540000, 3614600; 539900, 3614600; 539900, 3614700; 539600, 3614700; 539600, 3615000; 539300, 3615000; 539300, 3615100; 538500, 3615100; 538500, 3615200; 537900, 3615200; 537900, 3615300; 537600, 3615300; 537600, 3615200; 536600, 3615200; 536600, 3615300; 536400, 3615300; 536400, 3615400; 536100, 3615400; 536100, 3615500; 535400, 3615500; 535400, 3615600; 535100, 3615600; 535100, 3615700; 534800, 3615700; 534800, 3615800; 534500, 3615800; returning to 534500, 3616200.

(iii) Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 527900, 3608300; thence north to the Multiple Species Conservation Program (MSCP) boundary at x-coordinate 527900; thence east along the MSCP boundary to y-coordinate 3608700; thence east and following coordinates 528400, 3608700; 528400, 3608800; 528500, 3608800; thence north to the MSCP boundary at x-coordinate 528500; thence east along the MSCP boundary to y-coordinate 3609100; thence east and following coordinates 528700, 3609100; 528700, 3609200; 528800, 3609200; 528800, 3609400; 529000, 3609400; 529000, 3609500; 529100, 3609500; 529100, 3609600; 529200, 3609600; 529200, 3609700; 529300, 3609700; 529300, 3609900; 529200, 3609900; 529200, 3610600; 529600, 3610600; 529600, 3610700; 529500, 3610700; 529500, 3610800; 529300, 3610800; 529300, 3610900; 529200, 3610900; 529200, 3611300; 529300, 3611300; 529300, 3611400; 529400, 3611400; 529400, 3611500; 529500, 3611500; 529500, 3611600; 529700, 3611600; 529700, 3611700; 529800, 3611700; 529800, 3611800; 529700, 3611800; 529700, 3612000; 529900, 3612000; 529900, 3612400; 530000, 3612400; 530000, 3612800; 529900, 3612800; 529900, 3613500; 530000, 3613500; 530000, 3613800; 530200, 3613800; 530200, 3614000; 530300, 3614000; 530300, 3614200; 530400, 3614200; 530400, 3614500; 530500, 3614500; 530500, 3614700; 530600, 3614700; 530600, 3615100; 530700, 3615100; 530700, 3615500; 530800, 3615500; 530800, 3615600; 531000, 3615600; 531000, 3615500; 531100, 3615500; 531100, 3615400; 531000, 3615400; 531000, 3615200; 530900, 3615200; 530900, 3614800; 530800, 3614800; 530800, 3614500; 530700, 3614500; 530700, 3614300; 530600, 3614300; 530600, 3614000; 530500, 3614000; 530500, 3613800; 530400, 3613800; 530400, 3613600; 530300, 3613600; 530300, 3613400; 530200, 3613400; 530200, 3613300; 530100, 3613300; 530100, 3613100; 530200, 3613100; 530200, 3613000; 530300, 3613000; 530300, 3612400; 530600, 3612400; 530600, 3612300; 530500, 3612300; 530500, 3612200; 530400, 3612200; 530400, 3612000; 530300, 3612000; 530300, 3611900; 530200, 3611900; 530200, 3611700; 530300, 3611700; 530300, 3611600; 530200, 3611600; 530200, 3611500; 530100, 3611500; 530100, 3611400; 530200, 3611400; 530200, 3611300; 530100, 3611300; 530100, 3611200; 529600, 3611200; 529600, 3611100; 529700, 3611100; 529700, 3611000; 529900, 3611000; 529900, 3610800; 530000, 3610800; 530000, 3610300; 530100, 3610300; 530100, 3610200; 530200, 3610200; 530200, 3610000; 530100, 3610000; 530100, 3609800; 530000, 3609800; 530000, 3609700; 529800, 3609700; 529800, 3609500; 529600, 3609500; 529600, 3609400; 529500, 3609400; 529500, 3609300; 529400, 3609300; 529400, 3609200; 529200, 3609200; 529200, 3609000; 529100, 3609000; 529100, 3608900; 529000, 3608900; 529000, 3608100; 528900, 3608100; 528900, 3607900; 529000, 3607900; 529000, 3607700; 529100, 3607700; 529100, 3607600; 529200, 3607600; 529200, 3607500; 529300, 3607500; 529300, 3607600; 529400, 3607600; 529400, 3607500; 530100, 3607500; 530100, 3607300; 530200, 3607300; 530200, 3607200; 530400, 3607200; 530400, 3607100; 530300, 3607100; 530300, 3606600; 530700, 3606600; 530700, 3606500; 531100, 3606500; 531100, 3606400; 531600, 3606400; 531600, 3606500; 531700, 3606500; 531700, 3606600; 532100, 3606600; 532100, 3606700; 532300, 3606700; 532300, 3606800; 532500, 3606800; 532500, 3606700; 532600, 3606700; 532600, 3606800; 532700, 3606800; 532700, 3606900; 533100, 3606900; 533100, 3606800; 533300, 3606800; 533300, 3607100; 533400, 3607100; 533400, 3607300; 533700, 3607300; 533700, 3607200; 533800, 3607200; 533800, 3607300; 534200, 3607300; 534200, 3608000; 534500, 3608000; 534500, 3608100; 534800, 3608100; 534800, 3608200; 534900, 3608200; 534900, 3608300; 535000, 3608300; 535000, 3608500; 535100, 3608500; 535100, 3608600; 535300, 3608600; 535300, 3608700; 535500, 3608700; 535500, 3608800; 535700, 3608800; 535700, 3609200; 535600, 3609200; 535600, 3609300; 535500, 3609300; 535500, 3609700; 535800, 3609700; 535800, 3609800; 536100, 3609800; 536100, 3609900; 536300, 3609900; 536300, 3610000; 536400, 3610000; 536400, 3610100; 536600, 3610100; 536600, 3610200; 536700, 3610200; 536700, 3610400; 537000, 3610400; 537000, 3610500; 537500, 3610500; 537500, 3610600; 537600, 3610600; 537600, 3610700; 537300, 3610700; 537300, 3610900; 537400, 3610900; 537400, 3611000; 537600, 3611000; 537600, 3611100; 537900, 3611100; 537900, 3611400; 538200, 3611400; 538200, 3611500; 538400, 3611500; 538400, 3611700; 538500, 3611700; 538500, 3612200; 538400, 3612200; 538400, 3612400; 538500, 3612400; 538500, 3612500; 539000, 3612500; 539000, 3612600; 539100, 3612600; 539100, 3612700; 539200, 3612700; 539200, 3613200; 539300, 3613200; 539300, 3613300; 539400, 3613300; 539400, 3613400;

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(iv) Subunit 19c: From USGS 1:24,000 scale quadrangles Cuyamaca Peak, Descanso, and Mount Laguna. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 544000, 3639000; 544200, 3639000; 544200, 3638800; 544300, 3638800; 544300, 3638700; 544500, 3638700; 544500, 3638500; 544600, 3638500; 544600, 3638400; 544700, 3638400; 544700, 3638200; 544800, 3638200; 544800, 3638100; 544900, 3638100; 544900, 3637800; 545000, 3637800; 545000, 3637700; 545100, 3637700; 545100, 3637500; 545200, 3637500; 545200, 3637400; 545300, 3637400; 545300, 3637300; 545400, 3637300; 545400, 3636800; 545500, 3636800; 545500, 3636500; 545700, 3636500; 545700, 3636400; 545800, 3636400; 545800, 3636300; 546100, 3636300; 546100, 3636400; 546300, 3636400; 546300, 3636100; 546400, 3636100; 546400, 3635900; 546200, 3635900; 546200, 3636000; 546100, 3636000; 546100, 3635900; 546000, 3635900; 546000, 3635600; 545800, 3635600; 545800, 3635900; 545700, 3635900; 545700, 3636000; 545600, 3636000; 545600, 3636100; 545500, 3636100; 545500, 3636000; 545400, 3636000; 545400, 3635800; 545300, 3635800; 545300, 3635600; 545200, 3635600; 545200, 3635400; 545100, 3635400; 545100, 3635300; 545000, 3635300; 545000, 3635000; 544900, 3635000; 544900, 3634500; 544800, 3634500; 544800, 3634300; 544700, 3634300; 544700, 3634200; 544600, 3634200; 544600, 3633600; 544700, 3633600; 544700, 3633300; 544600, 3633300; 544600, 3633100; 544500, 3633100; 544500, 3632600; 544600, 3632600; 544600, 3632500; 544700, 3632500; 544700, 3632300; 544800, 3632300; 544800, 3632700; 544900, 3632700; 544900, 3632800; 545000, 3632800; 545000, 3632900; 544900, 3632900; 544900, 3633000; 545000, 3633000; 545000, 3633100; 545200, 3633100; 545200, 3632900; 545300, 3632900; 545300, 3632700; 545200, 3632700; 545200, 3632200; 545000, 3632200; 545000, 3632100; 545800, 3632100; 545800, 3631900; 545900, 3631900; 545900, 3632000; 546000, 3632000; 546000, 3632100; 546200, 3632100; 546200, 3632200; 546300, 3632200; 546300, 3632400; 546600, 3632400; 546600, 3632300; 546700, 3632300; 546700, 3632200; 546800, 3632200; 546800, 3632000; 546700, 3632000; 546700, 3631900; 546400, 3631900; 546400, 3631800; 546300, 3631800; 546300, 3631600; 545900, 3631600; 545900, 3631400; 545800, 3631400; 545800, 3631300; 545700, 3631300; 545700, 3631100; 545500, 3631100; 545500, 3631000; 545300, 3631000; 545300, 3631100; 545000, 3631100; 545000, 3631200; 544900, 3631200; 544900, 3631300; 544600, 3631300; 544600, 3631200; 544500, 3631200; 544500, 3631100; 543800, 3631100; 543800, 3631500; 543700, 3631500; 543700, 3631600; 543600, 3631600; 543600, 3631700; 543500, 3631700; 543500, 3632100; 543600, 3632100; 543600, 3632600; 543500, 3632600; 543500, 3632800; 543400, 3632800; 543400, 3632900; 543300, 3632900; 543300, 3633000; 543200, 3633000; 543200, 3633100; 543100, 3633100; 543100, 3633000; 543000, 3633000; 543000, 3632900; 542900, 3632900; 542900, 3632800; 542800, 3632800; 542800, 3632700; 542700, 3632700; 542700, 3632600; 542600, 3632600; 542600, 3632500; 542300, 3632500; 542300, 3632400; 542200, 3632400; 542200, 3632300; 542100, 3632300; 542100, 3632000; 542000, 3632000; 542000, 3631900; 541900, 3631900; 541900, 3631800; 541700, 3631800; 541700, 3631700; 541400, 3631700; 541400, 3631500; 541300, 3631500; 541300, 3631300; 541200, 3631300; 541200, 3631000; 541100, 3631000; 541100, 3630900; 540900, 3630900; 540900, 3630800; 540800, 3630800; 540800, 3630600; 540700, 3630600; 540700, 3630700; 540600, 3630700; 540600, 3631100; 540800, 3631100; 540800, 3631200; 541000, 3631200; 541000, 3631400; 541100, 3631400; 541100, 3631800; 541200, 3631800; 541200, 3631900; 541400, 3631900; 541400, 3632100; 541600, 3632100; 541600, 3632200; 541500, 3632200; 541500, 3632400; 541600, 3632400; 541600, 3632600; 542000, 3632600; 542000, 3632700; 542100, 3632700; 542100, 3632800; 542500, 3632800; 542500, 3632900; 542600, 3632900; 542600, 3633100; 542700, 3633100; 542700, 3633200; 542800, 3633200; 542800, 3633500; 542900, 3633500; 542900, 3633600; 543100, 3633600; 543100, 3633500; 543300, 3633500; 543300, 3633400; 543400, 3633400; 543400, 3633300; 543500, 3633300; 543500, 3633500; 543600, 3633500; 543600, 3634100; 543700, 3634100; 543700, 3634400; 543900, 3634400; 543900,

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(v) Subunit 19d: From USGS 1:24,000 scale quadrangles Barrett Lake, Descanso, and Viejas Mountain. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 536700, 3629100; 536900, 3629100; 536900, 3629000; 537000, 3629000; 537000, 3628800; 537200, 3628800; 537200, 3628700; 537400, 3628700; 537400, 3628600; 537200, 3628600; 537200, 3628500; 537000, 3628500; 537000, 3628600; 536800, 3628600; 536800, 3628500; 536700, 3628500; 536700, 3628300; 536600, 3628300; 536600, 3628200; 536500, 3628200; 536500, 3628100; 536400, 3628100; 536400, 3628000; 536100, 3628000; 536100, 3627800; 536000, 3627800; 536000, 3627700; 535900, 3627700; 535900, 3627500; 535500, 3627500; 535500, 3627400; 535400, 3627400; 535400, 3627100; 535300, 3627100; 535300, 3627000; 534900, 3627000; 534900, 3626800; 534800, 3626800; 534800, 3626700; 534600, 3626700; 534600, 3626300; 534400, 3626300; 534400, 3626200; 534300, 3626200; 534300, 3626000; 534200, 3626000; 534200, 3625900; 534100, 3625900; 534100, 3625800; 533900, 3625800; 533900, 3625300; 533800, 3625300; 533800, 3625100; 533700, 3625100; 533700, 3624900; 533900, 3624900; 533900, 3624700; 533700, 3624700; 533700, 3624500; 533600, 3624500; 533600, 3624400; 533400, 3624400; 533400, 3624300; 533200, 3624300; 533200, 3623900; 533300, 3623900; 533300, 3623600; 533100, 3623600; 533100, 3623100; 533000, 3623100; 533000, 3623000; 533100, 3623000; 533100, 3622500; 533000, 3622500; 533000, 3622300; 532900, 3622300; 532900, 3622000; 532700, 3622000; 532700, 3621900; 532800, 3621900; 532800, 3621800; 532900, 3621800; 532900, 3621500; 532800, 3621500; 532800, 3621400; 532700, 3621400; 532700, 3621200; 532600, 3621200; 532600, 3620900; 532500, 3620900; 532500, 3620700; 532400, 3620700; 532400, 3620600; 532300, 3620600; 532300, 3620300; 532200, 3620300; 532200, 3620100; 532100, 3620100; 532100, 3620000; 531900, 3620000; 531900, 3620100; 531800, 3620100; 531800, 3620200; 531600, 3620200; 531600, 3619500; 531500, 3619500; 531500, 3618900; 531200, 3618900; 531200, 3619000; 531100, 3619000; 531100, 3619200; 531200, 3619200; 531200, 3619600; 531300, 3619600; 531300, 3619900; 531400, 3619900; 531400, 3620400; 531500, 3620400; 531500, 3620500; 531800, 3620500; 531800, 3620400; 532000, 3620400; 532000, 3620700; 532100, 3620700; 532100, 3620900; 532200, 3620900; 532200, 3621000; 532300, 3621000; 532300, 3621100; 532400, 3621100; 532400, 3621500; 532500, 3621500; 532500, 3621700; 532400, 3621700; 532400, 3622100; 532300, 3622100; 532300, 3622200; 532400, 3622200; 532400, 3622500; 532500, 3622500; 532500, 3622600; 532600, 3622600; 532600, 3622700; 532500, 3622700; 532500, 3622900; 532600, 3622900; 532600, 3623000; 532700, 3623000; 532700, 3623600; 532600, 3623600; 532600, 3623700; 532100, 3623700; 532100, 3623600; 531600, 3623600; 531600, 3623500; 531500, 3623500; 531500, 3623600; 531400, 3623600; 531400, 3623700; 531300, 3623700; 531300, 3623800; 531400, 3623800; 531400, 3624000; 531500, 3624000; 531500, 3624100; 531600, 3624100; 531600, 3624200; 531700, 3624200; 531700, 3624400; 531900, 3624400; 531900, 3624600; 532100, 3624600; 532100, 3624900; 532300, 3624900; 532300, 3625000; 532500, 3625000; 532500, 3624800; 532400, 3624800; 532400, 3624500; 532300, 3624500; 532300, 3624400; 532200, 3624400; 532200, 3624300; 532100, 3624300; 532100, 3624200; 532000, 3624200; 532000, 3624100; 531900, 3624100; 531900, 3624000; 532000, 3624000; 532000, 3623900; 532100, 3623900; 532100, 3624000; 532300, 3624000; 532300, 3624100; 532500, 3624100; 532500, 3624000; 532900, 3624000; 532900, 3624500; 533200, 3624500; 533200, 3624600; 533400, 3624600; 533400, 3625000; 533300, 3625000; 533300, 3625100; 533400, 3625100; 533400, 3625300; 533600, 3625300; 533600, 3625700; 533500, 3625700; 533500, 3625900; 533600, 3625900; 533600, 3626000; 533800, 3626000; 533800, 3626400; 534000, 3626400; 534000, 3626500; 534100, 3626500; 534100, 3626600; 534200, 3626600; 534200, 3626900; 534300, 3626900; 534300, 3627000; 534400, 3627000; 534400, 3627100; 534500, 3627100; 534500, 3627200; 534600, 3627200; 534600, 3627300; 534900, 3627300; 534900, 3627400; 534800, 3627400; 534800, 3627600; 534900, 3627600; 534900, 3627700; 535000, 3627700; 535000, 3627800; 535200, 3627800; 535200, 3627700; 535300, 3627700; 535300, 3627800; 535400, 3627800; 535400, 3627900; 535600, 3627900; 535600, 3628000; 535700, 3628000; 535700, 3628100; 535800, 3628100; 535800, 3628200; 536100, 3628200; 536100, 3628400; 536200, 3628400; 536200, 3628600; 536300, 3628600; 536300, 3628700; 536400, 3628700; 536400, 3628800; 536500, 3628800; 536500, 3628900; 536600, 3628900; 536600, 3629000; 536700, 3629000; returning to 536700, 3629100.

(vi) **Note:** Map of arroyo toad proposed critical habitat Unit 19 follows.

BILLING CODE 4310–55–U

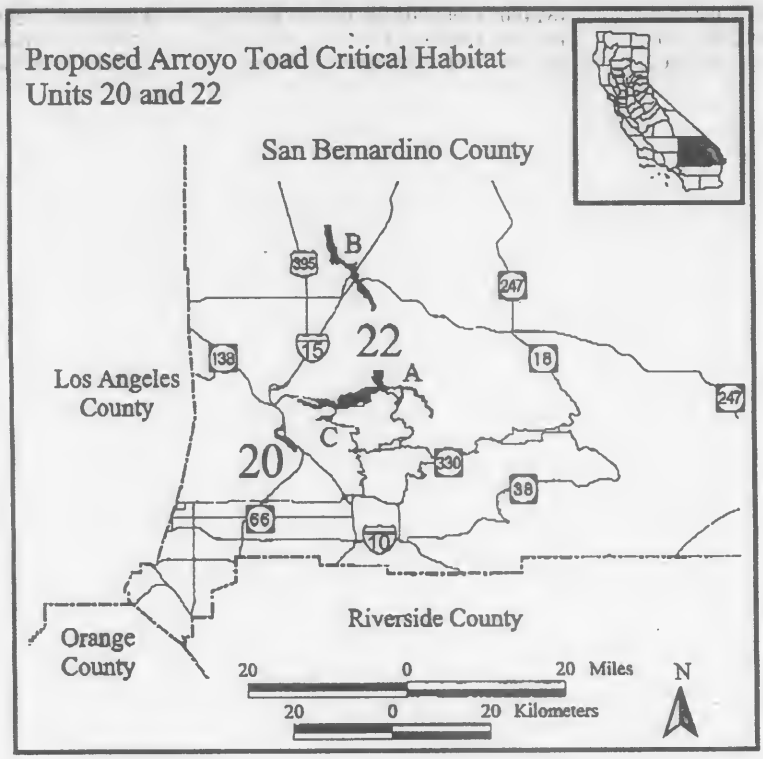
BILLING CODE 4310–55–C

(25) Unit 20; Upper Santa Ana River Basin/Cajon Wash, San Bernardino County, California.

(i) From USGS 1:24,000 scale quadrangle Cajon. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 458300, 3792500; 458700, 3792500; 458700, 3792100; 458600, 3792100; 458600, 3791800; 458500, 3791800; 458500, 3791600; 458000, 3791600; 458000, 3791500; 457900, 3791500; 457900, 3791400; 457400, 3791400; 457400, 3791300; 457200, 3791300; 457200, 3791000; 457100, 3791000; 457100, 3790800; 457200, 3790800; 457200, 3790600; 457300, 3790600; 457300, 3790500; 457400, 3790500; 457400, 3790400; 457500, 3790400; 457500, 3790300; 458000, 3790300; 458000, 3790200; 458300, 3790200; 458300, 3790100; 458600, 3790100; 458600, 3790000; 458700, 3790000; 458700, 3789900; 458800, 3789900; 458800, 3789800; 458900, 3789800; 458900, 3789700; 459000, 3789700; 459000, 3789600; 459100, 3789600; 459100, 3789400; 459400, 3789400; 459400, 3789300; 459500, 3789300; 459500, 3789200; 459600, 3789200; 459600, 3789000; 459700, 3789000; 459700, 3788900; 459800, 3788900; 459800, 3788800; 459900, 3788800; 459900, 3788700; 460000, 3788700; 460000, 3788600; 460100, 3788600; 460100, 3788500; 460400, 3788500; 460400, 3788400; 460600, 3788400; 460600, 3788300; 460700, 3788300; 460700, 3788200; 460800, 3788200; 460800, 3788100; 460900, 3788100; 460900, 3787400; 460800, 3787400; 460800, 3787100; 460600, 3787100; 460600, 3787200; 460500, 3787200; 460500, 3787300; 460400, 3787300; 460400, 3787400; 460300, 3787400; 460300, 3787500; 460200, 3787500; 460200, 3787600; 460100, 3787600; 460100, 3787700; 460000, 3787700; 460000, 3787800; 459800, 3787800; 459800, 3787900; 459700, 3787900; 459700, 3788000; 459600, 3788000; 459600, 3788100; 459400, 3788100; 459400, 3788200; 459300, 3788200; 459300, 3788300; 459200, 3788300; 459200, 3788500; 459100, 3788500; 459100, 3788700; 458900, 3788700; 458900, 3788900; 458700, 3788900; 458700, 3789000; 458500, 3789000; 458500, 3789100; 458300, 3789100; 458300, 3789300; 458100, 3789300; 458100, 3789400; 458000, 3789400; 458000, 3789500; 457900, 3789500; 457900, 3789600; 457800, 3789600; 457800, 3789700; 457700, 3789700; 457700, 3789800; 457600, 3789800; 457600, 3789700; 457500, 3789700; 457500, 3789800; 457300, 3789800; 457300, 3789900; 457000, 3789900; 457000, 3790100; 456900, 3790100; 456900, 3790200; 456800, 3790200; 456800, 3790500; 456700, 3790500; 456700, 3791000; 456600, 3791000; 456600, 3791200; 456700, 3791200; 456700, 3791300; 456800, 3791300; 456800, 3791400; 456900, 3791400; 456900, 3791500; 457100, 3791500; 457100, 3792000; 457300, 3792000; 457300, 3791900; 457400, 3791900; 457400, 3792000; 457500, 3792000; 457500, 3791900; 457600, 3791900; 457600, 3792000; 457900, 3792000; 457900, 3792100; 458000, 3792100; 458000, 3792200; 458200, 3792200; 458200, 3792400; 458300, 3792400; returning to 458300, 3792500.

(ii) **Note:** Map of arroyo toad proposed critical habitat Units 20 and 22 follows.

BILLING CODE 4310–55–U



BILLING CODE 4310–55–C

(26) Unit 21; Little Rock Creek Basin, Los Angeles County, California.

(i) From USGS 1:24,000 scale quadrangles Juniper Hills and Pacifico Mountain. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 406300, 3814500; 406500, 3814500; 406500, 3814100; 406600, 3814100; 406600, 3813600; 406800, 3813600; 406800, 3813400; 406700, 3813400; 406700, 3813300; 406800, 3813300; 406800, 3812700; 406900, 3812700; 406900, 3812300; 407000, 3812300; 407000, 3812200; 407200, 3812200; 407200, 3811900; 407300, 3811900; 407300, 3811800; 407400, 3811800; 407400, 3811700; 407500, 3811700; 407500, 3811600; 407600, 3811600; 407600, 3811400; 407800, 3811400; 407800, 3811200; 408200, 3811200; 408200, 3811100; 408500, 3811100; 408500, 3811000; 408700, 3811000; 408700, 3810900; 409000, 3810900; 409000, 3810800; 409100, 3810800; 409100, 3810600; 409200, 3810600; 409200, 3810400; 409300, 3810400; 409300, 3810300; 409400, 3810300; 409400, 3810100; 409500, 3810100; 409500, 3810000; 409800, 3810000; 409800, 3809900; 409900, 3809900; 409900, 3809700; 410100, 3809700; 410100, 3809500; 410200, 3809500; 410200, 3809400; 410300, 3809400; 410300, 3809200; 410400, 3809200; 410400, 3809100; 410500, 3809100; 410500, 3809000; 410700, 3809000; 410700, 3808900; 410800, 3808900; 410800, 3808700; 410900, 3808700; 410900, 3808500; 411000, 3808500; 411000, 3808300; 411100, 3808300; 411100, 3808100; 411200, 3808100; 411200, 3807900; 411300, 3807900; 411300, 3807600; 411400, 3807600; 411400, 3807400; 411200, 3807400; 411200, 3807500; 411000, 3807500; 411000, 3807700; 410900, 3807700; 410900, 3808100; 410800, 3808100; 410800, 3808200; 410700, 3808200; 410700, 3808300; 410600, 3808300; 410600, 3808600; 410400, 3808600; 410400, 3808800; 410300, 3808800; 410300, 3809000; 410100, 3809000; 410100, 3809100; 410000, 3809100; 410000, 3809200; 409900, 3809200; 409900, 3809300; 409800, 3809300; 409800, 3809500; 409600, 3809500; 409600, 3809700; 409300, 3809700; 409300, 3809800; 409200, 3809800; 409200, 3810000; 409100, 3810000; 409100, 3810100; 409000, 3810100; 409000, 3810300; 408900, 3810300; 408900, 3810400; 408800, 3810400; 408800, 3810500; 408600, 3810500; 408600, 3810600; 408200, 3810600; 408200, 3810800; 407900, 3810800; 407900, 3810900; 407700, 3810900; 407700, 3811000; 407600, 3811000; 407600, 3811100; 407500, 3811100; 407500, 3811200; 407400, 3811200; 407400, 3811300; 407300, 3811300; 407300, 3811400; 407100, 3811400; 407100, 3811500; 407000, 3811500; 407000, 3811600; 406900, 3811600; 406900, 3811700; 406800, 3811700; 406800, 3811800; 406700, 3811800; 406700, 3811900; 406600, 3811900; 406600, 3812600; 406500, 3812600; 406500, 3813100; 406400, 3813100; 406400, 3813200; 406300, 3813200; 406300, 3813500; 406400, 3813500; 406400, 3813800; 406300, 3813800; 406300, 3814000; 406200, 3814000; 406200, 3813900; 406100, 3813900; 406100, 3813800; 406000, 3813800; 406000, 3813700; 405900, 3813700; 405900, 3813600; 405700, 3813600; 405700, 3813500; 405600, 3813500; 405600, 3813400; 405500, 3813400; 405500, 3813300; 405400, 3813300; 405400, 3813100; 405200, 3813100; 405200, 3813000; 405000, 3813000; 405000, 3812900; 404800, 3812900; 404800, 3813100; 404900, 3813100; 404900, 3813300; 405000, 3813300; 405000, 3813400; 405100, 3813400; 405100, 3813500; 405200, 3813500; 405200, 3813600; 405400, 3813600; 405400, 3813700; 405500, 3813700; 405500, 3813800; 405600, 3813800; 405600, 3813900; 405800, 3813900; 405800, 3814000;

405900, 3814000; 405900, 3814200; 406000, 3814200; 406000, 3814300; 406100, 3814300; 406100, 3814400; 406300, 3814400; returning to 406300, 3814500.

(ii) Refer to paragraph 12(iii) for map of arroyo toad proposed critical habitat Units 6, 7 and 21.

(27) Unit 22; Upper Mojave River Basin, San Bernardino County, California.

(i) Subunit 22a: From USGS 1:24,000 scale quadrangles Butler Peak, Cajon, Lake Arrowhead, and Silverwood Lake. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 488400, 3795200; 488300, 3795200; 488300, 3795300; 488100, 3795300; 488100, 3795600; 488000, 3795600; 488000, 3795800; 487600, 3795800; 487600, 3795900; 487500, 3795900; 487500, 3796000; 487200, 3796000; 487200, 3796400; 487300, 3796400; 487300, 3796700; 487200, 3796700; 487200, 3797100; 487000, 3797100; 487000, 3797200; 486800, 3797200; 486800, 3797300; 486700, 3797300; 486700, 3797400; 486600, 3797400; 486600, 3797600; 486500, 3797600; 486500, 3797800; 486600, 3797800; 486600, 3797900; 486700, 3797900; 486700, 3798000; 486300, 3798000; 486300, 3797800; 486000, 3797800; 486000, 3798000; 485900, 3798000; 485900, 3798100; 485500, 3798100; 485500, 3798200; 485400, 3798200; 485400, 3798300; 485300, 3798300; 485300, 3798400; 485200, 3798400; 485200, 3798500; 485100, 3798500; 485100, 3798600; 485000, 3798600; 485000, 3798800; 485100, 3798800; 485100, 3799000; 485300, 3799000; 485300, 3799100; 485100, 3799100; 485100, 3799200; 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(ii) Subunit 22b: From USGS 1:24,000 scale quadrangles Apple Valley South, Helendale, Hesperia, and Victorville. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 472700, 3822600; 472600, 3822600; 472600, 3822500; 472500, 3822500; 472500, 3823000; 472400, 3823000; 472400, 3823600; 472300, 3823600; 472300, 3823800; 472200, 3823800; 472200, 3823900; 472100, 3823900; 472100, 3824000; 472000, 3824000; 472000, 3824100; 471900, 3824100; 471900, 3824200; 471800, 3824200; 471800, 3824300; 471500, 3824300; 471500, 3824400; 471400, 3824400; 471400, 3824600; 471300, 3824600; 471300, 3824700; 471200, 3824700; 471200, 3824800; 471100, 3824800; 471100, 3824900; 471000, 3824900; 471000, 3824800; 470800, 3824800; 470800, 3824900; 470700, 3824900; 470700, 3825200; 470800, 3825200; 470800, 3825300; 470400, 3825300; 470400, 3825400; 469900, 3825400; 469900, 3825300; 469800, 3825300; 469800, 3824900; 469600, 3824900; 469600, 3825000; 469500, 3825000; 469500, 3825300; 469400, 3825300; 469400, 3825400; 469200, 3825400; 469200, 3825500; 468900, 3825500; 468900, 3825100; 468600, 3825100; 468600, 3825400; 468500, 3825400; 468500, 3825500; 468200, 3825500; 468200, 3825700; 468300, 3825700;

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(iii) Subunit 22c: From USGS 1:24,000 scale quadrangles Cajon and Silverwood Lake. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 466500, 3794200; 466900, 3794200; 466900, 3794100; 468300, 3794100; 468300, 3793500; 467800, 3793500; 467800, 3793600; 467500, 3793600; 467500, 3793500; 467400, 3793500; 467400, 3793300; 467200, 3793300; 467200, 3793400; 467100, 3793400; 467100, 3793600; 466900, 3793600; 466900, 3793700; 466200, 3793700; 466200, 3793500; 465700, 3793500; 465700, 3793400; 465300, 3793400; 465300, 3793500; 465200, 3793500; 465200, 3793600; 465400, 3793600; 465400, 3793700; 465700, 3793700; 465700, 3793900; 465900, 3793900; 465900, 3794000; 466000, 3794000; 466000, 3794100; 466500, 3794100; 466500, 3794200.

(iv) Refer to paragraph 25(ii) for map of arroyo toad proposed critical habitat Unit 20 and 22.

(28) Unit 23; Whitewater River Basin, Riverside County, California.

(i) From USGS 1:24,000 scale quadrangles Catclaw Flat and White Water. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 530300, 3764000; 530400, 3764000; 530400, 3763900; 530600, 3763900; 530600, 3763800; 530800, 3763800; 530800, 3763500; 531000, 3763500; 531000, 3763200; 531100, 3763200; 531100, 3762800; 531000, 3762800; 531000, 3762400; 531200, 3762400; 531200, 3762200; 531500, 3762200; 531500, 3761900; 531600, 3761900; 531600, 3761500; 531700, 3761500; 531700, 3761100; 531800, 3761100; 531800, 3760900; 531900, 3760900; 531900, 3760800; 532000, 3760800; 532000, 3760600; 532100, 3760600;

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(ii) Refer to paragraph 14(iii) for map of arroyo toad proposed critical habitat Units 9 and 23.

Dated: April 15, 2004.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 04–9204 Filed 4–27–04; 8:45 am]

BILLING CODE 4310–55–U

Federal Register

Wednesday,
April 28, 2004

Part III

Department of Agriculture

Agricultural Marketing Service

7 CFR Part 929

Cranberries Grown in the States of Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York; Recommended Decision and Opportunity to File Written Exceptions to Proposed Amendment of Marketing Agreement and Order No. 929; Proposed Rule

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 929

[Docket Nos. AO–341–A6; FV02–929–1]

Cranberries Grown in the States of Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York; Recommended Decision and Opportunity To File Written Exceptions to Proposed Amendment of Marketing Agreement and Order No. 929

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and opportunity to file exceptions.

SUMMARY: This recommended decision invites written exceptions on proposed amendments to the marketing agreement and order for cranberries grown in Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York. The amendments were proposed by the Cranberry Marketing Committee (Committee), which is responsible for local administration of the order, and other interested parties representing independent growers and handlers. The proposed amendments would: Revise the volume control provisions; Add authority for paid advertising; Authorize the Committee to reestablish districts within the production area and reapportion grower membership among the various districts; Clarify the definition of handle; and incorporate administrative changes. The proposed amendments are intended to improve the operation and functioning of the cranberry marketing order program.

DATES: Written exceptions must be filed by May 28, 2004.

ADDRESSES: Written comments should be filed with the Hearing Clerk, U.S. Department of Agriculture, room 1081–S, Washington, DC 20250–9200, FAX number (202) 720–9776. Four copies of all written exceptions should be submitted and they should reference the docket numbers and the date and page number of this issue of the **Federal Register**, or you may send your comments by the electronic process available at Federal eRulemaking portal at *http://www.regulations.gov*. Comments can be viewed at: *http://www.ams.usda.gov/fv/moab.html*.

FOR FURTHER INFORMATION CONTACT: Kathleen M. Finn, 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 compliance 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.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Notice of Hearing issued on April 23, 2002, and published in the May 1, 2002, issue of the **Federal Register** (67 FR 21854); Secretary's Decision on partial amendments issued on December 4, 2003, and published in the December 12 issue of the **Federal Register** (68 FR 69343).

This administrative action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to the proposed amendment of Marketing Agreement and Order No. 929, regulating the handling of cranberries in 10 States (hereinafter referred to as the order), and the opportunity to file written exceptions thereto. Copies of this decision can be obtained from Kathleen Finn whose address is listed above.

This action is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), hereinafter referred to as the "Act," and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900).

The proposed amendment of Marketing Agreement and Order No. 929 is based on the record of a public hearing held in Plymouth, Massachusetts on May 20 and 21, 2002; in Bangor, Maine on May 23, 2002; in Wisconsin Rapids, Wisconsin on June 3 and 4, 2002; and in Portland, Oregon on June 6, 2002. Notice of this hearing was published in the **Federal Register** on May 1, 2002. The notice of hearing contained numerous proposals submitted by the Committee, other interested parties and one proposed by the Agricultural Marketing Service (AMS). A Secretary's Decision and Referendum Order on 6 of the proposals determined necessary to be expedited was published in the **Federal Register** on December 12, 2003. This action recommends amendments on the remainder of the proposals.

The proposed amendments included in this proceeding would: Authorize the Committee to reestablish districts within the production area and reapportion grower membership among the various districts; simplify criteria considered and set forth more appropriate dates in establishing the Committee's marketing policy; revise the formula for calculating sales histories under the producer allotment program in § 929.48; allow compensation of sales history for catastrophic events that impact a grower's crop; remove specified dates relating to when information is required to be filed by growers/handlers in order to issue annual allotments; clarify how the Committee allocates unused allotment to handlers; allow growers who decide not to grow a crop flexibility in deciding what to do with their allotment; allow growers to transfer allotment during a year of volume regulation; authorize the implementation of the producer allotment and withholding programs in the same year; require specific dates for recommending volume regulation; add specific authority to exempt fresh, organic or other forms of cranberries from order provisions; allow for greater flexibility in establishing other outlets for excess cranberries; update and streamline the withholding volume control provisions; modify the buy-back provisions under the withholding volume control provisions; add authority for paid advertising under the research and development provision of the order; modify the definition of handle to clarify that transporting fresh cranberries to foreign countries is considered handling and include the temporary cold storage or freezing of withheld cranberries as an exemption from handling; relocate some reporting provisions to a more suitable provision and streamline the language relating to verification of reports and records; and Delete an obsolete provision from the order relating to preliminary regulation.

The Fruit and Vegetable Programs of AMS proposed to allow such changes as may be necessary to the order, if any of the proposed amendments are adopted, so that all of the order's provisions conform to the effectuated amendments.

Five proposed amendments are not being recommended for adoption and are discussed in this decision.

Thirty-two witnesses testified at the hearing. These witnesses represented cranberry growers and handlers in States currently covered by the order

and in Maine. Some witnesses supported the proposed amendments, while others were opposed to the recommended changes or suggested modifications to them.

At the conclusion of the hearing, the Administrative Law Judge fixed August 9, 2002, as the final date for interested persons to file proposed findings and conclusions or written arguments and briefs based on the evidence received at the hearing on proposal numbers 1, 3, 7 and 13. The Administrative Law Judge fixed September 13, 2002, as the final date for interested persons to file proposed findings and conclusions or written arguments and briefs based on evidence received at the hearing on all other proposals. This briefing period was extended until September 20, 2002. A total of 17 briefs were filed, of which 7 related to the proposals being addressed in this decision.

The Committee filed a brief in support of its proposed amendments. Stephen L. Lacey, attorney for Clement Pappas & Company and Cliffstar Corporation, filed a brief in support of his and other proposals, in opposition to some proposals or suggestions for modifications. Linda and Paul Rinta filed a brief in support of many proposals and suggesting modification to others. The Cape Cod Cranberry Growers' Association (CCCGA) filed a brief opposing one proposal, supporting others, and suggesting modifications to others. All discussions in briefs pertaining to the proposals being recommended in this decision have been considered.

Introduction

The U.S. cranberry industry is experiencing an oversupply situation. Recent increases in acreage and yields have resulted in greater supplies, while demand has remained fairly constant. The result has been building inventories and reduced grower returns.

The cranberry industry has operated under a Federal marketing order since 1962. The order's primary regulatory authority is volume regulation. At that time, production was trending sharply upward, due primarily to improving yields, and demand was not keeping pace. The intent of the program was to limit the volume of cranberries available for marketing in fresh market outlets in the United States and Canada, and in all processing outlets, to a quantity reasonably in balance with the demand in such outlets. This method of controlling volume was the "withholding" provisions whereby "free" and "restricted" percentages would be established. Growers would deliver all contracted cranberries to their respective handlers. Free cranberries could be marketed by handlers in any outlet, while restricted berries would have to be withheld from handling and, if possible, diverted by handlers to noncompetitive markets. The withholding program has not been used since 1971.

The order was amended in 1968 to authorize another form of volume regulation—producer allotments. The intent was to discourage new plantings and allow growers to remove surplus berries in a more economical manner, by reducing their production to approximate the marketable quantity or by leaving excess berries unharvested.

Production had continued to increase, and the industry was reluctant to recommend a sufficient restricted percentage under the withholding regulations. Under the producer allotment program, growers were issued base quantities. Base quantity was the quantity of cranberries equal to a grower's established cranberry acreage multiplied by such grower's average per acre sales made from the acreage during a representative period. If the allotment base program were activated, each handler would be allowed to acquire for normal marketing only a certain percentage of each grower's base quantity. This authority was used to establish a regulation for the 1977–78 season, but that regulation was subsequently rescinded.

In 1992, the producer allotment provisions were amended to change the method of calculating growers' annual allotments from the base quantity method to a sales history method. Under this amendment, a grower's sales history is calculated based on a grower's actual sales, expressed as an average of the best 4 of the previous 6 years of sales. There were concerns that base quantities did not accurately reflect actual levels of sales because as growers' acreage increased or decreased, the base quantity did not change. It was concluded that basing allotments on actual sales off acreage would be a more realistic and practical way to determine annual allotments. These provisions were first used in the 2000–2001 season and again in 2001–2002. No volume regulations were implemented in 2002–2003.

In recent years, the Committee has been considering ways in which the marketing order could be improved to better address the oversupply situation. Although the regulations implemented for volume regulation were as flexible as the order would allow, the Committee believed there were improvements that could be made through the amendment process. The Committee appointed an amendment subcommittee to analyze the marketing order and make recommendations to the Committee on proposed amendments. The subcommittee considered the volume control provisions as well as other provisions of the order, such as Committee structure, production area, and promotion authorities. The Committee's proposals are the result of years of discussions on improvements to the marketing order. In addition, other interested parties included proposed amendments in the proceeding.

Material Issues

The material issues of record addressed in this decision are as follows:

Administrative Body

(1) Whether to authorize the Committee to reestablish districts within the production area and reapportion grower membership among the various districts.

Volume Regulations

(2) Whether to simplify criteria considered and set forth more appropriate dates in establishing the Committee's marketing policy.

(3) Whether to revise the formula for calculating sales histories under the producer allotment program in § 929.48. The revision includes providing additional sales history to compensate growers for expected production on newer acres. This proposed change to § 929.48 would also: allow for more flexibility in recommending changes to the formula; and add authority for segregating fresh and processed sales.

(4) Whether to allow compensation of sales history for catastrophic events that impact a grower's crop.

(5) Whether to remove specified dates relating to when information is required to be filed by growers/handlers in order to issue annual allotments.

(6) Whether to clarify how the Committee allocates unused allotment to handlers.

(7) Whether to authorize growers who choose not to grow a crop during a year of volume regulation to not assign their allotment to their handler.

(8) Whether to allow growers to transfer allotment during a year of volume regulation.

(9) Whether to authorize the implementation of the producer allotment and withholding programs in the same year.

(10) Whether to require the Committee to recommend volume regulations by specified dates.

(11) Whether to add specific authority to exempt fresh, organic or other forms of cranberries from order provisions.

(12) Whether to allow for greater flexibility in establishing other outlets for excess cranberries. This includes whether to clearly define what countries are authorized for foreign development with excess cranberries and whether to establish a limit on foreign markets eligible for shipments of excess berries.

(13) Whether to update and streamline the withholding volume control provisions.

(14) Whether to revise the buy-back provisions under the withholding provisions, including allowing growers to be compensated if any funds are returned to handlers by the Committee.

(15) Whether to incorporate a handler marketing pool or buy-back provisions under the producer allotment program to allow handlers without surplus access to cranberries to meet customer needs.

(16) Whether to authorize an exemption from order provisions for the first 1,000 barrels of cranberries produced by each grower.

Production Area

(17) Whether to add Maine, Delaware and the entire State of New York to the production area.

Paid Advertising

(18) Whether to add authority for paid advertising under the research and development provision of the order.

Definition of Cranberry

(19) Whether to add the species *Vaccinium oxycoccus* to the definition of cranberry.

Definition of Handle

(20) Whether to modify the definition of handle to clarify that transporting fresh cranberries to foreign countries is considered handling and include the temporary cold storage or freezing of withheld cranberries as an exemption from handling.

Reporting Requirements

(21) Whether to relocate some reporting provisions to a more suitable provision and streamline the language relating to verification of reports and records.

Deletion of Obsolete Provision

(22) Whether to delete an obsolete provision from the order relating to preliminary regulation.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof.

Material Issue Number 1—Reestablishment of Districts and Reapportionment of Committee Membership Among Districts

The order should be amended to add authority to reestablish the geographic districts set up for purposes of grower representation on the Committee and to reapportion membership among those districts.

Section 929.20 of the order establishes the Cranberry Marketing Committee, comprised of 13 growers and 1 public member. Grower membership is allocated among two groups—growers affiliated with the major cooperative marketing organization and all other growers. One grower member represents the production area-at-large, while the remaining grower members are apportioned among four districts as shown below.

District	No. of grower members
1—Massachusetts, Rhode Island, and Connecticut	4
2—New Jersey and New York	2
3—Wisconsin, Michigan, and Minnesota	4
4—Oregon and Washington	2

Currently, there is no authority under the order to reestablish the districts or to reapportion membership among the districts. Testimony indicated that adding such authority would allow the Committee to address, in a timely fashion, situations wherein changes are needed to the districts' makeup to more appropriately align the districts or the representation of the districts. Adding this authority would allow the Committee to recommend changes to be made through informal rulemaking rather than through an order amendment.

The Committee manager testified that before any recommendations could be made by the Committee regarding reestablishment of districts or reapportionment of membership, several criteria should be considered. The criteria to be considered would be: (1) The relative volume of cranberries produced in each district; (2) the relative number of cranberry producers within each district; (3) cranberry acreage within each district; and (4) other relevant factors.

This proposed amendment would allow the Committee to recommend realigning district boundaries (for example, moving a State from one district into another); to modify the number of districts; and to change the number of grower members to represent each district. The four criteria established would need to be considered prior to any Committee recommendation.

This proposed amendment would not allow an increase or decrease in the total number of members on the Committee. It also would not allow increases or decreases in the total number of members allotted to each group (growers affiliated with the major cooperative marketing organization and other growers).

An opponent of adding this authority testified that if this provision were adopted, unnecessary discord would occur in the industry. He provided an example using current independent grower membership. Growers not affiliated with the major cooperative are now allocated two members from District 1, one member from District 2, two members from District 3, and one member from District 4. The witness envisioned a situation where independent representatives from Wisconsin could want an additional seat on the Committee for their district based on volume produced and independent representatives from Massachusetts could want an additional seat for their district based on the number of growers in that district. It would take a Committee vote to recommend such an action, which would require a super majority of votes to pass (11 of 14 members if the public member chose to vote, 10 of 13 members otherwise). He testified that the decision would ultimately be made by members representing the major cooperative because the non major cooperative members would be split on their votes. He did not believe it would be fair to the group representing other than the major cooperative if the major cooperative decided which district is entitled to an additional independent seat. A Committee motion on this issue could polarize the members, he testified.

The witness testified that the current district makeup and allocation of membership is well thought out and well reasoned. He believed that any needs that arise to modify districts should be accomplished through the formal amendment process, where growers can vote in a referendum on this issue. He further testified that the industry structure does not change rapidly as evidenced by the last amendment on establishing districts, which occurred in 1978.

At the hearing, one witness testified that he believed that adding this authority would allow the Committee to add States not currently regulated under the order through informal rulemaking if the Committee determined it

necessary. This is not true. Any change in the production area would require an amendment of § 929.4 of the order through the formal amendment process. Adding this authority would not allow the Committee to expand the production area.

As an example of redistricting, there was much testimony on the significance of the State of New Jersey relative to the States of Wisconsin and Massachusetts. Some believe it is not equitable to provide a separate district and two seats to New Jersey based on the number of growers and volume of production in that State. While it has been determined that current Committee representation is reasonable, this situation could change in the future. The Committee should have the authority to recommend a modification in the district structure, either by increasing or decreasing the number of districts, reassigning geographic regions among the districts, or reallocating membership among the districts, without having to amend the order. The Committee would recommend the change to USDA and notice and comment rulemaking would determine if changes are warranted.

A witness stressed the importance of having the experience and knowledge on the Committee from every growing area. Because the industry is spread out across the United States, the educational aspect of representatives reporting Committee activities to growers in their district is critical, he testified. Although this witness supported modifying districts by order amendment, he was concerned with the smaller districts not having representation and the Committee not being able to address the problem quickly.

Record evidence supports adding the authority to reestablish districts and reapportion membership among the districts. This authority would give the Committee greater flexibility in responding to changes in grower demographics and district significance in the future. It is possible that if this amendment is adopted, the larger districts may attempt to attain an additional seat. Since the total number of seats on the Committee cannot be altered (except through amendment of the order), the only way to accomplish this would be to transfer a seat from another district or to eliminate a district and combine the States in that district with another district. Any recommendation to modify the districts or representation would need a Committee vote and USDA approval. Since all Committee actions require a super majority vote to pass, recommendations to change the districts would require support from both groups, including the major cooperative. These voting requirements were established to ensure that all Committee recommendations are supported by a majority of the industry, regardless of affiliation. A vote on district makeup would be no different than any other issue the Committee considers.

In addition to a Committee recommendation, notice and comment rulemaking would be necessary to implement any modifications in district representation on the Committee. All growers and handlers would be provided the opportunity to comment on the Committee recommendation before it was adopted. USDA considers all comments before issuing a final rule. Therefore, it is concluded that growers would have ample opportunity to be heard on issues concerning Committee representation.

Changes in industry structure could occur more quickly in the future than they have in the past. For this reason, it is deemed important that the Committee be provided the flexibility to address any changes in industry demographics by reestablishing districts and reapportioning membership.

Record evidence supports adding the authority to reestablish districts and reapportion Committee membership among the districts. Therefore, a new § 929.28 is proposed to be added to the order.

Material Issue Number 2—Development of Marketing Policy

Section 929.46 should be revised to simplify the criteria required to be considered in the Committee's annual marketing policy and eliminate obsolete dates.

Section 929.46 of the order requires the Committee to develop a marketing policy each year as soon as practicable after August 1. In its marketing policy, the Committee projects expected supply and market conditions for the upcoming season. The marketing policy should be adopted before any recommendation for regulation, as it serves to inform USDA and the industry, in advance of the marketing of the crop, of the Committee's plans for regulation and the bases therefore. Handlers and growers could then plan their operations in accordance with the marketing policy. Additionally, the marketing policy is useful to the Committee and USDA when specific regulatory action is being considered, since it would provide basic information necessary to the evaluation of such regulation.

Currently, § 929.46(b) states that as soon as practicable after August 1 of each crop year and prior to making any recommendations for a producer allotment or withholding program, the Committee shall submit a marketing policy which considers nine criteria. The nine criteria include: (1) The estimated total production of cranberries; (2) the expected general quality of the crop; (3) the estimated carryover, as of September 1, of frozen cranberries and other cranberry products; (4) the expected demand conditions for cranberries in different market outlets; (5) supplies of competing commodities; (6) trend and level of consumer income; (7) the recommended desirable total marketable quantity of cranberries, including an adequate carryover into the following crop year; (8) any volume regulation expected to be recommended by the Committee during the crop year; and (9) other factors having a bearing on the marketing of cranberries. The Committee proposed that numbers 5, 6 and 8 be deleted.

The proponents testified that there are really no directly competing commodities for cranberries since they are a fresh seasonal item for holiday use. Also, cranberry juice competes for shelf space, but the competition is between the branded companies and private label companies rather than with other types of juices. The trend and level of consumer income is another criterion that the Committee does not believe is of much value to consider. Proponents testified that there are different cranberry products available at different price levels that can be purchased by consumers depending on their wishes. Other factors are more important to consumers, however, in making food choices. Consumers may buy cranberry products based on health related issues, for example. The proponents recommended that these two items be deleted from the marketing policy criteria. However, the Committee may consider any factors it deems relevant under the language that allows the Committee to consider "other factors having a bearing on the marketing of cranberries."

With regard to criterion number 8, no testimony was given in support of deleting this item. However, the record supports that the Committee's marketing policy should be adopted prior to any recommendation for volume regulation, and should serve as the justification for such recommendation. Therefore, it should be removed as a criterion to be considered in recommending a marketing policy.

The Committee also proposed revising the dates by which the Committee must estimate the marketable quantity necessary to establish a producer

allotment program and the date by which the Committee shall submit its marketing policy to USDA for consideration. Currently, § 929.46(a) states the Committee shall estimate the marketable quantity for the following crop year each year prior to May 1. Section 929.46(b) states that as soon as practicable after August 1 of each crop year, and prior to making any recommendation for regulation, the Committee shall submit to USDA its marketing policy.

The proponents testified that May 1 is too late for cranberry producers to make informed decisions on the steps they may want to take if a producer allotment regulation were to be recommended based on the marketing policy. Witnesses testified that producers need to know the Committee's intentions as early as possible in the year so they can make decisions on whether or not to grow a crop, flood their bogs, and consider cultural practices that could save the producers money. For example, a producer may want to apply less fertilizer, herbicides, or pesticides to curtail production in the event of the implementation of a producer allotment program. The earlier that the decision is made by the Committee, the more information the producer has to plan for the necessary cultural practices for the upcoming crop. For these reasons, the Committee proposed that recommendations for producer allotment regulations be made no later than March 1.

Record testimony also establishes, however, that a withholding regulation would not have to be recommended quite as early in the year because such a regulation is imposed on handler acquisitions of cranberries rather than on the amount handlers can purchase from their growers. In the event such a regulation were contemplated, the marketing policy could be submitted later when more accurate information about the upcoming crop were available.

The dates by which recommendations for the different types of volume regulations must be made are being recommended for inclusion in § 929.51, Recommendations for regulation. This recommendation is discussed later as Material Issue Number 10.

The Committee also proposed that the Committee be required to forward its marketing policy for the following crop year prior to August 31. Currently, § 929.46(b) states that the marketing policy must be submitted to USDA after August 1 of each crop year. Although the August 31 date would allow the Committee to evaluate information that comes available in mid-August, it is inconsistent with the recommendation that any producer allotment regulation be recommended prior to March 1.

USDA is recommending that § 929.46 be amended by deleting both dates that currently appear in that section and by modifying the criteria to be considered in recommending a marketing policy as proposed by the Committee. The marketing policy would be submitted along with any recommendations for a producer allotment and/or a withholding regulation.

Material Issue Number 3—Revision of Sales History

Calculations

Section 929.48 of the order should be amended to change the way sales histories are calculated, provide more flexibility in making any further changes to the calculations, and authorize separate sales histories to be calculated for fresh and processed sales.

Section 929.49 of the order authorizes cranberry volume controls in the form of producer allotment regulations. That section provides that if USDA finds from a Committee recommendation or from other available information, that limiting the quantity of cranberries that can be purchased from or handled on behalf of growers during a crop year would tend to effectuate the declared policy of the Act, USDA shall determine and establish a marketable quantity for that year. (Marketable quantity is defined as the number of pounds of cranberries needed to meet total market demand and to provide for an adequate carryover into the next season.)

USDA would also establish an allotment percentage that is equal to the marketable quantity divided by the total of all growers' sales histories. The allotment percentage would then be applied to each grower's individual sales history to derive each grower's annual allotment. Handlers could not handle cranberries unless they are covered by a grower's annual allotment.

Section 929.48 of the order provides for computing growers' sales histories. Sales history is defined in § 929.13 as the number of barrels of cranberries established for a grower by the Committee. The Committee updates growers' sales histories each season. The Committee accomplishes this by using information submitted by the grower on a production and eligibility report filed with the Committee. The order sets forth that a grower's sales history is established by computing an average of the best 4 years' sales (out of the most recent 6 years) for those growers with existing acreage. For growers with 4 years or less of commercial sales history, the sales history is calculated by averaging all available years of such grower's sales. A new sales history for a grower with no sales history is calculated by using the State average yield per acre or the total estimated commercial sales, whichever is greater. This section also provides the authority for calculating new sales histories for growers after each crop year where a volume regulation was established using a formula recommended by the Committee and approved by USDA.

In recent years, cranberry production has exceeded market demand, resulting in building inventories and dramatic declines in grower prices. In 2000, the Committee recommended the use of a producer allotment volume regulation to bring supplies more in line with demand. A marketable quantity of 5.468 million barrels was established for the 2000–01 season, implemented through an allotment percentage of 85 percent. Many growers, particularly those with acreage 4 years old or less, indicated that the method of sales history calculation placed them at a disadvantage because they realized more production on their acreage than their sales history indicated. At that time, it was determined that approximately 30 percent of all cranberry acreage was planted in 1995 or later. With the volume of new acres within the industry, many growers were affected.

Because sales histories are based on an average of past years' sales, newer growers could be restricted to a greater extent than more established growers. This is because a cranberry bog does not reach full capacity until several years after being planted. Using an average of early years' sales (which are low) can result in sales histories below future sales potential. A more established grower, on the other hand, would have a sales history more reflective of his or her production capacity.

In recommending volume regulations for the 2000 season, the Committee considered the most equitable method of determining sales histories within the scope of the order. The final rule on volume regulation for the 2000 crop year was as flexible as the order would allow in alleviating the differential impact of the volume regulation on growers.

The Committee determined that something needed to be done to address concerns associated in the 2000 crop year with growers with newer acreage. As stated previously, there is authority under the order for calculating new sales histories for growers after each crop year where a volume regulation is established using a formula recommended by the Committee and

approved by USDA. In light of this authority, the Committee and USDA gave much thought to the most equitable method of determining sales histories in the event volume regulation was recommended in 2001. The method established specifically addressed growers' concerns by providing a more equitable determination of their sales histories. The method developed was based on industry and USDA analysis of average yields for acreage at different stages of growth. The method provides additional sales history for growers with newer acres to account for increased yields for each growing year up to the fifth year by factoring in appropriate adjustments to reflect rapidly increasing production during initial harvests. The adjustments were in the form of additional sales histories based on the year of planting.

The modified method of calculating sales histories was expected to address concerns associated with using a grower's actual sales history without taking into account anticipated production when calculating annual allotments. Ideally, in a year of volume regulation, all growers' actual crops would be reduced by the same percentage. Because of uncertainties in making crop predictions, annual allotment calculations based on averaging growers' sales histories alone does not provide any adjustment for new acres as they rapidly increase production during the first several harvests. Therefore, growers can be impacted differently depending upon their particular situation. The result is that sales histories for growers with a significant number of acres being harvested for the first, second, third, or fourth time can be below what the average crop for these growers is expected to be during the next harvest. The restriction percentages for these growers in a year of volume regulation could therefore exceed the average allotment restriction percentage. The method recommended by the Committee for the 2001–2002 season addressed that issue by minimizing the differential impact among growers with newer acreage.

The revised formula provided a specified amount of additional sales history for newer acreage based on USDA and industry analysis of cranberry production. The amount of such additional sales history depended on the year of planting. Also, the formula took into account different harvesting times for first year harvests by basing first year averages on the year planted.

The Committee recommended this method at its August 28, 2000, Committee meeting. The recommendation was set forth in a proposed rule published in the **Federal Register** on January 12, 2001, (66 FR 2838) with a comment period ending February 12, 2001.

At a Committee meeting on February 5, 2001, concerns were raised that the proposed formula would give an unfair advantage to growers who only had acres with 1 to 3 years of sales history (as opposed to growers with mature acres combined with new or replanted acres). The Committee believed that these growers would be provided an adjusted sales history in excess of average yields. The Committee recommended that the proposal be modified to be more equitable to all growers by providing that growers with acreage with 1 to 3 years of sales histories divide their total sales by 4 instead of all available years and then be provided additional sales history in accordance with the formula for adjusting sales history.

At the February 2, 2001 meeting, the Committee also recommended using regulation again to continue the effort to restore economic health to the cranberry industry. The modification to the sales history calculations was incorporated into the proposed rule for volume regulation published in the **Federal Register** on May 14, 2001 (66 FR 24291) and was finalized with a publication in the **Federal Register** on June 27, 2001 (66 FR 34332). The marketable quantity for the 2001–2002 crop year was set at 4.6 million barrels and the allotment percentage was designated at 65 percent.

Specifically, the calculation of sales histories for the 2001–02 season were as follows:

For each grower with acreage with 7 or more years of sales history, a new sales history was computed using an average of the highest 4 of the most recent 7 years of sales. If the grower had acreage with 6 years sales history, a new sales history was computed by averaging the highest 4 of the 6 years. If the grower had acreage with 5 years of sales history and such acreage was planted prior to 1995, a new sales history was computed by averaging the highest 4 of the 5 years.

For growers whose acreage had 5 years of sales history and was planted in 1995 or later, the sales history was computed by averaging the highest 4 of the 5 years and was adjusted with additional sales history in accordance with the formula. For growers whose acreage had 4 years of sales history, the sales history was computed by averaging all 4 years and was adjusted with additional sale history in accordance with the formula. For growers whose acreage had 1 to 3 years of sales history, the sales history was computed by dividing the total years sales by 4 and was adjusted with additional sales history in accordance with the formula.

For growers with acreage with no sales history or for the first harvest of replanted acres, the sales history was 75 barrels per acre for acres planted or re-planted in 2000 and first harvested in 2001 and 156 barrels per acre for acres planted or re-planted in 1999 and first harvested in 2001.

In addition to the sales history for growers, additional sales history was assigned to growers specified above with acreage planted in 1995 or later. The additional sales histories depending on the date the acreage was planted are shown in Table 1.

TABLE 1.—ADDITIONAL SALES HISTORY ASSIGNED TO ACREAGE IN 2001

Date planted	Additional 2001 sales history per acre
1995	49
1996	117
1997	157
1998	183
1999	156
2000	75

The Committee did not recommend volume regulations for the 2002–2003 crop year. The authority to use a new formula to calculate sales histories for growers is only applicable after a crop year where a volume regulation is established. Therefore, the next time the Committee recommends volume regulation, the Committee will not be able to use the formula developed for the 2001–2002 crop year. Sales history calculations would have to be accomplished using the best 4 out of 6 crop years, and no additional sales histories could be assigned to newer acreage.

The Committee's proposed amendment to § 929.48 would add to that section the formula for calculating sales histories that was used for the 2001–2002 crop year. In addition, the proposed amendments to this section include allowing more flexibility in recommending changes to the formula, adding authority to calculate fresh and processed cranberry sales histories separately, and modifying the way growers' sales histories can be adjusted to compensate for catastrophic events that impact growers' crops. This material issue will discuss all proposed

amendments to this section except for adjusting growers' sales histories to compensate for catastrophic events. That issue will be discussed in Material Issue Number 4.

Sales History Formula

The sales history formula used in the 2001–2002 crop year was specific to that particular season. The Committee developed generic language to include in § 929.48 that uses the principles of the 2001–02 formula, but can be applied to future crop years.

Under the proposed amendment, sales histories would be computed by the Committee in the following manner:

For growers with acreage with 6 or more years of sales history, the sales history would be computed using an average of the highest 4 of the most recent 6 years of sales. For growers with 5 years of sales history for acreage planted or replanted 2 years prior to the first harvest on that acreage, the sales history would be computed by averaging the highest 4 of the 5 years.

For growers with 5 years of sales history from acreage planted or replanted 1 year prior to the first harvest on that acreage, the sales history would be computed by averaging the highest 4 of the 5 years, and would be adjusted to provide additional sales history to compensate for increased production on the newer acreage. For growers with 4 years or less of sales history, the sales history would be computed by dividing the total sales from that acreage by 4, and would be adjusted to provide additional sales history to compensate for increased production on the newer acreage. These two groups of growers would be provided with additional sales history using a formula x=(a−b)c. The letter "x" constitutes the additional number of barrels to be added to the grower's sales history. The value "a" is the expected yield for the forthcoming year harvested acreage as established by the Committee. The value "b" is the total sales from the acreage as established by the Committee. The value "c" is the number of acres planted or replanted in the specified year. For acreage with 5 years of sales history: "a" would equal the expected yield for the forthcoming sixth year harvested acreage (as established by the Committee); "b" would equal an average of the most recent 4 years of expected yields (as established by the Committee); and "c" would equal the number of acres with 5 years of sales history.

For growers with acreage having no sales history, or the first harvest of replanted acres, the sales history would be the average first year yield (depending on whether the first harvest is 1 or 2 years after planting or replanting) as established by the Committee, multiplied by the number of acres.

There are several variables in the Committee's proposed sales history formula that would have to be established through the informal rulemaking process prior to using the formula. These relate to the adjustments for newer acreage. Specifically, in the formula x=(a−b)c, the values of a and b would have to be established by the Committee. The value of c would be an actual acreage number, and x would be a computed value.

It is likely the Committee would use the results of the analysis performed prior to the 2001 season to set these values. However, appropriate adjustments could be made if better information becomes available in the future. Rulemaking to modify these numbers would be undertaken as necessary, and need not be done every year.

The Committee's proposed amendment of § 929.48 also provides that a new sales history would be calculated for each grower, after each crop year, using the above formula or another formula as determined by the Committee and approved by USDA. The proposed amendment further provides that the Committee, with USDA approval, may adopt regulations to alter the number and identity of years to be used in computing sales histories, including the number of years to be used in computing the average.

The Committee manager testified that § 929.48, as currently written, restricted the Committee from being able to make the best calculations of sales histories for the 2000–2001 crop year. With that section authorizing a new formula to calculate sales histories after a year of volume regulation, the Committee was able to develop a more equitable system of calculating sales histories for the 2001–02 crop year. However, the Committee did not recommend a producer allotment regulation for the 2002–2003 crop year, and as a consequence, the method of calculating sales histories reverts back to the method in which initial sales histories were calculated in 2000–2001.

The Committee manager testified that theory and practical application do not always coincide, and that as situations change, the Committee needs the opportunity to modify the regulations to correspond to industry practices, within the scope of order authority. He stated that with changing circumstances in the future, the Committee may want to consider calculating sales histories using different inputs. The proposed amendment is flexible enough to allow the Committee to modify how sales histories are calculated depending upon grower and handler practices while still maintaining the fundamental effectiveness of a producer allotment program.

Testimony indicated that providing the Committee with the flexibility to recommend changes to the formula may allow some producers, particularly those with newer or replanted acreage, to deliver additional fruit. This would improve returns to newer growers, as the recalculation of sales histories is most critical during periods when a producer allotment regulation has been established. Allowing growers additional sales history to recognize expected increases in yields on newer acres would provide these growers with a sales history more reflective of their actual sales potential.

A witness testified that a 20 percent reduction in sales history under volume regulation (through an allotment percentage of 80 percent) for growers with new acreage might actually reduce these growers' crops by 40 percent or more if most of their acreage is new. An example used was a grower with three years of harvests from one acre. In the first year he harvested 50 barrels, in the second year 90 barrels, and in the third year 130 barrels. His sales history would be an average of those years or 90 barrels. If a 20 percent volume regulation were implemented the next year, his allotment would be 72 barrels (80 percent of 90 barrels). There would not be sufficient sales history built up on that acre to allow for the fact that it could yield 250 barrels in the year of volume regulation. If this grower harvested 250 barrels and could only sell 72, a 20 percent volume regulation would be 70 percent to this grower.

The intent of the revised method is to predict what the production of new acreage would be during the upcoming year so that the crop reduction for growers with new acreage is similar to that of growers who do not have new acreage.

Some growers believed the revised formula was too restrictive while others thought it was not restrictive enough. A grower opposed to this method of computing sales histories testified that providing additional sales histories to newer growers encourages more production. She testified that because of strong prices, many new growers entered the cranberry business between 1990 and 1997 without looking at the long-range impact. This increase in acreage is what caused the current oversupply situation. This witness

believed that it was each grower's responsibility to guard against this impact. Growers should not be rewarded with additional sales history for making unwise business decisions.

The record indicates that in developing this method, the Committee assembled yield data on over 10,000 cranberry acres to understand what yields are typical for new acreage over the first 5 years after planting. This data provided the basis for establishing the sales history formula used for the 2001 season. This data also demonstrated the need for this change.

USDA worked with cranberry handlers in assembling data. Handlers were asked to provide information on growers' yield per acre for yearly harvests made 1, 2, 3, 4 and 5 years after planting for acres harvested over the past 5 years. The handlers were also asked to indicate which varieties were planted, specifying the proportion of total new acreage dedicated to each variety.

Two large handlers supplied detailed information relative to harvested acres. To supplement this information, data was also gathered from growers who delivered cranberries to other handlers. This additional data collection was accomplished to broaden the scope of the industry data used in the analysis.

The data combined grower information from all cranberry producing regions, as well as data for all varieties and years of birth (original date of planting). The data was analyzed to determine what an average grower, growing in average conditions, would experience in terms of yield per acre if he or she planted new acreage and then harvested it 5 consecutive years thereafter.

The results were divided into two categories: Group A (growers harvesting for the first time 1 year after planting) and Group B (growers waiting 2 years before the first harvest). The data included the first harvest and four subsequent harvest yields for groups A and B, respectively, and was analyzed to determine the average yields and rate of increase in yields over the first 5 harvests for each grower/bog category.

The analysis of yield progression over the first 5 harvests for groups A and B revealed significant differences in first harvest yields, but supported the conclusion that yield progression rates for subsequent years were comparable. Based on this observation, yield rates and expected yield/sales histories were averaged based on the sample size from each group. These averages were 50, 131, 197, 227 and 250 barrels per acre for acres harvested the first, second, third, fourth and fifth year after planting, respectively.

Since these numbers are based on average yields for the sample groups, it is reasonable to conclude that the yields of approximately 50 percent of the growers impacted by this proposal would be higher than the average. To accommodate as many growers as possible, it was agreed to adjust the averages upward by 25 barrels which would result in growers receiving a higher amount of additional sales history under the formula. This would also assure that first harvests (acreage with no sales history) which were provided the State average yield as a sales history in the 2000 crop year would receive a comparable sales history for 2001. The average expected yields for each year, increased by 25 barrels, were 75, 156, 222, 252 and 275 barrels per acre for acres harvested the first, second, third, fourth and fifth year after planting, respectively.

These yield figures were incorporated into the formula for determining the additional sales history per acre that growers would be provided, and were applied to acreage planted in 1995 or later.

In addition to the actual sales history, such growers were provided additional sales history to account for expected increased production in the forthcoming year.

The formula was a tool used to make an appropriate adjustment in sales histories for growers harvesting young acreage, which was not yet producing at optimal capacity. The formula was based on industry data from all growing areas and from all sizes of growing operations, and used a higher than mid range of this data.

USDA does not agree that new plantings would be encouraged by adding this authority to the order or that growers are being rewarded for making poor business decisions. Incorporating this method into the order would address equity concerns expressed during the volume regulations implemented in 2000 and 2001. The formula used in the 2001 season was an improvement from the formula used in 2000. However, the way the current order language is written, this improved method cannot be used the next time volume regulations are implemented because the revised formula can only be implemented after a year of volume regulation. The formula would compensate growers for anticipated production on recently planted acres that do not have sales histories reflective of current production potential. Accommodating the new acreage is an important element in any attempt to equitably implement a producer allotment volume regulation.

The proposal would also authorize the Committee, with USDA approval, to adopt recommendations to alter the number and identity of years to be used in computing sales histories, including the number of years to be used in computing the average. This would allow the Committee to have the flexibility to address unforeseen events that occur that would make it appropriate to modify the number of years used in computing sales histories.

Record evidence supports amending § 929.48 by changing the way sales histories are calculated as proposed by the Committee and allowing for more flexibility in recommending changes to the sales history formula. Therefore, this proposal is recommended for adoption.

Calculations of Fresh and Processed Cranberry Sales Histories

The Committee also proposed that sales histories, starting with the crop year following adoption of this amendment, should be calculated separately for fresh and processed cranberries. In a year an allotment percentage is set, that percentage would be applied only to a grower's processed sales history if fresh fruit is exempt from regulation (as it was in the recent 2 years of regulation). If fresh fruit was not exempt from volume regulation, the allotment percentage would be applied to a grower's total sales history (fresh and processed combined).

As proposed, the amount of fresh fruit sales history may be calculated based on either the delivered weight of the barrels paid for by the handler (excluding trash and unusable fruit) or on the weight of the fruit paid for by the handler after cleaning and sorting for the retail market. Handlers using the former calculation would allocate delivered fresh fruit subsequently used for processing to growers' processing sales. Fresh fruit sales history, in whole or in part, may be added to processed fruit sales history with the approval of the Committee in the event that the grower's fruit does not qualify as fresh fruit at delivery.

Testimony revealed that this proposal would address some of the inequities experienced in the last two volume regulations. Fresh and organic fruit were exempt from the 2000 and 2001 volume regulations under the authority of § 929.58 which provides that the Committee may relieve from any or all order requirements cranberries in such minimum quantities as the Committee, with the approval of USDA, may prescribe. It was determined that fresh and organic fruit did not contribute to

the surplus. Fresh cranberry sales constituted less than 5 percent of the cranberry market. Organically grown cranberries comprised an even smaller portion of the total crop, about 1,000 barrels sold annually. All fresh and organically grown cranberries could be marketed and did not compete with the processed market. For this reason, the Committee recommended that fresh and organically grown cranberries be exempt from volume regulations.

In both years, fresh fruit sales were deducted from sales histories and each grower's sales history represented processed sales only. In 2000, concerns were expressed that this exemption would give an unfair advantage to some cranberry processors (those that did not handle fresh fruit) and to their growers. Because of the timing of the rulemaking, it was decided by the Committee not to recommend any additional changes to the fresh fruit exemption for 2000. However, the Committee would consider the way fresh fruit is handled under a volume regulation in future years. In 2001, the fresh fruit exemption was still recommended to be deducted from sales histories but the exemption was clarified so that fresh fruit was handled as it was intended by the Committee.

In addition, in both years of volume regulation, in the event that the growers' fruit did not qualify as fresh fruit at delivery, the sales from that fruit were added to the growers' processed fruit sales histories. Testimony indicated that in the fresh fruit industry, there are instances when growers deliver fresh fruit that fails the handler's fresh fruit specifications and therefore is converted to processing fruit. In this case, the fruit not used as fresh would be applied to that grower's processed fruit sales history.

It is possible that exempting fresh fruit from volume regulation may not be appropriate in future years. Testimony indicated that because of the exemption from volume regulation, there was an increase in the amount of fresh fruit produced. Many growers took advantage of the exemption and sold fresh fruit when they normally would not. A fresh fruit handler testified that many handlers had more fresh fruit than could be sold. The price fell from 1999 to 2000 and remained stable for 2001.

For this reason and to have sales histories more reflective of actual sales, the Committee is recommending that the Committee begin calculating separate sales histories for fresh and processed sales. Testimony revealed that this proposal would address the inequities experienced in the last two volume regulations.

Testimony indicated the reason for incorporating language specifying that the amount of fresh fruit sales history may be calculated based on either the delivered weight of the barrels paid for by the handler (excluding trash and unusable fruit) or on the weight of the fruit paid for by the handler after cleaning and sorting for the retail market was because handlers process growers' fruit differently. For example, the major cooperative accounts for fresh fruit on a delivered basis. A major cooperative grower delivering 1,000 barrels of fresh fruit would be paid for 1,000 barrels of fresh fruit. Samples are taken at delivery and premiums are paid based on quality. On the basis of its packed out and sold fresh fruit, the cooperative assigns a fresh fruit sales history back through to its growers proportional to their original deliveries.

Independent handlers pay growers for fruit on a packed out basis and pay their growers based on their individual pack outs. If a grower delivers 1,000 barrels to an independent handler, and the pack out is 80 percent, the grower would be credited with 800 barrels of fresh fruit and 200 barrels of processed fruit.

It is not the intent of this proposal to force handlers to change the way they do business with their growers. Therefore, this language acknowledges the different ways handlers pack fruit and allows them to continue to do so.

The Committee would calculate the sales histories on fresh and processed sales separately every year, not just in years of volume regulation.

Record evidence supports modifying the formula for calculating sales histories, allowing for more flexibility in recommending changes to the formula, and adding authority for segregating fresh and processed sales. Therefore, it is recommended that these amendments to § 929.48 be adopted.

Material Issue Number 4—Catastrophic Events That Impact Growers' Sales Histories

The order should be amended to allow more liberal adjustments in growers' sales histories when they lose production due to catastrophic events.

The order currently provides in § 929.48(a)(4) that if a grower has no commercial sales from such grower's cranberry acreage for three consecutive crop years due to forces beyond the grower's control, the Committee shall compute a level of commercial sales for the fourth year for that acreage using an estimated production, obtained by crediting the grower with the average sales from the preceding 3 years during which sales occurred. Any and all relevant factors regarding the grower's lost production may be considered by the Committee prior to establishing a sales history for such acreage.

During the two recent seasons when volume regulations were in place, the Committee appointed an appeals subcommittee for growers who were dissatisfied with their sales histories as calculated by the Committee. Growers could appeal if they believed the figures used in the sales history calculation were incorrect or if they believed the calculation was incorrectly performed by Committee staff.

Testimony revealed that in 2001, there was only one situation that actually met the 3 years of no production criteria. A grower's acreage in Massachusetts was destroyed from chemical contamination not of his doing and this grower was compensated with additional sales history.

The Committee's proposal would provide more flexibility in this provision by authorizing the Committee to recommend rules and regulations to adjust a grower's sales history to compensate for catastrophic events that impact a growers' crop for more than 2 years. At the hearing, Committee witnesses modified their proposal to make this provision more flexible by removing the requirement that a grower's crop had to be impacted for more than 2 years.

The Committee manager testified that growers do experience catastrophic events and forces beyond their control that do not totally destroy their ability to produce a portion of their crop. Using the current criteria of a total loss for 3 concurrent years, few growers, if any, would ever qualify for such an adjustment.

According to the record, there were many growers who had situations where their crop was not totally destroyed for 3 consecutive years, but the losses incurred negatively impacted their sales history. The Committee was unable to authorize any adjustments.

A grower testified that his crop was impacted by the State of Wisconsin Department of Natural Resources (DNR) land that borders on his property. The DNR applied a chemical on a high heat day that spread across the grower's property. This situation destroyed a good percentage of his marsh, and dramatically impacted his crop for two years. The Committee was unable to adjust his sales history because it was not a total loss that impacted his crop for 3 consecutive years.

Under this proposal, this grower could have been provided with additional sales history to compensate him for his losses. Specifically, this grower produced 20,000 barrels of

cranberries and his allotment was 9,000 barrels. The 2001–02 volume regulation thus had a greater impact on him than on other growers.

If the language was kept at more than 2 years of loss as originally proposed by the Committee, this grower would still not have been provided with additional sales history. This is one of the reasons the Committee recommended removing the more than 2-year requirement and leaving it to the Committee's discretion to establish guidelines through the rulemaking process to determine if the grower should be provided additional sales history. The reason the Committee included the more than 2 years restriction initially was because sales histories are based on the best 4 out of 6 years. A grower's calculation of initial sales history would allow the 2 lowest years to be excluded in the calculation. The Committee thought this would cover any situation involving 1 or 2 years of losses. However, the Committee believes unique situations could occur where the losses on a grower's crop for even a single year could warrant an adjustment to that grower's sales history.

Other discussions at the hearing on this proposal pertained to what would constitute a "catastrophic" event. The Committee recommended changing the terminology from the current language which states "forces beyond the growers' control" to "catastrophic events" because they wanted to ensure that normal agricultural problems that occur, such as long periods of rain that may have a detrimental impact on a grower's crop or hail damage, would not be situations where growers would be entitled to additional sales histories. It was testified that excessive rain or hail is an event that is beyond a grower's control, but it may not be a catastrophic event. Some of these situations would be covered by crop insurance, so the grower is already being compensated for his loss.

Testimony indicated that the intent of the proposal is to allow the Committee to recommend, through informal rulemaking, specific determinations of what catastrophic events would entitle growers to adjustments in their sales histories. The regulation should benefit growers by allowing them to understand what situations would entitle them to such adjustments. It could also help reduce the number of appeals filed and reduce administrative time and expenses in reviewing appeals.

Testimony also indicated that each case should be reviewed and considered on its own merits (within guidelines established through the rulemaking process) and that less than a 100 percent loss can significantly impact a grower's sales history. The proposed amendment addresses this situation by not requiring a grower to have suffered a total crop loss before being eligible for an adjustment in his or her sales history.

Testimony indicated that the proposed amendment would have a positive impact on producers, as the Committee would be in a position to compensate growers who experienced losses due to catastrophic events. The Committee would recommend procedures and guidelines to be followed in each year a volume regulation is implemented.

Allowing the Committee to make such recommendations through informal rulemaking would provide the flexibility to ensure the best interests of the growers are being served.

Record evidence supports allowing adjustments in sales histories for catastrophic events that impact a grower's crop. The procedures and guidelines would be recommended by the Committee and approved by USDA. Therefore, the addition of paragraph (e) to § 929.48 is recommended to be adopted.

Material Issue Number 5—Remove Specified Dates Relating To Issuance of Annual Allotments

Section 929.49, Marketable quantity, allotment percentage, and annual allotment, should be revised by removing specified dates relating to the issuance of annual allotment; clarifying the provision related to calculation of the allotment percentage; and updating information growers need to submit to the Committee to receive annual allotments.

Currently, § 929.49 provides that when a producer allotment regulation is implemented, USDA will establish an allotment percentage equal to the marketable quantity divided by the total of all growers' sales histories. The allotment percentage is then applied to each grower's sales history to determine that individual's annual allotment. All growers must file an AL–1 form with the Committee on or before April 15 of each year in order to receive their annual allotments. The Committee is required to notify each handler of the annual allotment that can be handled for each grower whose crop will be delivered to such handler on or before June 1.

Proponents testified that the Committee's experience during the 2000 and 2001 crop years has proven that maintaining a specified date by which growers are to file a form to qualify for their allotment and for the Committee to notify handlers of their growers' annual allotments has been difficult. The proposed amendment would delete the specified dates and allow a more appropriate date by which growers are to file forms and the Committee is to notify handlers of their growers' annual allotments to be established through informal rulemaking. The Committee would like to establish dates that the industry can realistically meet each season when a volume regulation is implemented. Because volume regulation was not recommended until the end of March, growers had difficulty in submitting the required reports in a timely manner. Additionally, the rulemaking process to establish the allotment percentage had not been completed by June 1. Therefore, the Committee was unable to notify handlers of their growers' allotment by the specified deadline. For these reasons, the Committee should have the flexibility to recommend other dates to USDA for approval that can realistically be met by the industry and serve the purposes of the marketing order. With this proposed amendment, reasonable filing dates could be established in line with the timing of the recommendation and establishment of volume regulation.

The Committee also recommended clarifying the explanation of how an allotment percentage is calculated. Currently, § 929.49(b) states that such allotment percentage shall equal the marketable quantity divided by the total of all growers' sales histories. It does not specify that "all growers" sales histories' includes the sales histories calculated for new growers. The Committee has proposed in this amendment proceeding that sales histories given to new growers each season (growers that have no prior sales history) should also be included in the calculation of the allotment percentage. Section 929.48(a)(5) as proposed would provide that the Committee compute a sales history for a grower who has no history of sales associated with such grower's cranberry acreage during a crop year when a volume regulation has been established, by taking the average of the first year yields as established by the Committee and multiplying it by the number of acres. During the two recent years of volume regulation, new growers' sales histories were included in the calculation of the allotment percentage. The amendment is merely a clarification to ensure that total sales histories are used in this calculation.

The Committee also proposed revising the information required to be submitted by growers to qualify for an annual allotment. Currently, § 929.49(d) provides that the Committee shall require all growers to qualify for allotment by filing with the Committee,

on or before April 15 each crop year, a form wherein growers include the following information: (1) The location of their cranberry producing acreage from which their annual allotment will be produced; (2) the amount of acreage which will be harvested; (3) changes in location, if any, of annual allotment; and (4) such other information, including a copy of any lease agreement, as is necessary for the Committee to administer the order. Such information is gathered by the Committee on a form specified as the AL–1 form.

The proposed amendment would modify the criteria by only requiring pertinent information to be required by growers on the AL–1 form. Record evidence showed that growers are assigned a grower number and the amount of acreage on which cranberries are being produced is maintained. However, the proponents testified that the location of the cranberry producing acreage is not maintained. Therefore, the Committee does not see the need to collect this information on the form. The form also asks about changes in location, if any, of their annual allotment including the lease agreement. Annual allotment is linked to a grower's cranberry producing acreage and, since the acreage cannot be moved from one location to another, information on changes in location is not relevant. Therefore, the Committee has proposed that the information required to be submitted by growers be revised by deleting the information that the Committee does not need to operate a producer allotment program. Other information that is currently requested (including identifying the handler(s) to whom the grower will assign their allotment) would remain unchanged.

The modifications proposed by the Committee add flexibility and clarity to the order and are therefore recommended for adoption.

Material Issue Number 6—Clarify How the Committee Allocates Unused Allotment to Handlers

Section 929.49 should be amended to clarify the method by which the Committee allocates unused allotment to handlers having excess cranberries. Specifically, the Committee would be required to make such a distribution in a way that is proportional to each handler's total allotment.

Currently under the producer allotment volume regulation features of the order, § 929.49(g) provides that handlers who receive more cranberries than the sum of their growers' annual allotments have "excess cranberries" and shall notify the Committee. Handlers who have remaining unused allotment are "deficient" and shall notify the Committee. The Committee is required to equitably distribute unused allotment to all handlers having excess cranberries.

This provision of the order allows handlers to handle additional cranberries by providing them with unused allotment. During years of a producer allotment volume regulation program, handlers cannot handle cranberries unless those berries are covered by an allotment.

The proponents testified that there has been a debate in the industry on the interpretation of what equitable distribution means and how it should be accomplished. To add specificity, the Committee proposed replacing the words "equitably distribute" with "proportional to each handler's total allotment".

The proponents further testified that the distribution of unused allotment would only be to those handlers who have excess fruit and are in need of allotment to cover that fruit. Such handlers would then receive any available allotment in proportion to the amount such handler handles. Record evidence indicated that if handlers had excess fruit and needed allotment from the Committee, they would receive up to the amount they needed to cover that excess fruit. Allotment would only be distributed proportionately to handlers when there are more requests for unused allotment than available unused allotment.

This proposed amendment is supported by record evidence and is recommended for adoption.

Material Issue Number 7—Growers Who Do Not Produce a Crop During a Year of Regulation and Assignment of Their Allotment

Section 929.49 should be amended to eliminate the requirement that growers assign any unused allotment to their handlers under certain circumstances.

As previously discussed, each year a producer allotment regulation is in place, each cranberry grower receives an annual allotment. This allotment represents the volume of that grower's cranberries that can be handled.

Currently, § 929.49(f) requires growers who do not produce cranberries equal to their computed annual allotment to transfer their unused allotment to such growers' handlers. The handlers are then required to equitably allocate the unused allotment to growers who deliver excess cranberries to such handlers. Unused allotments remaining after all such transfers have occurred are then transferred to the Committee.

The proponents testified that one concern of growers was what happens to a grower's annual allotment if the grower decides not to grow a crop during a year of volume regulation. Currently, such growers have no alternative but to transfer their allotments to their contracted handlers. The handlers, in turn, can reallocate those growers' annual allotments among growers delivering excess cranberries to that handler. Growers felt that the annual allotments are based on their sales and that they should have more control over what happens to their unused annual allotment. Further, they believed that their decision not to grow a crop in a year of oversupply should not result in other growers being able to deliver a greater portion of their crops. This dilutes the effectiveness of the allotment regulation.

Concerns were raised at the hearing regarding the contractual arrangements that growers may have with their handlers, and how this amendment could affect those arrangements. The proponents testified that this amendment is not intended to encroach on private contractual arrangements between growers and handlers. Such arrangements fall outside the scope of the order.

One grower testified that if a grower does not want to transfer the allotment to his or her handler, it should be given back to the Committee and the Committee should be accountable for all the allotment that is available. It was supported that growers who do not choose to grow a crop should not be required to transfer such allotment to their handler.

The hearing testimony did not explain what happens to the allotment if a grower does not grow a crop and does not transfer the allotment to such grower's handler. It was suggested that the Committee should have informal rulemaking authority to further define what would happen to such allotment.

The concept of allowing growers to choose whether or not to assign unused allotment to their handlers was not opposed at the hearing. The modification proposed by the Committee is recommended for adoption.

Material Issue Number 8—Transfers of Allotment

Section 929.50 of the order should be amended to allow growers to transfer their allotments during a year of a producer allotment volume regulation, and to provide that a sales history remain with the lessor when there is a total or partial lease of cranberry acreage to another grower.

As previously discussed, in years of a producer allotment volume regulation, an allotment percentage is established and is applied to each grower's sales history to determine that grower's allotment. A grower's allotment represents the amount of cranberries a handler may purchase from or handle for that grower. A complete discussion of how growers' sales histories are calculated is contained in the findings and conclusions regarding Material Issue No. 3.

Currently, § 929.50, Transfers, does not allow the direct transfer of allotment between growers. What it does provide is that in the event cranberry acreage is sold or leased, the sales history associated with that acreage is transferred to the buyer or lessor. Therefore, the only option available to a grower to accomplish a transfer of allotment (aside from purchasing additional acreage) is to complete a lease agreement with another grower. Section 929.50 also provides that growers who lease their acreage must file a lease agreement with the Committee before the Committee recognizes it. The Committee will not recognize such lease agreement until the Committee is in receipt of a completed lease form. Total and partial leases of cranberry acreage require the lessor to transfer the appropriate sales history associated with the acreage being leased.

The Committee manager testified that during 2000 and 2001, when producer allotment volume regulations were implemented, a grower who wanted to obtain more allotment from another grower to cover barrels harvested from his or her acreage had to enter into a short-term lease agreement. Such a legal agreement had to be filed with the Committee. Usually this agreement was just for 30 to 60 days in duration, just to allow growers to transfer sales history (and, indirectly, allotment) to one another.

The Committee manager testified that many of these lease agreements were initiated during the two years of volume regulation and created a burden on the Committee staff as well as on the growers involved. The Committee staff had to process the transfers, keep track of the transfers, and then reverse the transfers within a relatively short period of time. Also, the Committee staff had to recalculate the allotment available to each handler since it may have changed when growers' sales histories and allotments are recalculated under the lease agreement. A problem many growers did not consider at the time these transfers were taking place is that the sales history transferred from one grower to another is combined with that second grower's sales history. The allotment percentage is then applied to that grower's total sales history. This may not result in as much additional allotment as that grower expected. Witnesses testified that this revised process would not affect growers' sales history calculations since allotment would be transferred, not sales histories.

Record evidence showed that this complex transfer process is necessary because there is no method currently available under the order for direct transfers of allotment among growers. The proposed amendment would allow a simple transfer of allotment between growers.

Under this proposed amendment, growers delivering to the same handler could transfer allotments among themselves freely. Growers delivering to different handlers who wish to transfer allotment would have to receive prior consent in writing from the respective handlers, and provide documentation to that effect to the Committee prior to the transfer of allotment. Record evidence shows that the requirement for handler notification and consent is necessary so that handlers know how much allotment they will have available during the crop year.

To ensure that the Committee is aware of allotment transfers, growers would be required to file appropriate forms with the Committee by such date as the Committee may determine. The Committee manager testified that such form would likely include such information as the name of the two growers involved in the transfer, the amount of allotment being transferred, and the handler or handler(s) to whom the growers deliver their crops.

The Committee manager also testified that the Committee should be informed by August 1 of the transfer. This date would be 30 days prior to the beginning of the crop year and would allow the Committee staff to complete the required paperwork on the transferred allotment. One witness testified, however, that growers should be able to transfer allotment through harvest. Growers should be allowed to transfer through harvest because they would not know until harvest how much unused allotment they would have available or how much additional allotment they would need. The witness suggested a modification to change the deadline for transfers from August 1 to December 1.

USDA is modifying the Committee's proposal. The order should provide that the date by which allotment transfers must be completed be established through informal rulemaking. The Committee needs to evaluate whether a later date would be administratively feasible to accomplish and consider the needs of the growers in determining this date. No opposing testimony was presented on this proposed amendment. Therefore, this portion of the proposal is recommended with a modification.

With regard to lease agreements, the Committee manager testified that currently, the lessor and lessee must provide written details regarding the lease to the Committee. The lessee then reports and is credited with the sales from the leased acreage during the lease period. Sales from leased acreage are calculated to determine the lessee's new sales history. At the end of the lease period, barring renewal, the cranberry acreage and all sales history associated with that leased acreage reverts back to the lessor or the owner. The sales history includes all sales history accumulated during the lease period attributable to the leased acreage. The lessee would be required to notify the handler or handlers to whom they are delivering the sales from the leased acreage to be credited to the lessor. It would be the responsibility of the lessor to ensure that the handler receiving the cranberries from the leased acreage is correctly crediting the lessor with the appropriate sales figures.

The manager testified that most leases are a temporary situation, and therefore, most of the grower paperwork is unnecessary because eventually the sales history attributable to the leased acreage would revert back to the lessor or the owner of the acreage. Thus, this proposed amendment provides that in cases where acreage is leased, the sales history associated with that acreage would remain with the landowner. However, the amount of allotment that would be transferred to the lessor could be a part of the lease agreement between the parties involved.

There was no opposition testimony on this proposal. This proposed amendment would simplify the process for transfers of allotment and is recommended for adoption.

Material Issue Number 9—Authorizing Producer Allotment and Withholding Programs in the Same Year

Section 929.52, Issuance of regulations, should be amended to authorize the implementation of the producer allotment and withholding programs in the same year. Currently, that section provides that USDA may regulate the volume of cranberries that may be handled in a crop year by either fixing free and restricted percentages (withholding) or by establishing an allotment percentage (producer allotment).

The record evidence is that that Public Law 107–76, enacted on November 28, 2001, amended the Agricultural Marketing Agreement Act of 1937 by adding the following provision to section 8c(1): "The Secretary is authorized to implement a producer allotment program and a handler withholding program under the cranberry marketing order in the same crop year through informal rulemaking based on a recommendation and supporting economic analysis submitted by the Cranberry Marketing Committee. Such recommendation and analysis shall be submitted by the Committee no later than March 1 of each year."

Therefore, this proposed amendment is intended to bring the marketing order into conformity with the Act. The Committee manager testified that operating both programs during the same year would likely serve as a safety valve. Since the producer allotment program would be implemented early in the year prior to harvest, it could be set too low. A withholding program could therefore be implemented to take additional fruit off the market. The withholding regulation could also be suspended later in the year if it was deemed to be unnecessary.

One witness testified that he was in favor of the amendment but was not clear how both forms of volume regulation would operate in the same year of regulation. The Committee would have to address how these two programs should be used together in a given year. This is an area that could be explored in the economic analysis the Committee would need to submit in support of such a recommendation for regulation, and would assist USDA in its review of that recommendation.

This proposed amendment would bring the order into conformity with the enabling statute. Thus, it is being recommended for adoption.

Material Issue Number 10—Dates for Recommending Volume Regulations

Section 929.51 of the order should be amended to provide deadlines for Committee recommendations for volume regulations. Specifically, if only one type of volume regulation were recommended, a producer allotment regulation would have to be recommended by March 1 each year, and a withholding program would have to be recommended before August 31. However, in the event the Committee determines it desirable to recommend both a producer allotment and withholding regulation, such a recommendation would have to be made by March 1. Currently, § 929.51 does not specify any certain dates by which the Committee must make a recommendation to USDA for volume regulation of the upcoming crop.

As previously discussed, to implement both types of volume regulations during the same year, the Act requires such a Committee recommendation prior to March 1. This deadline is proposed to be added to § 929.51 rather than to § 929.52 as proposed by the Committee. There are no dates specified in the marketing order by which the Committee must recommend a handler withholding or producer allotment regulation when only one type of volume regulation is chosen.

The Committee manager testified that recommending a producer allotment program prior to March 1 would be beneficial to growers. Growers have indicated they need to know as soon as possible whether the Committee is going to recommend a regulation, since a producer allotment program permits handlers to acquire only a portion of their growers' crops. The Committee's decision influences whether growers decide to cut back on purchases of chemicals and fertilizer or to take acreage out of production. The later the decision is made, the greater the chances are that growers will already have started working on preparing their bogs to produce a full crop. Therefore, it is in the best interest of the growers to have a Committee recommendation for a producer allotment program prior to March 1.

The witness further testified that the Committee would hold its regularly scheduled winter meeting in February, at which time the Committee would review the most current information on the upcoming crop.

It was also testified and supported that the March 1 date should be flexible to allow for unforeseen circumstances that could arise that could prevent the Committee from estimating the marketable quantity prior to that date. Proponents testified that the Committee may not be able to reach a consensus by that date and may need more time to review the current situation within the industry. Although the March 1 deadline would apply in most years, USDA is recommending that § 929.51 include a provision that an exception could be made when unforeseen circumstances preclude the Committee from making an informed recommendation that early in the year. This modification is consistent with record testimony and the Committee's brief.

Regarding the handler withholding program, the Committee's original proposal indicated that such a regulation should be made as soon as possible after August 1. The record supports a modification—that free and restricted percentages should be recommended no later than August 31.

The Committee manager testified that the Committee, prior to August 31, should recommend a handler withholding program. This would provide the Committee staff ample time to prepare reports based on handler inventory reports through July 31. The Committee could then meet at its summer meeting (typically held in August) and review the most complete and accurate information available to make a decision on the implementation of such program.

Some concerns were raised at the hearing that establishing a program at the required dates would make the percentages inflexible to crop conditions as they occur. However, any established regulation could be modified, suspended, or terminated pursuant to § 929.53 as crop or market conditions necessitate such action.

Therefore, the Committee's proposal, with appropriate modifications, is recommended for adoption.

Material Issue Number 11—Exemptions From Regulations

Section 929.58 of the order should be amended to add authority to exempt fresh, organic or other types or forms of cranberries from any or all regulatory requirements imposed under the order.

Currently, § 929.58 provides authority for USDA to relieve from any or all requirements under the order, the handling of cranberries in such minimum quantities as the Committee may recommend. In 2000 and 2001, the Committee recommended the implementation of producer allotment volume regulations. In both years, an exemption from the volume regulations was provided for fresh and organic cranberries. It was determined that such fruit comprised a small portion of the crop, did not compete directly with processing fruit cranberries, and did not add materially to the industry surplus of fruit.

Under current production and marketing practices, there is a distinction between cranberries for fresh market and those for processing markets. Cranberries intended for fresh fruit outlets are grown and harvested differently. Fresh cranberries are dry picked while cranberries used for processing are water picked, the bog is flooded and the cranberries that rise to the top are harvested. Dry picking is a more labor intensive and expensive form of harvesting. Some cranberry bogs are designated as "fresh fruit" bogs and

are grown and harvested accordingly. Only the lower quality fruit from a fresh bog goes to processing outlets. Organic cranberries are a growing niche market and it was believed that regulating them could have had an adverse effect on the production and marketing of this product.

In 2000, the first time a volume regulation was implemented in nearly 35 years, fresh and organic fruit was exempt from that regulation. The industry experienced an increase in fresh fruit production because of the exemption. This was caused by processed fruit growers changing to fresh fruit production. Also, the intent of the fresh fruit exemption in the 2000–01 volume regulation was to only exempt cranberries going to retail outlets as fresh cranberries, and questions arose as to what constituted "fresh" under the regulations.

Therefore, the Committee recommended this change to the exemption provision to clarify the current language and provide guidelines for the specific forms and types of cranberries that can be exempted. The Committee manager testified at the hearing that the different forms or types of cranberries might include cranberries sold as packed-out fresh fruit and/or organically grown cranberries sold as fresh or processed fruit.

The witness also testified that extending a minimum exemption to particular forms or types of cranberries during a period when a regulation was in effect would ensure that sufficient fruit would be available to meet current demand, and would encourage the industry to develop new markets. The amendment, however, would not limit the different forms or types of cranberries the Committee could consider in its marketing policy. Such recommendation for exempting cranberries from volume regulations would take place in the Committee's deliberations for volume regulation and could be accomplished through informal rulemaking.

The Committee manager testified that the types of cranberries could be extended to include different varieties of cranberries. For example, the witness testified that the Stevens variety of cranberries could be exempted if circumstances warranted such an exemption.

The Committee would also determine what particular regulations the exemption would apply to. For example, for the 2000 and 2001 seasons, fresh and organic cranberries were exempt only from the volume regulation provisions, but handlers still had to file reports and pay assessments on those cranberries. The Committee could make a recommendation to exempt specific types or forms of cranberries from any or all of the other regulations in effect under the marketing order.

Therefore, this decision recommends that the exemption provision in § 929.58 be modified to clarify the current language and provide that specific forms and types of cranberries can be exempted from any or all regulatory requirements. There was no opposition testimony presented on this issue.

Material Issue Number 12—Outlets for Excess Cranberries

Section 929.61 of the order should be amended to broaden the scope of noncommercial and noncompetitive outlets authorized as outlets for excess cranberries.

Under the order, the producer allotment program provides for limiting the amount of the total crop that can be marketed for normal commercial uses. If a producer allotment program were implemented, USDA would establish an allotment percentage that would equal the marketable quantity divided by the total of all growers' sales histories. The allotment percentage would be applied to each grower's individual sales history to derive each grower's annual allotment. Handlers cannot handle cranberries unless they are covered by a grower's annual allotment.

Handlers who receive more cranberries than are covered by their growers' annual allotments have excess cranberries. The Committee is required to equitably distribute any unused allotment it receives to those handlers who have excess cranberries.

Section 929.59 defines excess cranberries as cranberries withheld by handlers after all unused allotment has been allocated. It also provides for handlers to notify the Committee by January 1 of a written plan to dispose of excess cranberries and to dispose of them by March 1.

There is no need to limit the volume of cranberries that may be marketed in noncommercial and noncompetitive outlets. Section 929.61 of the order designates outlets for handlers to dispose of excess cranberries. Specifically, the provision establishes noncommercial outlets as charitable institutions and research and development projects approved by USDA for the development of foreign and domestic markets, including, but not limited to, dehydration, radiation, freeze drying, or freezing of cranberries. Noncompetitive outlets are established under § 929.61 as any nonhuman food use (animal feed) and foreign markets, except Canada. Canada is excluded because significant sales of cranberries to Canada could result in transshipment back to the United States of the cranberries exported there. This could disrupt the U.S. market, contrary to the intent of the volume regulation.

To ensure that excess cranberries diverted to the specified outlets do not enter normal marketing channels, certain safeguard provisions are established under § 929.61. These provisions require handlers to provide documentation to the Committee to verify that the excess cranberries were actually used in a noncommercial or noncompetitive outlet. This section also provides that the storage and disposition of all excess cranberries withheld from handling shall be subject to the supervision and accounting control of the Committee. In addition, the Committee, with USDA approval, may establish as needed rules and regulation for the implementation and operation of this section.

Under the final rule establishing and implementing the 2000 volume regulation, regulations pertaining to excess cranberries were established under § 929.104. These regulations include all outlets mentioned in § 929.61. The Committee recommended foreign markets be excluded as outlets for excess cranberries because the industry is actively selling cranberries in at least 54 foreign countries today. When foreign markets were listed as potential outlets for excess cranberries, cranberry exports were not as significant to the industry as they are today. However, it was determined that because excess cranberries could not be "handled" and fresh cranberries were exempt from the 2000 volume regulation, this recommendation was deemed unnecessary. However, USDA revised § 929.104 to clarify that excess cranberries cannot be processed and sent to foreign markets.

In the 2001 volume regulation, the provisions on outlets for excess cranberries were modified to broaden the scope of research and development projects authorized as outlets for excess cranberries. It was determined by the Committee that the provision from the 2000 volume regulation regarding research and development projects was too restrictive and could exclude some outlets for excess cranberries that could be deemed noncommercial and noncompetitive. The Committee unanimously recommended modifying paragraph (a)(4) of § 929.104 to state that any research and development projects approved by the Committee would be eligible as outlets for excess cranberries. This provided more flexibility in determining if a specific project could

be considered noncompetitive or noncommercial. Research and development projects were not limited to dehydration, radiation, freeze-drying, or freezing of cranberries for the development of foreign markets.

The Committee proposed amending § 929.61 to provide more flexibility in establishing outlets for excess cranberries if volume regulations are recommended and implemented in the future. Testimony revealed that adoption of this proposal would provide the Committee, with USDA's approval, the ability to recognize and authorize the use of additional or new noncommercial and/or noncompetitive outlets for excess cranberries through informal rulemaking.

Mr. Gregory Gitter, representing a Wisconsin cooperative, also proposed amending § 929.61. His proposal recommended that foreign markets only be authorized as outlets for excess cranberries in countries whose total annual consumption is less than the equivalent of 20,000 barrels of cranberries and/or cranberry products. According to his testimony, the purpose of the proposal is to expand noncompetitive outlets for excess cranberries by clearly defining in what countries excess cranberries can be used. In this regard, Mr. Gitter testified that this specific information would allow handlers to better manage their marketing strategies of excess cranberries.

In support of the Committee's proposal, the Committee manager testified that the current provisions did not allow the Committee the ability to recognize and authorize the use of additional or new noncommercial or noncompetitive outlets during the last two volume regulations. During the 2001 regulation, some handlers suggested outlets to dispose of their excess cranberries, which could have been deemed noncommercial or noncompetitive, but were not allowed based on the current provisions.

The provisions regarding noncommercial outlets are currently restricted to only charitable institutions and research and development projects approved by USDA for the development of foreign and domestic markets, including, but not limited to, dehydration, radiation, freeze-drying, or freezing of cranberries. The provisions regarding noncompetitive outlets are restricted to any nonhuman food use and foreign markets, except Canada.

The Committee's proposal would expand the noncommercial outlet provisions by specifying charitable institutions and research and development projects, but not limiting the authority to these outlets. For noncompetitive outlets, the Committee's proposal would expand the provisions by specifying nonhuman food uses and "other outlets established by the Committee with USDA approval." The Committee manager testified that there could be new and unforeseen noncommercial and noncompetitive outlets that are not available or even exist today. Testimony indicated that these changes would allow the Committee flexibility in making recommendations for these outlets.

There was no opposition testimony regarding the Committee's proposal to expand the outlets for disposition of excess cranberries. Testimony did relate to the procedures the Committee uses in approving these outlets. For the 2001 volume regulation, the Committee developed guidelines for deciding whether specific research and promotion projects or foreign market development proposals were noncompetitive or noncommercial and therefore, authorized for use for excess cranberries. A review panel was established consisting of Committee staff and USDA personnel. It was determined that Committee members or any other industry member should not be a part of the review panel for confidentiality reasons.

Testimony reflected that the method used in 2001 to review these proposals to determine whether they should be approved as outlets for excess cranberries could be improved. It was testified at the hearing that the intent of the Committee's proposal is to provide latitude to the Committee in developing guidelines and in determining the best method of review. This would be accomplished by informal regulation. If this proposal is adopted, and a producer allotment volume regulation is recommended, the Committee would include in its recommendation for volume regulation, guidelines for reviewing proposals for disposal of excess cranberries.

Different safeguard procedures may be appropriate for different outlets for excess cranberries as some outlets are well defined and documentation is required to verify the excess cranberries were disposed of in such outlets. For example, excess cranberries being given to a charitable organization could be easily documented by the organization receiving the excess cranberries. In addition, cranberries being disposed of as animal feed could be easily documented.

Mr. Gitter stated that his proposal to expand the noncompetitive outlets for excess cranberries would clearly define what countries are open for foreign development by specifying a minimum number of barrels of annual consumption in that country required before an outlet is considered competitive. Mr. Gitter's proposal would base the determination of what constitutes a competitive market on the annual consumption of cranberries in each foreign country. If a country's consumption exceeded 20,000 barrels, it would be considered a competitive market and not authorized as an outlet for excess cranberries. Mr. Gitter testified that 20,000 barrels may be too high a number, but that some specific minimum number should be required.

The Committee manager testified that data relative to annual consumption in foreign countries is not available. The Committee collects information from handlers on the countries where cranberries are shipped and the quantities sold. In some cases, he testified, the cranberries are transshipped to other countries.

The Committee manager testified that the Committee's proposal provides flexibility not available under Mr. Gitter's proposal by authorizing the Committee to develop guidelines for research and development projects for excess cranberries at the time the volume regulation is recommended. The desired results of Mr. Gitter's proposal can be achieved by adopting the Committee's proposal. Mr. Gitter was concerned that allowing the Committee to make this determination does not provide the detail needed prior to the beginning of the season.

Based on record evidence, § 929.61 should be amended to expand the outlets authorized for excess cranberries. There was no testimony provided at the hearing that opening new markets with excess cranberries should not be done. However, defining noncompetitive markets as those markets having an annual consumption of less than 20,000 barrels of cranberries or cranberry products would not be an effective way of determining whether a market is competitive. Information on annual consumption in foreign countries is not currently available.

Additionally, the record revealed that there are many more factors that need to be considered when determining if a market is competitive. The development of new and foreign markets requires significant investment of time and money prior to achieving significant sales. Some foreign markets may never achieve the equivalent of 20,000 barrels of sales. New foreign markets are unfamiliar with cranberries and cranberry products in general, and it takes several years to work with processors and consumers to establish a

foundation on which to build a profitable and sustainable market. A witness testified that allowing sporadic disposal of excess cranberries in years of volume regulation in markets where others have been investing for years would create havoc in those markets, probably permanently damaging those emerging markets.

The record revealed that during volume regulations in recent years, some companies emerged to take possession of growers' excess cranberries with no payment, but with the promise to share profits, if any, from foreign sales. A witness testified that low-cost cranberries offered in overseas markets compete with allotment cranberries for the same markets. Even if the low-cost cranberries are sold in a market devoid of cranberries, transshipment to established markets is possible.

It is not the intent of this proposal to restrict sales to foreign markets. Foreign markets are one area where growth is occurring and demand is increasing. Exports of cranberries have increased from 184,000 barrels in 1988 to 824,000 barrels in 2000. This provision only applies to excess cranberries resulting from a producer allotment volume regulation. Any handler is allowed to compete in any market at any time with allotment cranberries or free market cranberries.

Because competitive markets can change from season to season and new and different research ideas can be devised, the Committee should develop guidelines at the time a producer allotment volume regulation is recommended. Considerable expense can be involved in developing markets and planning research and development projects. Therefore, the Committee should define as specifically as possible noncompetitive and noncommercial outlets eligible for use with excess cranberries.

For the above reasons, § 929.61 should be amended to broaden the scope of activities authorized as outlets for excess cranberries.

Material Issue Number 13—General Withholding Provisions

Section 929.54 of the order, which sets forth the general parameters pertaining to withholding regulations, should be amended to more closely reflect current production and handling practices.

When the cranberry order was promulgated in 1962, volume regulation authority was limited to "withholding" regulations. Under this form of regulation, free and restricted percentages are established, based on market needs and anticipated supplies. The free percentage is applied to handlers' acquisitions of cranberries in a given season. A handler may market free percentage cranberries in any chosen manner, while restricted berries must be withheld from handling.

The withholding provisions of the order were used briefly over three decades ago. The industry has since developed a second method of regulation—producer allotments—designed to overcome the difficulties encountered with the application of withholding regulations. Although the cranberry industry has not used the authority for withholding regulations in quite some time, the record evidence supports maintaining this tool for possible future use. However, substantive changes in industry practices have rendered current withholding provisions in need of revision.

The record shows that at the time the withholding provisions were designed, the cranberry industry was much smaller, producing and handling much lower volumes of fruit than it does now. In 1960, production was about 1.3 million barrels; by 1999, a record 6.3 million barrels were grown. A much higher percentage of the crop was marketed fresh—about 40 percent in the early 1960's versus less than 10 percent in recent years.

Changes in harvesting and handling procedures have been made so the industry is better able to process higher volumes of cranberries. Forty years ago, virtually all cranberries were harvested dry, and water harvesting was in an experimental stage of development. Water harvesting is currently widespread in certain growing regions; cranberries harvested under this method must be handled immediately as they are subject to rapid deterioration.

In the early 1960's, handlers acquired some cranberries that had been "screened" to remove extraneous material that was picked up with the berries as they were being harvested, and "unscreened" berries from which the extraneous material (including culls) had not been removed. The handler cleaned some of the unscreened berries immediately upon receipt, while others were placed in storage and screened just prior to processing.

Paragraph (a) of § 929.54 provides, in part, that when a withholding regulation is implemented, the restricted percentage will be applied to the volume of "screened" berries acquired by handlers. Since the term "screening" is obsolete, the Committee proposed eliminating all references to that term. To accomplish this, the Committee recommended deleting a substantial portion of § 929.54(a). The Committee's proposed revision to this paragraph (as set forth in the Notice of Hearing) failed to indicate, however, how the restricted percentage would be applied.

Testimony indicates that it remains the intent of the industry to apply the withholding regulations to the quantity of marketable cranberries acquired by handlers; culls and other extraneous material that are normally discarded during the handling process should not be used to meet a handler's withholding obligation. However, the record also indicates that cleaning and processing practices differ somewhat among the various handling facilities, and there may not be a single, most efficient means of determining what portion of handlers' receipts constitutes marketable cranberries. It may not be economical, for example, to apply the restricted percentage to cranberries only after a truckload of berries has been dumped and run through the entire processing line. USDA is therefore recommending a modification to § 929.54(a) to provide that any restricted percentage be applied to the volume of marketable cranberries acquired by each handler. The manner in which the marketable volume would be calculated would need to be developed and set forth through the informal rulemaking process. This would entail a Committee recommendation and approval by USDA.

Section 929.54 also currently provides that withheld cranberries must meet such quality standards as recommended by the Committee and established by USDA. That section further provides that the Federal or Federal-State Inspection Service will inspect such cranberries and certify that they meet the prescribed quality standards. The intent of these provisions is, again, to ensure that the withholding regulations reduce the volume of cranberries in the marketplace by not allowing culls to be used to meeting withholding obligations. The inspection and certification process is also meant to assist the Committee in monitoring the proper disposition of restricted cranberries, thereby ensuring handler compliance with any established withholding requirements.

The need for inspection and certification of withheld cranberries, and the agency that would be responsible for those activities, were subject to much debate at the hearing. Several witnesses stated that the inspection and certification of withheld cranberries would be cost prohibitive, particularly since most withheld berries would have to subsequently be dumped,

therefore generating no revenue for growers or handlers. Witnesses also expressed concern that inspection requirements could inordinately slow down handling operations. There was also discussion of potential differential impacts of such requirements because some handling facilities operate in ways that lend themselves to more efficient methods of pulling representative samples (for inspection purposes) than others.

The preponderance of evidence is that the authority for imposing inspection and certification requirements be permissive rather than mandatory. While such requirements may be needed to effectively implement a withholding program, alternative safeguards could be developed by the industry to achieve its objectives at lower costs. Section 929.54 is proposed to be amended accordingly.

Another area of some discussion was designation of the agency that would be conducting any required inspection and certification activities. The Committee had recommended (as proposed in the Notice of Hearing) that its staff be used to perform such functions. It supported this recommendation at the hearing by stating this may be a more cost effective manner of monitoring implementation of a withholding program.

Witnesses at the hearing objected, however, stating the Committee does not currently have sufficient staff with the requisite expertise to provide such services in a timely manner. These witnesses also speculated that it might be more expensive for the industry to hire and train its own personnel to perform this function than to utilize currently available services of the Federal or Federal-State Inspection Service. Finally, witnesses expressed the belief an independent, third party inspection agency would have more credibility than staff hired by the industry.

In its brief, the Committee recommended that the Federal or Federal-State Inspection Service be retained as the agency responsible for any required inspection and certification. USDA is accepting this recommendation.

In its proposal to streamline the provisions of § 929.54, the Committee inadvertently eliminated two items that it did not support at the hearing.

The first of these currently appears in the introductory text of paragraph (a) of § 929.54. The inadvertently deleted text states that the withholding requirements do not apply to any lot of cranberries acquired by a handler for which the withholding obligation had already been met by another handler. The purpose of this provision is to allow transfers of free percentage cranberries among handlers without subjecting those berries to the restricted percentage more than once. The record shows that handler transfers occur quite frequently in the cranberry industry and, thus, this provision is still needed.

The second item appears in paragraph (b) of § 929.54, and provides that the Committee, with approval of USDA, shall prescribe the manner in which handlers must comply with their withholding obligations, and the date or dates by which handlers must comply with those obligations. The record evidence that this provision is also still needed and should be retained.

Material Issue Number 14—Buy-Back Provisions Under the Handler Withholding Program

Section 929.56 of the order, which sets forth provisions for handlers to buy back withheld cranberries under a withholding regulation, should be amended to: (1) Allow direct handler to handler buy-back arrangements; (2) add criteria the Committee needs to consider in establishing buy-back prices; (3) revise the handler payment schedule; and (4) provide that if the Committee cannot purchase free cranberries to replace restricted fruit requested to be released under the buy back provisions, the money deposited by the requesting handler will be refunded to that handler.

As discussed under the previous Material Issue Number 13, one method of volume regulation authorized under the order is referred to as the handler withholding program. Under such regulations, free and restricted percentages are established. These percentages are applied to handlers' acquisitions, with the handlers being required to withhold from handling their restricted cranberries.

Section 929.56 of the order, entitled "Special provisions relating to withheld (restricted) cranberries," sets forth procedures under which handlers may have their restricted cranberries released to them. These provisions are commonly referred to in the industry as the buy-back provisions.

Under the current buy-back provisions, a handler can request the Committee to release all or a portion of his or her restricted cranberries for use as free cranberries. The handler request has to be accompanied by a deposit equal to the fair market value of those cranberries. The Committee then attempts to purchase cranberries in an amount equal to the amount of free cranberries from other handlers. Cranberries so purchased by the Committee are transferred to the restricted percentage and disposed of by the Committee in outlets that are noncompetitive to outlets for free cranberries. The provision that each handler deposit a fair market price with the Committee for each barrel of cranberries released and that the Committee use such funds to purchase an equal amount or as nearly an equal amount as possible of free cranberries is designed to ensure that the percentage of berries withheld from handling remains at the quantity established by the withholding regulation for the crop year.

The Committee has the authority to determine the fair market price for the release of restricted cranberries. The money deposited with the Committee by handlers requesting release of their restricted cranberries is the only money the Committee has available for acquiring free cranberries. Thus, the amount deposited must be equal to the then current market price or the Committee will have insufficient funds to purchase a like quantity of free cranberries.

The Committee is required to release the restricted cranberries within 72 hours of receipt of a proper request (including the deposit of a fair market value). The record shows that this release was made automatic so that handlers would be able to plan their operations, and very little delay would be encountered.

If the Committee is unable to purchase free berries to replace restricted cranberries that are released under these provisions, the funds deposited with the Committee are required to be returned to all handlers in proportion to the volume withheld by each handler.

The withholding provisions of the order have not been used in many years. In recent years, when volume regulations were deemed necessary, the Committee chose to recommend producer allotment regulations rather than withholding regulations. Nevertheless, the evidence supports retaining the withholding provisions of the order in the event they are needed in the future. However, the cranberry industry has identified several portions of the order pertaining to the withholding program, including those relating to buy-back, that need to be updated to meet current industry needs.

The Committee recommended amending § 929.56 to authorize direct buy-back arrangements between handlers. Under this modification, a handler would not have to go through the Committee to have his or her restricted berries released. Instead, that

handler could arrange for the purchase of another handler's free cranberries directly. All terms of the deal, including the price paid, would be between the two parties involved and would not be limited by the Committee. The Committee recommended this change to add flexibility to the order. It could offer a more efficient method of buying back cranberries, since no Committee administrative costs would be incurred. Handlers would have the option of using this method, or they could buy back their berries through the Committee, as is currently provided.

There was no objection to this modification at the hearing, and it is being recommended for adoption.

There are four criteria currently listed in § 929.56 that the Committee needs to consider in establishing a fair market price under the buy-back program. These include prices at which growers are selling their cranberries to handlers; prices at which handlers are selling fresh berries to dealers; prices at which cranberries are being sold to processors; and prices at which the Committee has purchased free berries to replace released restricted berries.

The Committee recommended adding a fifth criterion to the list—the prices at which handlers are selling cranberry concentrate. A Wisconsin grower/handler proposed adding growers' costs of production as an additional criterion. The level of both of these items appear generally known in the industry and appear to be relevant criteria to take into consideration in recommending a fair market value. Thus, it is being proposed that they be added to § 929.56.

Under the current buy-back provisions, handlers are required to deposit with the Committee the full market value of the berries they are asking to be released. The Committee proposed a different payment schedule so that handlers would not have to make a large payment of cash prior to the sale of their restricted cranberries. The Committee proposed that 20 percent of the total amount should be paid at the time of the request, with an additional 10 percent due each month thereafter. There were no objections to this revision expressed at the hearing.

However, in its brief, the Committee modified its proposal to provide that 20 percent of the total amount would be due at the time of the request, with the balance to be due within 60 days. The Committee's brief provided no compelling argument for this change, and there was no opportunity for other parties to express their opinions on this payment schedule. Thus, this decision recommends including in the order the payment plan originally proposed by the Committee. However, this payment plan could be revised through general rulemaking authority contained in § 929.56. Any such revisions would require a Committee recommendation and USDA approval.

As previously discussed, releases by the Committee of withheld berries are currently required to be virtually automatic. In its proposed amendment of the buy-back provisions, the Committee recommended that no release be granted unless the Committee was able to purchase free berries to replace those being bought back. Under this scenario, if the Committee was unable to purchase the free berries, it would refund the money received from the requesting handler, and the request would be denied.

The Committee manager testified that this change is necessary to maintain an appropriate volume of cranberries in the marketplace. If withheld berries are released for handling, and no free berries are purchased to replace them, more cranberries would be available than the Committee deemed appropriate. This would obviate the effectiveness of the volume regulation and result in lower grower returns.

Several handlers objected to this portion of the Committee's proposal. They indicated that it would unduly limit handlers' abilities to fill their customers' needs.

It would also unduly delay any decisions on handlers' requests for releases of their restricted berries.

Those opposed to this change also testified that there should be free cranberries available for purchase. This is because handlers with inventories (which are free from regulation) would have an economic incentive to use those inventories to fill current orders, and sell current year's cranberries to the Committee for its disposal. It was also pointed out that if the Committee were not able to purchase unrestricted fruit, that would be an indication that either the market had improved or that the original free percentage determination was incorrect. Handlers with additional sales opportunities should not be placed at a disadvantage because of these situations.

USDA concurs that the Committee's recommendation could unduly restrict handlers' opportunities for buying back their restricted fruit. As such, this change is not being recommended for adoption.

One additional proposal to amend § 929.56 was received. Stephen L. Lacey, on behalf of two cranberry handlers, proposed changing the refund provisions in the buy-back program. If the Committee is unable to purchase free berries under the buy-back system, it is currently required to refund the money to all handlers proportional to the amount each handler withheld under regulation. Mr. Lacey recommended that the money be returned to the handler who deposited it to be distributed to the growers whose fruit was sold. He stated it would be unfair to penalize growers whose fruit was sold by handlers not being able to pay them for that fruit because that money went to other handlers' growers.

USDA believes that Mr. Lacey's arguments have merit. Additionally, this change could provide an incentive for handlers to make available free cranberries for purchase to replace restricted cranberries that are released under the buy-back provisions. For these reasons, USDA is recommending adoption of this proposal.

Section 929.56 is being recommended for amendment as described above.

Material Issue Number 15—Handler Marketing Pool and Buy-Back Under the Producer Allotment Program

The order should not be amended to include the establishment of a handler marketing pool or buy-back under the producer allotment provisions of the order.

Stephen L. Lacey, on behalf of Clement Pappas and Company, Inc., and Cliffstar Corporation, proposed adding a new § 929.47 to the order establishing a handler marketing pool as part of the marketable quantity in any crop year in which a producer allotment regulation is effectuated. As a modification of this proposal, a Massachusetts handler recommended adding buy-back provisions to the producer allotment program as well.

Under Mr. Lacey's proposal, in any crop year in which a producer allotment regulation were recommended, a Handler Marketing Pool would be established. Handlers determined to be in surplus would have to contribute fruit to the pool, and handlers determined to be deficit would have access to those cranberries in the pool. The Committee would determine which handlers are in surplus and which handlers are in deficit based on a formula that would appear in the order. The order would also contain provisions relating to pool pricing and payment terms.

In support of the proposal, Mr. Lacey testified that during the 2000 and 2001 volume regulations, concerns were raised about the effects volume controls could have on handlers that do not maintain inventories of cranberries. He testified that the surplus that necessitated volume regulations was

held by two entities, and the regulations put the remaining, non-surplus handlers at a significant competitive disadvantage because they experienced difficulty in securing product from the surplus handlers to fill their customers' needs.

With one exception, Mr. Lacey's proposal is identical to the language that was drafted by the amendment subcommittee, which attempted to develop a recommendation for a handler marketing pool. The difference is the section on pricing. Mr. Lacey's proposal would allow non-surplus handlers to purchase pool cranberries at a price equal to the price that handler is paying its growers for the current crop.

In volume regulation discussions over the last 2 years, concerns were raised that the current producer allotment provisions place handlers who do not have inventories at a disadvantage. Because some handlers do not maintain inventories, the restricted percentage does not provide enough fruit for them to meet their market demands and maintain market share. Although handler-to-handler purchases are a normal business practice (with or without a volume regulation), a producer allotment restriction increases the need for handlers to purchase from handlers with inventories to maintain market share. Some handlers believe this places them in a vulnerable position, needing more fruit than normal from their competitors.

The purpose of the handler marketing pool would be to provide cranberries to those handlers who do not have a surplus in years of volume regulation. Some witnesses suggested the existence of such a mechanism would help to build industry consensus for volume regulation and for the appropriate marketable quantity which would help facilitate the use of volume regulation when needed. As proposed, the volume of cranberries in the pool would be included within the marketable quantity, not be in addition to the marketable quantity. If the pool cranberries were in addition to the marketable quantity, the effectiveness of the volume regulation would be decreased.

Regarding payment terms, the proposal would require handlers acquiring cranberries from the pool to deposit an initial payment of $5.00 per barrel with the Committee within 30 days of receipt of product. Subsequent payments would be made every 60 days in the amount specified by the Committee based on handler payments to growers. Full payment would be made by August 31 of the following year. The Committee would make immediate payments to the surplus handlers.

The proposed amendment would allow the Committee to collect information necessary to verify prices. Mr. Lacey testified that the pricing mechanism would ensure that non-surplus handlers would not be competitively harmed by a volume regulation, and would help maintain the prices paid to growers that deliver to these handlers. In addition, this pricing mechanism would establish a fair price to handlers purchasing cranberries and the growers that produced the cranberries.

Mr. Lacey discussed activities of the amendment subcommittee, which began discussions on ways to improve the volume regulations in February 2001. Discussed were the concepts of adding buy-back provisions to the producer allotment program (similar to those currently existing under the withholding provisions) or establishing a handler marketing pool. In additional subcommittee meetings in 2001, consensus was reached for the subcommittee to focus its efforts on establishing a fruit-based handler marketing pool within the marketable quantity. At an August 2001 teleconference meeting, concerns were raised about the pricing mechanism and whether it would afford handlers access to cranberries at below market rates.

As a result of these concerns, the subcommittee did not forward the amendment proposal for consideration by the full Committee. Nevertheless, the full Committee did consider a motion to include the handler marketing pool with the Committee's proposed amendments at an August 27, 2001, meeting, which motion was rejected.

According to Mr. Lacey, there is overwhelming support from handlers, growers and the public member for the concept of a handler marketing pool. In addition, he testified that the information necessary to administer the program is already collected by the Committee in connection with its marketing policy report.

Mr. Lacey testified that the proposal would not raise costs to producers, handlers or USDA. It would require the Committee to undertake additional efforts to administer the marketing pool, and any costs associated with this effort would be paid from assessment funds. Mr. Lacey further testified that the proposal would, over time, improve producer returns by ensuring stability in the industry and help prevent further consolidation at the handler level.

A Massachusetts independent handler testified in support of the handler marketing pool. He also proposed adding a buy-back provision under the producer allotment program similar to the provisions under the handler withholding program. He testified that he would support adopting one or the other or both of these provisions, as long as the cranberries he has cleaned, frozen and put in the freezer are made available to him.

In support of the handler marketing pool, this handler testified that this proposal is essential to make any allotment volume regulation a fair and reasonable regulation. Some handlers are smaller than others and some have inventories while others do not. He testified that these differences among handlers must be recognized and without this provision, the allotment option, as opposed to the withholding option, would remain as it presently exists, the lesser of two evils. He further testified that a handler marketing pool with a fair pricing formula would dramatically alter the existing environment where consensus in unachievable. According to his testimony, this proposal would alleviate the many difficulties experienced in garnering support for a volume regulation.

This handler testified that if the handler marketing pool concept is rejected, the entire amendment process would have failed to address the real issues that keep the industry polarized. He recommended a modification to the proposal's pricing provisions. He suggesting adding to the paragraph on pool pricing that the handlers purchasing from the pool would pay the price that they are paying their growers, or the average price that all handlers purchasing from the pool are paying their growers, whichever is higher. He believed adding this language would avoid the possibility of handlers manipulating their pool price by not paying their growers a reasonable price.

Regarding this handler's proposal to add a buy-back provision under the producer allotment program, he testified that this would further improve the allotment option and do so in a way that would generate industry-wide support. The proposed provision would allow handlers to buy back excess cranberries delivered by their growers. The proposed buy-back mechanics of the producer allotment program would be identical to the provisions under the withholding (as previously discussed under Material Issue Number 14). The same pricing formula would apply to purchases of cranberries as is set forth in the handler marketing pool proposal.

This handler stated that there would not be an incentive for growers to deliver fruit over their allotment

because they would not be paid for any deliveries over their allotment. Growers' only incentive to exceed their allotment would be to help their handler maintain its market share. He further stated that it is in the growers' best interests to allow non-surplus handlers to buy cranberries back even though the growers are not compensated. It was unclear under this proposal who would be responsible for cleaning, processing and storage charges for excess cranberry deliveries. This handler believed that because growers would not be compensated for any excess cranberry deliveries, there would only be a minimal amount of excess cranberries to buy back.

As an example of how the producer allotment program negatively impacted his business, the handler testified that during the last volume regulation, his company lost a large customer to a Canadian handler because his company was no longer able to be a reliable supplier. Although the relationship continued, sales to the customer went from 200,000 gallons of concentrate to 50,000 gallons. He does not believe the volume regulation should drive customers out of the country. He also testified that the smaller handlers, although not small businesses under the SBA definition, are at a distinct disadvantage when competing with the larger volume handlers.

Regarding this handler's proposal to add buy-back provisions under the producer allotment program, he testified that to be consistent, similar provisions should be in place under both the withholding and the producer allotment programs.

A Massachusetts grower testified that although he was not opposed to a buy-back provision or a handler marketing pool, he believed that there should also be a provision guaranteeing the grower reasonable returns. He testified that during the last two volume regulations, the focus has been on handlers fighting for market share, and little attention was given to growers. He further testified that if there is going to be a pool for handlers to be able to have access to cranberries to compete with one another, the growers should be guaranteed the cost of production.

A Wisconsin handler in opposition had two main objections to the handler marketing pool as proposed. He testified that the definition of a handler's "needs" should be based on purchases from growers of domestic cranberries rather than basing the needs on a percentage of prior years' sales. He believes this definition favors handlers that do not purchase all their cranberries from growers.

As an example, he discussed a handler that would purchase 50,000 barrels of cranberries from growers and 200,000 barrels from other handlers. This handler's needs would be defined as 250,000 barrels. If a volume regulation were implemented, only the 50,000 barrels would be subject to the allotment, and that handler would be considered in deficit and authorized to purchase a minimum of 200,000 barrels from the marketing pool.

This would encourage handlers to not purchase directly from growers because their needs would be better met with purchases from the marketing pool. This handler testified that the proposal is clearly an attempt to limit a handler's risk of entering contracts with growers, and to reward the handler for not entering contracts with growers. This proposal, as written, would have the potential to seriously reduce the competitive marketplace for grower fruit, thus depressing prices paid to growers. It would also discourage normal handler-to-handler purchases, because the deficit handler would wait and buy cranberries from the pool at a lower price.

The handler testified that the proposal is especially troublesome in light of the fact that the industry clearly acknowledges that the international supply of fruit is expected to exceed annual sales for the next few years. The proposal would devastate individual growers because it would insulate any handler from having to directly compete for grower fruit by offering better prices or terms because they would be protected by the marketing pool. This handler would support the proposal if the calculation of need used a maximum need number as the number of barrels directly purchased from growers in the production area. As in the example provided, the handler who purchases 50,000 barrels from growers and 200,000 from handlers would have its need limited to 50,000 barrels.

In addition, he believed that the pricing mechanism should be linked to the market price for cranberries during the year of volume regulation rather than what handlers are paying their growers. He did not believe it was equitable to allow a handler to purchase cranberries from the marketing pool at a price that could be lower than what the surplus handler paid its growers. As an example, he testified that his company can sell cranberries to Tropicana Company for $20 per barrel, but could have to sell to a competitor handler for $17, if that is what that handler paid its growers.

This handler further testified that the handler marketing pool concept is potentially highly detrimental to growers and highly beneficial to handlers that choose to contract directly from growers for less fruit than their needs. He believes that if this proposal were adopted, handlers would be encouraged to make fewer contracts with growers and buy their cranberries directly from the pool. Also, buyers (or second handlers) would be encouraged to purchase a minimal amount of fruit from growers, so they can become a handler and have access to the pool.

Based on record evidence, the order should not be amended to include a handler marketing pool. Conceptually, the handler marketing pool showed promise in addressing the concerns of some handlers. However, an effective means of establishing a pool under the producer allotment program has not been presented.

Opponents of this proposal discussed relevant flaws in how this pool would be implemented in an effective manner. The pricing mechanism of the pool is a major concern. In addition, the methodology used to determine a handler's status, whether surplus or deficit, is problematic.

As previously indicated, one handler suggested that a handler buy-back provision be added to the producer allotment program in order to be consistent with the handler withholding program. However, including a buy-back provision under the producer allotment program would be counterproductive.

The withholding method of volume regulation is applied at the handler level. Growers deliver to their handler everything they grow. Free and restricted percentages are applied to each handler's acquisitions of cranberries. Because handlers apply the percentage after delivery, the restricted cranberries are in the possession of the handlers and available to be sold.

The intent under the producer allotment program is to discourage production at the grower level so that less fruit is delivered to handlers. Establishing a buy-back under a producer allotment program is problematic for that reason. If growers believed that some of their excess fruit would eventually be bought back, increased production could be encouraged, defeating the purpose of the program. Even if the growers were not paid for any deliveries in excess of their allotment, handlers could encourage them to deliver excess cranberries.

If buy-back provisions were added to the producer allotment program, handlers and growers whose deliveries exceed their allotment are rewarded, and the handlers who comply with the

allotment are at a detriment. Although the Massachusetts handler testified that only a minimal amount of cranberries would be excess, it would set the stage for growers to be encouraged to deliver in excess of their allotment, defeating the purpose of the program. Encouraging growers to deliver excess cranberries with no compensation to assist their handler in maintaining market share is contrary to the objectives of a producer allotment volume regulation.

Therefore, the proposal to add buy back provisions under the producer allotment program is not being accepted.

During the discussions at the subcommittee level, there was never industry consensus on the pricing mechanism for cranberry purchases from the pool. Some handlers believed the price should be set at the same price they pay their growers. Some growers believed this price would give handlers an incentive to pay them less as testified by one grower. Growers believe the price should be set to reflect the cost of production. Some believed the price should be set at fair market value at the time of purchase, including recovery costs for cleaning, shipping, storage, etc. Without resolution of this issue and cohesiveness from all segments of the industry, the handler marketing pool concept would not work.

The volume regulation authority of the order is intended to address industry oversupply problems and enhance grower returns on an industry-wide basis.

Regarding foreign cranberry production, volume regulation can only be imposed on cranberries grown in the production area. The impact of foreign competition is also an item that may be taken into consideration prior to recommending volume regulation.

For the above reasons, record evidence does not support adding a handler marketing pool or buy-back provisions under the producer allotment program.

Material Issue Number 16—Grower Exemption

The order should not be amended to allow the first 1,000 barrels of each grower's production to be exempt from regulations issued under the order.

A Massachusetts grower proposed an amendment to the order to authorize an exemption from order provisions for the first 1,000 barrels of cranberries produced by each grower. This proposal appeared in the Notice of Hearing, although it was subsequently withdrawn by the grower who submitted it. Nevertheless, two witnesses testified on the proposed amendment at the hearing.

One witness testified in favor of the proposal. He believed it would offer relief to small cranberry growers who are facing difficult economic circumstances.

The Committee manager testified in opposition to the proposal. Based on his review of the 1999 crop, which was the last crop not regulated, if the exemption was in place 510 farm units out of a total of 1,124 farm units would have been totally exempted from the volume regulation. The witness testified that these farm units represented 203,778 barrels of cranberries that would have been exempt from the producer allotment volume regulation.

The Committee manager also testified that within the Ocean Spray cooperative, 35 percent of its members are growers that produce less than 1,000 barrels. In Massachusetts alone, the number is 50 percent, and in Wisconsin, 90 percent of the cooperative's growers produce less than 1,000 barrels. The witness also testified that handlers that handle a large number of small growers' cranberries would receive more relief from such an exemption than handlers that handle the fruit of larger growers. A particular handler would not be regulated at all if all the growers delivered less than 1,000 barrels of their production from their individual farm units. The witness also was concerned that growers could split their farm units into units that produce 1,000 barrels or less so that all of their production would be exempt. For example, if a grower produces 2,000 barrels, such grower could split his or her farm unit and have two farms that produce 1,000 barrels each to take advantage of the exemption.

Record evidence does not support the amendment as proposed. This exemption could result in such a magnitude of fruit being unregulated that any volume control program would be rendered ineffective. This proposal could have the effect of requiring growers that produce more than 1,000 barrels—roughly half of the grower population—to hold back more of their fruit to meet the increased allotment percentage that would be required as a result of the exemption. Additionally, the proposal could provide an incentive for growers to reorganize their businesses so that all of their production would be exempt.

For the above reasons, USDA recommends that the proposed amendment to exempt the first 1,000 barrels of each grower's production should not be adopted.

Material Issue Number 17—Expansion of Production Area

The production area should not be expanded to include the States of Maine, Delaware and the entire State of New York.

The marketing order and its rules and regulations apply only to cranberries grown in the production area, as defined in § 929.4 of the order. Currently, the production area is defined to include the States of Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York.

The marketing order was promulgated in 1962. The order's primary regulatory authority is volume regulation, but it also provides for research and promotion activities to promote the consumption of cranberries and increase demand. The order also provides the authority to collect and disseminate information on industry statistics to benefit the entire industry.

Currently, cranberries are produced in 12 States, but the vast majority of farms and production are concentrated in Massachusetts, New Jersey, Oregon, Washington, and Wisconsin. Massachusetts was the number one producing State until 1990, when Wisconsin took over the lead. Since 1995, Wisconsin has been the top producing State. Together, both States account for over 80 percent of cranberry production. Average farm size for cranberry production is very small. The average across all producing States is about 33 acres. Wisconsin's average is twice the U.S. average, at 66.5 acres, and New Jersey averages 83 acres. Average farm size is below the U.S. average for Massachusetts (25 acres), Oregon (17 acres) and Washington (14 acres).

Small cranberry growers dominate in all States: 84 percent of growers in Massachusetts harvest 10,000 or fewer barrels of cranberries, while another 3.8 percent harvest fewer than 25,000 barrels. In New Jersey, 62 percent of growers harvest less than 10,000 barrels, and 10 percent harvest between 10,000 and 25,000 barrels. More than half of Wisconsin growers raise less than 10,000 barrels, while another 29 percent produce between 10,000 and 25,000 barrels. Similar production patterns exist in Washington and Oregon.

Evidence produced at the hearing indicated that there are 39 growers in Maine and approximately 265 producing acres. Testimony indicated that one producer in Maine produces 75 percent of Maine's production on 111 acres. The remaining 38 growers thus have combined acreage of 154 acres, or

an average of 4 acres apiece. This is substantially below the average of the major producing States of Wisconsin (66.5 acres) and Massachusetts (25 acres). The range of acreage for the remaining Maine growers is from 1 to 5 acres bogs, averaging about 110 barrels per farm.

In 2000, 9,000 barrels were harvested in Maine compared with 18,000 barrels in 2001. This represents a very small proportion of total U.S. production of 5.6 million barrels in 2000 (0.2 percent) and of 5.4 million barrels in 2001 (0.3 percent).

There are 2 growers in New York and 1 grower in Delaware commercially producing cranberries. Combined, these two States have less acreage and production than the totals in Maine, and are thus of less consequence in the scheme of the total domestic industry.

According to testimony received at the hearing, most Maine cranberries were utilized in the processed markets until 1999. There is no juice market for Maine cranberries, and most processed cranberries are used in the ingredient market. At the time of the hearing, it was estimated that about 20 percent of Maine production was used in the fresh market, primarily in Maine and New Hampshire. Maine handlers source additional cranberries from Canadian rather than U.S. growers due to transportation costs, the value of the dollar, and trade-off agreements with blueberry handlers in Canada.

For many years, the cranberry industry enjoyed increasing demand for cranberry products, primarily due to the success of cranberry juice-based drinks. This situation encouraged additional production. While production capacity increased dramatically, demand leveled off. This has resulted in supplies outpacing demand, high levels of inventories, and dramatic drops in grower prices. Grower prices rose from $8.83 per barrel in 1960 to a peak level of $65.90 per barrel in 1996. By 1998, grower prices had decreased to $36.60 per barrel, and returns for the 2000 crop year were only $19.60 per barrel, well below the cost of production, which ranges from $15 to $45 per barrel. This situation led to the Committee recommending, and USDA establishing, volume regulations for the 2000 and the 2001 crops.

The record indicates that domestic growers, including those in Maine, benefited from the volume controls under the order. Grower returns in Maine were estimated at $12 in 2000 and $23 in 2001. A grower testified that the increase in grower returns was directly related to the volume regulation under the order in 2001.

Proponents testified that all cranberries produced in the U.S. are connected and compete for markets. It was expressed by proponents that cranberry growers share a common bond relative to the decline in prices and increasing returns to growers will take a concentrated effort by the entire industry. It was further testified that production from unregulated areas flows freely into the marketplace, which counteracts the Committee's ability to establish and maintain equilibrium. Proponents also expressed the opinion that all growers benefit from the operation of the marketing order and, thus, all should share the burden of regulation necessary to restore economic health to the industry.

Opponents testified that States with insignificant production should be exempt from the marketing order. One opponent recommended having a State threshold of 500 acres or 50,000 barrels of production before inclusion under the marketing order. If there were several non-regulated States producing 50,000 barrels of cranberries annually, this could have a significant negative impact on the regulated States.

Maine is a relatively new cranberry growing State. Testimony indicated that the maximum number of years producers have been growing cranberries is 10 years, with many growers just beginning to grow cranberries in the last 3 years. The average yield per acre in Maine is only 60 barrels. This compares with average yields in the major producing States of 186 barrels in Wisconsin and 133 barrels in Massachusetts.

Testimony indicated that Maine has the potential to increase its acreage from the current 265 acres to 2,000 acres. At 2,000 acres, Maine would represent about 13 percent of the total U.S. acreage of 15,100 acres. However, with current yields, Maine production would still be less than one-half of one percent of the U.S. total.

Although Maine's current production represents 0.3 percent of total domestic production, proponents of expanding the production area claimed that the potential for increased production and more efficient yields exists. It was further testified that growers and handlers in the regulated States would have an incentive to develop acreage in Maine if it is not included under the order.

Opponents testified that given the state of the industry, new cranberry acreage in Maine is not likely. In addition, opponents testified that strict environmental regulations and associated costs would deter development of any additional acreage. Anyone wanting to develop new bogs would elect to develop them in Canada before Maine because of the environmental restrictions and climate. It was further testified that yields would not increase dramatically because of the climatic conditions in Maine.

Certain aspects of growing cranberries in Maine are restrictive and the climatic conditions may not be ideal for growing cranberries. It would be risky financially to develop and plant new bogs in any great degree given the current oversupply situation.

To help stabilize market supply and demand conditions, volume regulation was introduced under the order in 2000, marking the first time in over 30 years that such regulation was implemented. Volume regulation was again implemented in 2001. No volume regulations were recommended in 2002. Proponents of expanding the production area testified that production in non-regulated areas diminishes the effectiveness of volume regulation. It was testified that growers in non-regulated areas benefit from the sacrifice of those in the regulated area. In addition, recommending volume regulations is very controversial for regulated producers and handlers, partly because of non-regulated production. If all U.S. growers were regulated, it was testified that there would be more grower support for a volume regulation.

If Maine was included in the production area, the allotment percentage established under a producer allotment volume regulation would not change because that State produces such small volumes of cranberries. Thus, there would be no benefit to regulated growers to including production of Maine growers at the current time.

Additionally, Maine growers testified that any volume regulation would have a negative impact on Maine growers because they are mostly newer acres not in full production. These growers believed that they would be at a disadvantage in the allocation of sales histories. Proponents testified that many acres were planted in the production area at the same time Maine was planting, and the current order provides adjustments in sales histories for growers with newer acreage and growers with no sales histories.

Opponents testified that Maine cranberries are superior, and premium prices are received for cranberries grown in Maine. One grower cited a study that showed Maine cranberries have a higher sugar content than other cranberries. Another grower testified that testing on Maine cranberries demonstrates it is a superior product,

probably due to the younger bogs and less pollution in Maine. A Committee witness countered by testifying that if Maine shipped their cranberries to the Massachusetts wholesale market, they would not receive a premium price. Growers testified that Maine's economy would be further damaged if Maine cranberries were included under the marketing order. Washington County—accounting for most of Maine's production—has the lowest income and highest unemployment in Maine. Testimony revealed that Washington County is designated a Federal HUB zone or depressed area.

Proponents testified that Maine benefits from the domestic and foreign generic promotion sponsored by the Committee and should contribute to those promotions. The additional revenue generated from assessing Maine handlers would allow for increased promotion funds. However, the additional revenue to be expected from regulating Maine cranberries would be minimal (18,000 barrels times the assessment rate of 18 cents a barrel would yield assessment income of only $3,240).

Additionally, opponents testified that Maine does not benefit from promotion of juice and/or concentrate since no Maine production is used for juice and/or concentrate. Testimony indicated that Maine does not want to fund out-of-State companies in the juice market. Further, growers testified that generic promotion could actually harm the Maine industry because much has been done to establish Maine products as unique. A grower testified that a generic promotion would put the Maine branding program in jeopardy as funds used to promote "the Maine mystique" would be diminished. The Maine Growers Association collects a voluntary assessment of $.20 per barrel. These funds are used for promoting Maine products, including cranberries.

Proponents also testified that the Committee would have access to more information on cranberry imports, acquisitions, and dispositions if the production area were expanded. This would enable the Committee to more accurately establish its marketing policy.

Currently, the Committee has no access to data on foreign cranberry imports into Maine and New York, and it has had no success in requesting this information voluntarily. In October 1999, authority was granted to USDA to collect information from processors and handlers outside the production area. It also allows collection of information on cranberry imports. However, to implement this authority, the order need not be amended for this reason. Additionally, opponents testified that Maine growers would continue to provide production information to the National Agricultural Statistics Services.

The Act requires that a marketing order be limited in its application to the smallest regional production area practicable. USDA finds that expanding the production area under the cranberry marketing order would be contrary to the Act at this time. Production in the areas proposed to be added to the current production area is so minimal that their inclusion under the order would have no impact on the level of volume regulation that may need to be imposed to reduce oversupply situations. Additionally, little additional assessment revenue would be generated for generic promotion purposes, and information collection needs could be accomplished through other means.

For the above reasons, USDA concludes that the definition of production area should not be revised to include the States of Maine, Delaware and New York.

Material Issue Number 18—Adding Authority for Paid Advertising

Section 929.45 of the order, Research and development, should be amended to add authority for the Committee to fund paid advertising.

Currently, § 929.45 authorizes the Committee, with the approval of USDA, to participate in production research, marketing research, and market development projects designed to assist, improve, or promote the marketing, distribution, consumption, or efficient production of cranberries. There is no specific authority for the Committee to fund paid advertising.

The Act lists specific commodities for which paid advertising may be conducted under marketing order programs. Until recently, the Act did not include cranberries in that list. The record shows that authority to allow paid advertising for cranberries was added to the Act by Public Law 106–78, Agricultural Appropriation Bill, signed on October 22, 1999.

As previously discussed in this decision, the domestic cranberry industry has recently been experiencing an oversupply situation. Increases in cranberry production have exceeded growth in demand for cranberries and cranberry products. One marketing order tool the industry has used to help cope with the current situation is volume control through producer allotment regulations.

The Committee has also engaged in promotion activities designed to increase demand for cranberries. For example, in recent years the Committee has participated in USDA's Foreign Agricultural Service's Market Access Program (MAP). Under this program, industry funds are augmented by USDA funds to promote the use of domestic products in overseas markets. The record shows that the Committee's export promotion program has resulted in increased foreign sales.

Additionally, at the time of the hearing, the Committee was in the process of developing a domestic promotion program. The Committee believes that expanding demand will benefit growers and handlers in the industry.

The Committee proposed adding paid advertising authority to the order to provide it with another tool to promote the consumption of cranberries in its export and domestic programs. Currently, paid advertising of cranberries is limited to branded advertising by individual handlers or processors in the industry. The Committee would like to use assessments or other available funding sources (such as MAP funds) for paid advertising as a component of its promotion programs to meet its stated objectives of increasing demand and consumption of cranberries and cranberry products. There may be opportunities, for example, to use paid advertising as a means of providing consumers with relevant information on the health-related benefits of cranberries.

There was no opposition expressed to this Committee proposal. For the above reasons, it is recommended that § 929.45 be amended by adding authority for paid advertising.

Material Issue Number 19—Definition of Cranberries

Section 929.5 of the order should not be amended to revise the definition of "cranberries."

The order's provisions, including volume regulations, assessments, and reporting requirements, apply to all cranberries grown in the production area. Currently, § 929.5 defines cranberries to mean all varieties of the fruit *Vaccinium macrocarpon,* known as cranberries, grown in the production area.

The Committee proposed that the genus and species *Vaccinium oxycoccus* be added to the definition of cranberries. *Vaccinium oxycoccus,* also known as European cranberry, grows wild in Europe, Canada, and some parts of the United States. The record evidence established that it is not commercially produced in the United States. During shortfalls in domestic

production, the industry has imported *Vaccinium oxycoccus* to use in cranberry products.

The Committee recommended adding *Vaccinium oxycoccus* to the definition of cranberries so that the Committee could obtain information on the quantity of that species handlers acquire. This would enable the Committee to make better marketing decisions in recommending such things as volume regulations, and keep data separate from the regulated species of cranberry during years of volume regulation. The record shows that there is no intent to subject this species to marketing order requirements (such as volume controls) other than those relating to reporting.

Witnesses testified that this change would make the marketing order definition consistent with the Food and Drug Administration's (FDA) definition of cranberry, which includes *Vaccinium macrocarpon* and *Vaccinium oxycoccus*. Witnesses however, do not agree with the FDA definition because the two varieties are distinctly different in flavor, appearance and acid content. Some witnesses testified that the industry should work with FDA to change its definition rather than change the marketing order definition. Further, concerns were raised that inclusion of the term in the definition would legitimize *Vaccinium oxycoccus* fruit as "true" cranberries, which is not the Committee's or the domestic industry's intent.

Currently, § 929.105 of the rules and regulations in effect under the order requires handlers to report to the Committee the total quantity of cranberries and *Vaccinium oxycoccus* cranberries the handlers acquire and the amount they have in inventory. This information is required to be submitted to the Committee on a quarterly basis. Witnesses acknowledged through testimony that the needed information regarding *Vaccinium oxycoccus* is and can be obtained through these reports.

The evidence supported that the Committee is able to obtain the information intended under this proposal through current provisions. With the regulations already in place requiring handlers to report all receipts and dispositions of *Vaccinium oxycoccus*, and the lack of the need to regulate such variety, the definition of cranberries should remain as it is.

Record evidence does not support amending the marketing order to change the definition of "cranberries," and the proposed amendment is not being recommended for adoption.

Material Issue Number 20—Clarification of the Definition of Handle

The order should be amended to clarify the definition of handle that appears in § 929.10. This definition serves to identify those activities that are subject to regulation under the order.

Currently, the definition of handle specifies, in part, that handle means to sell, consign, deliver, or transport fresh cranberries or in any other way to place fresh cranberries in the current of commerce within the production area or between the production area and any point outside thereof in the United States or Canada.

The Committee proposed modifying this language to clarify that the transporting of fresh cranberries to foreign markets other than Canada is also considered handling. According to testimony, the current language could be confusing as it could be construed that handling of fresh cranberries is only applicable to movement within the production area, the United States and Canada. However, the Committee manager testified that fresh cranberries are exported to many foreign countries including the United Kingdom, Germany and Japan. Placing fresh cranberries into the current of commerce within these and other foreign countries would constitute handling. The Committee proposal merely clarifies this language to avoid any confusion in the definition of handle. There was no opposition testimony on this proposed change.

In addition, the definition of handle currently excludes from handling, the cold storage or freezing of excess cranberries for the purpose of temporary storage during periods when an annual allotment percentage is in effect prior to their disposal. Section 929.10 does not currently exclude the temporary cold storage or freezing of withheld cranberries when a withholding provision is in effect.

The Committee proposed including the cold storage or freezing of withheld cranberries as an exemption from handling for the purpose of temporary storage during periods when withholding provisions are in effect prior to their disposal. The Committee manager testified that handlers should be allowed to temporarily use cold storage or freezing of restricted cranberries when a handler withholding regulation is in effect just as the authority exists for excess cranberries under a producer allotment. The period in which handlers could temporarily use cold storage or freezing storage of either excess and/or restricted cranberries could not exceed the date set by the Committee (with USDA approval) for the disposition of excess and/or withheld cranberries. There was no opposition testimony to this proposal.

Record evidence supports modifying the definition of handle to clarify that handling includes the placing fresh cranberries within the stream of commerce to markets within the United States, as well as to all foreign countries. In addition, record evidence supports adding an exemption from handling for the temporary freezing or cold storage of restricted cranberries under a handler withholding program.

USDA is recommending that § 929.10 be amended as proposed by the Committee.

Material Issue Number 21—Reporting Requirements

Currently under the order, there is a reference to a reporting requirement for growers under § 929.48, Sales History. The reporting requirement specifies that growers shall file a report with the Committee by January 15 of each crop year, indicating the total acreage harvested, the total commercial cranberry sales in barrels from such acreage, and the amount of any new or renovated acreage planted, and to allow the committee to compute a sales history for each grower.

Section 929.62 currently includes reporting requirements for handlers. The requirements include reports relating to handler inventories, receipts, amount of cranberries handled, withheld and other reports deemed necessary.

Section 929.64 sets forth that the Committee shall have access to handler records for the purpose of assuring compliance and checking and verifying records and reports filed by handlers.

The Committee proposed moving the grower reporting requirements to § 929.62, Reports, in order to maintain all reporting functions of growers and handlers in one section of the order for ease of referencing. In addition, the Committee proposed adding more specific requirements under the grower reporting provisions. The Committee proposed modifying grower reporting requirements by: Having the grower specify whether their acreage is owned or leased; Having the grower specify the amount of acreage either in production, but not harvested or taken out of production and the reason(s) why; Changing the word renovated acreage to replanted acreage; Having the grower specify the name of the handler(s) to whom commercial cranberry sales were made; and Having the grower supply

such other information as may be needed for implementation and operation of this section.

Under the handler reporting requirements, the Committee recommended changing the word "handler" to "person" under the inventory reporting requirement. The reason for this was because of legislation enabling USDA to require persons engaged in the handling or importation of cranberries or cranberry products to provide information on acquisitions, inventories, and dispositions of cranberries and cranberry products. The Committee's intent was to broaden the scope of the entities required to report certain information.

The Committee also recommended deleting a paragraph relating to handlers reporting of withheld cranberries when a withholding volume regulation is in effect. The reason specified for this deletion was that the paragraph requiring handlers to file reports on the quantity of cranberries handled would cover the reporting of withheld cranberries as well as excess cranberries under a producer allotment program.

The Committee's proposed changes to § 929.64, Verification of Reports, are to simplify and clarify the language as to the Committee's authority to have access to any handler's premises where records are maintained for the purpose of assuring compliance and checking and verification of records and reports filed by handlers. The Committee believed this proposal to be administrative in nature as no changes are being proposed to the current regulations or requirements contained in the marketing order regarding the checking and verifying of handle records.

There was no opposition testimony on the changes to the reporting requirements as proposed by the Committee. However, USDA is modifying some of the proposals.

The grower reporting requirements should be moved to the section of the order relative to reports. This will allow them to be located easily. Expanding the requirements to include additional information would ensure that the Committee staff is provided with appropriate information to accomplish its mission. In addition, because of the changes being recommended in how sales histories are computed and in authorizing growers to transfer their sales histories to other growers, more information from growers is necessary, such as planting dates and whether the acreage is leased or owned. This will assist the Committee in assembling the most accurate information as possible. The addition of language requiring such other information as may be needed for implementation and operation of this section will allow additional reporting requirements to be recommended if any unforeseen need arises.

Orders with producer allotment programs are unique in that specific information is needed from growers in order to implement a program. Under the cranberry order, growers benefit from reporting the information by being provided accurate and timely sales histories that reflect their production and allow equitable allotments to be determined on their acreage during years of volume regulation. The failure of growers to file these reports could be detrimental to them in the event volume regulations are implemented.

Therefore, record evidence supports relocating the grower reporting requirements to the reporting requirements section of the order and expanding the information needed from growers. This proposal is recommended for adoption.

The Committee's proposal to change the word "handler" to "person" is not being recommended. The reason the Committee proposed the change was due to legislation expanding the data collection requirements for cranberries and cranberry products. Regulations regarding this legislation are being developed apart from the order. Any regulations adopted from this legislation would include appropriate reporting requirements for those impacted by the regulations. This proposed change is, therefore, unnecessary and is not being recommended for adoption.

The Committee proposal to delete the paragraph relating to handlers' reporting of cranberries withheld under a withholding volume regulation is not being recommended. However, a modification is being recommended. The Committee's reason for deleting this paragraph was that the handler requirement for reporting quantities of cranberries handled would cover this instance. Withheld cranberries under a withholding provision as well as excess cranberries under a producer allotment program are not allowed to be handled. Therefore, there should be specific requirements for handlers to report these quantities. The current language in that section, however, only relates to withheld cranberries and should also include excess cranberries. Therefore, USDA is recommending retaining that paragraph in this section but modifying it to include that handlers are required to report information on the quantities of excess cranberries as well as withheld cranberries. Record evidence supports this modification.

The Committee also proposed adding a paragraph under this provision authorizing that the committee may establish, with the approval of the Secretary, rules and regulations for the implementation and operation of this section. This paragraph is being recommended to allow the Committee to develop and recommend rules and regulations needed to implement these provisions.

Any additional reporting requirements resulting from adoption of this proposed amendment would be submitted to the Office of Management and Budget prior to implementation.

The Committee proposal to simplify and clarify the language relating to verification of reports is being recommended. This is an administrative change and should be made.

Material Issue Number 22—Deletion of Obsolete Provision

The order should be amended to delete § 929.47, as it is obsolete.

Section 929.47, entitled Preliminary Regulation, refers to base quantity, which is a term that is no longer used under the marketing order. The order was amended in 1992 to improve the producer allotment program to base annual allotments on sales histories rather than base quantities. This section is obsolete, serves no purpose, and therefore should be removed from the order.

Small Business Considerations

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), 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 so that small businesses will not be unduly or disproportionately burdened. Marketing orders and amendments thereto are unique in that they are normally brought about through group action of essentially small entities for their own benefit. Thus, both the RFA and the Act are compatible with respect to small entities.

Small agricultural producers have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $750,000. Small agricultural service firms, which include handlers regulated under the order, are defined as those with annual receipts of less than $5,000,000.

Interested persons were invited to present evidence at the hearing on the probable regulatory and informational

impact of the proposed amendments on small businesses. The record indicates that these amendments could result in additional regulatory requirements being imposed on some cranberry growers and handlers. Overall benefits are expected to exceed costs.

The record indicates that there are about 20 handlers currently regulated under Marketing Order No. 929. In addition, the record indicates that there are about 1,250 producers of cranberries in the current production area.

Based on recent years' price and sales levels, AMS finds that nearly all of the cranberry producers and some of the handlers are considered small under the SBA definition. In 2001, a total of 34,300 acres were harvested with an average U.S. yield per acre of 156.2 barrels. Grower prices in 2001 averaged $22.90 per barrel. Using these figures, average total annual grower receipts for 2001 are estimated at $153,375 per grower. However, there are some growers whose estimated sales would exceed the $750,000 threshold. Thus, the consequences of this decision would apply almost exclusively to small entities.

Five handlers handle over 97 percent of the cranberry crop. Using Committee data on volumes handled, AMS has determined that none of these handlers qualify as small businesses under SBA's definition. The remainder of the crop is marketed by about a dozen grower-handlers who handle their own crops. Dividing the remaining 3 percent of the crop by these grower-handlers, all would be considered small businesses.

This decision proposes that the order be amended: (1) To authorize the Committee to reestablish districts within the production area and reapportion grower membership among the various districts; (2) to simplify criteria considered and set forth more appropriate dates in establishing the Committee's marketing policy; (3) to revise the formula for calculating sales histories under the producer allotment program in § 929.48, which includes providing additional sales history to compensate growers for expected production on younger acres. This proposed changed to § 929.48 would also allow for more flexibility in recommending changes to the formula and add authority for segregating fresh and processed sales; (4) to allow compensation of sales history for catastrophic events that impact a grower's crop; (5) to remove specified dates relating to when information is required to be filed by growers/handlers in order to issue annual allotments; (6) to clarify how the Committee allocates unused allotment to handlers; (7) to allow growers to decide whether to assign allotment if no crop is produced; (8) to allow growers to transfer allotment during a year of volume regulation; (9) to authorize the implementation of the producer allotment and withholding programs in the same year; (10) to set dates by which volume regulations must be recommended; (11) to add specific authority to exempt fresh, organic or other forms of cranberries from order provisions; (12) to allow for greater flexibility in establishing other outlets for excess cranberries; (13) to update and streamline the withholding volume control provisions; (14) to modify the withholding volume regulations by allowing growers to be compensated under the buy-back provisions if any funds are returned to the handler by the Committee; (15) to add authority for paid advertising under the research and development provision of the order; (16) to modify the definition of handle to clarify that transporting fresh cranberries to foreign countries is considered handling and include the temporary cold storage or freezing of withheld cranberries as an exemption from handling; (17) to relocate some reporting provisions to a more suitable provision and streamline the language relating to verification of reports and records; and (18) to delete an obsolete provision from the order relating to preliminary regulation.

This decision does not recommend for adoption the following proposed amendments: (1) To incorporate a handler marketing pool or buy-back provisions under the producer allotment program; (2) to authorize an exemption from order provisions for the first 1,000 barrels of cranberries produced by each grower; (3) to add Maine, Delaware and the entire State of New York to the production area; (4) to add the species *Vaccinium oxycoccus* to the definition of cranberry.

Historical Trends and Near Term Outlook

The cranberry industry has operated under a Federal marketing order since 1962. For many years, the industry enjoyed increasing demand for cranberry products, primarily due to the success of cranberry juice-based drinks. This situation encouraged additional production. Between 1960 and 1999, production increased from 1.34 million barrels (one barrel equals 100 pounds of cranberries) to a record 6.3 million barrels. This represents a 370 percent increase from 1960 and a 17-percent gain from the 1998 crop year. Production in the 2000 crop year declined to 5.6 million barrels and to 5.4 million barrels in 2001, due to the use of volume control by the industry and a decrease in yields in some production areas due to adverse weather conditions during the growing season.

Production increased for each of the five major producing States from 1960 to 2001. In 1995, Wisconsin surpassed Massachusetts to become the largest producing State. Production in all States is highly variable. This variation in production is mainly due to the variation in yields, which is influenced by weather in each of the producing States. The variation in production is one of the primary reasons the industry likes to carry out a reasonable volume of inventory into the next crop year to insure against a short crop.

Cranberries are produced in at least 10 States, but the vast majority of farms and production are concentrated in Massachusetts, New Jersey, Oregon, Washington, and Wisconsin. Area harvested for the U.S. has increased from 21,140 acres in 1960 to 34,300 acres in 2001. Most of this increase has come from Wisconsin, where area harvested has increased from 4,200 acres in 1960 to 15,100 acres in 2001. Currently, Wisconsin has the highest amount of area harvested at 15,100 acres, followed by Massachusetts with 12,200, New Jersey with 3,100 acres, Oregon with 2,300 acres, and Washington with 1,600 acres. Total U.S. area harvested has declined from a peak of 37,500 in 1999 to 34,300 acres in 2001. This decline is likely due to the surplus situation the industry has experienced over the last several crop years. Massachusetts has traditionally had the largest area harvested. However, in 1998, Wisconsin became the State with the largest area harvested. Since 1998, Wisconsin area harvested has continued to increase, while Massachusetts area harvested has declined. Together, both States account for over 80 percent of cranberry production.

Average farm size for cranberry production is very small. The average across all producing States is about 27 acres. Wisconsin's average is twice the U.S. average, at 56 acres, and New Jersey averages 66 acres. Average farm size is below the U.S. average for Massachusetts (20 acres), Oregon (13 acres) and Washington (11 acres).

Yields are highly variable from year to year and yields have been increasing over time. For the U.S., yields have more than doubled from the 1960's to the 2000's. Increasing yields suggest that cranberry growers have become more productive. Over the last five crop years (1997–2001), Wisconsin has had the highest yield at 185.9 barrels per acre,

followed by New Jersey with an average yield of 154.0 barrels per acre, then Oregon with an average yield of 151.2 barrels per acre, then Massachusetts with an average yield of 133.2 barrels per acre, and then Washington with an average yield of 104.1 barrels per acre.

While production capacity continues to rise, demand has leveled off. Per capita consumption of fresh cranberries has remained stable ranging from 0.07 to 0.10 pounds per person. The per capita consumption of processed cranberries increased to 1.70 pounds per person in 1994. In 1994, total domestic production was 4,682,000 barrels, while total sales increased to 4,692,507 barrels. This increase in sales and per capita consumption, accompanied by increasing grower prices provided further incentives for growers to increase plantings and productivity. However, after 1994, sales of processed cranberries began to stagnate. Stagnant sales of processed cranberry products continued until 2000. In the 2000 crop year, per capita consumption of processed cranberries increased to 1.87 pounds and sales of processed cranberries increased to over 5 million barrels for the first time.

About 92 percent of the cranberry crop is processed, with the remainder sold as fresh fruit. In the 1950's and early 1960's, fresh production was considerably higher than it is today, and in many years, constituted as much as 25 to 50 percent of total production. Fresh production began to decline in the 1980's, while processed utilization and output soared as cranberry juice products became popular. Today, fresh fruit claims only about 8 percent of total production. Three of the top five States produce cranberries for fresh sales. New Jersey and Oregon produce fruit for processed products only. There has been tremendous growth in processed cranberries, while the fresh market has remained relatively stable.

When supply is greater than demand, inventories are carried over into the next crop year. Carryin inventories are reported by the Committee. In many agricultural industries, modest levels of inventories are believed to be desirable in situations of a late harvest or a disastrous production year. From 1987 through 1997, annual carryin inventories were relatively stable, averaging 1.1 million barrels. Beginning with the 1998 crop, carryin inventories exceeded 2 million barrels. For the 2000 crop year, carryin inventories exceeded 4 million barrels. Large and increasing inventories provide an indication of how far supply is outpacing demand. Larger inventories, beginning in 1997, have resulted in prices paid to growers dropping dramatically.

From 1974 through 1996, prices trended up. Prices increased from $11.00 per barrel in 1974 to $65.90 per barrel in 1996. Since 1996, prices have decreased. Prices reached a recent low of $17.20 per barrel in 1999. In 2001, prices are reported at $22.90 per barrel. The period of increasing prices provided an incentive for producers to expand planted acres and to increase yields. The price decline over the past several crop years is due to the surplus situation which resulted from the increase in planted acreage and yields and the lack of significant sales increases to keep pace with increased production.

Grower prices do not vary greatly among the five major producing States. This provides an indication that domestic market forces similarly impact all U.S. cranberry growers. Further evidence that prices for the five producing States follow very similar movements is provided by computing the correlation coefficient for the five producing States from 1960 to 2001. Correlation is a statistical measure, which shows how variables are related and a figure of 1.0 would mean perfect correlation. The price correlation among the five States is greater than 0.97.

Real prices are derived by deflating the actual (nominal) prices by a price index (Prices Received by Farmers All Farm Products Index 1990–92=100). Real prices have the effects of inflation removed. Real prices show whether there has been any change in a commodity's price behavior absent the effects of inflation. Real cranberry prices reached a peak in 1997. Currently, real prices have fallen to levels similar to the mid 1970's.

The value of production increased dramatically from 1960, reaching a peak of $350 million in 1997. In 2000, the value of production fell below $100 million for the first time since 1980. Between 1997 and 2001, growers lost 69 percent of the value of production due to the surplus situation. The value of production has declined in all of the major producing States.

With most agricultural commodities, there is a pronounced inverse relationship between production and prices. When production is high, prices are generally low and when production is low, prices are generally high. From 1960 through 1996, prices and production are positively correlated (the correlation coefficient is 0.93). However, beginning in 1997, as production continued to increase, prices started to decline and continued to decline as production increased in crop years 1998 and 1999. Starting in 1996, supply began to outpace demand, ultimately resulting in declining prices.

To help stabilize market supply and demand conditions, volume regulation was introduced in 2000 and again in 2001, marking the first time in 30 years that such regulations were implemented. Crop sizes in 2000 and 2001 have been reduced by the use of the producer allotment program, which limits the amount of product that a producer can deliver to a handler. Reduced crop sizes for these two crop years, combined with increased sales and USDA purchases, have resulted in a reduction of inventories.

In an industry such as cranberries, where the product can be stored for long periods of time, volume control is a method that can be used to reduce supplies so that they are more in line with market needs. Large inventories are costly to maintain and, with the outlook for continued high production levels, these inventories are difficult to market. Producers may not receive full payment for cranberries delivered to storage for several years, and storage costs are deducted from their final payment.

The demand for cranberries is inelastic. A producer allotment program results in a decrease in supply because producers can only deliver a certain portion of their past sales history. With an inelastic demand, a small shift (decrease) in the supply curve results in relatively large impacts on grower prices. An allotment program results in increasing grower prices and grower revenues.

The level of unsold inventory, the current capacity to produce in excess of expected demand, and continuing low grower prices have resulted in the industry debating various alternatives under their marketing order.

Reestablishment of Districts and Reapportionment of Grower Membership Among the Districts

The proposed amendment to authorize the Committee to reestablish and/or reapportion districts would give the Committee greater flexibility in responding to changes in grower demographics and district significance in the future. This authority would allow the Committee to recommend changes through informal rulemaking rather than through an order amendment. The proposal includes specific criteria to be considered prior to making any recommendations.

This proposed authority does not change the districts. It only authorizes the Committee to recommend changes more efficiently. No additional administrative costs are anticipated.

with this proposed amendment. This proposal should be favorable to both large and small entities.

Development of Marketing Policy

Section 929.46 of the order requires the Committee to develop a marketing policy each year as soon as practicable after August 1. In its marketing policy, the Committee projects expected supply and market conditions for the upcoming season. The marketing policy should be adopted before any recommendation for regulation, as it serves to inform USDA and the industry, in advance of the marketing of the crop, of the Committee's plans for regulation and the bases therefore. Handlers and growers can then plan their operations in accordance with the marketing policy.

The Committee is currently required to consider nine criteria in developing its marketing policy. The criteria include such items as expected production, expected demand conditions, and inventory levels. This rule recommends removing criteria not considered to be relevant in making a decision on the need for volume regulation.

The marketing order section of the order also states that the Committee must estimate the marketable quantity necessary to establish a producer allotment program by May 1, and must submit its marketing policy to USDA after August 1. These dates are inconsistent with the dates by which the Committee must recommend a volume regulation (if one or both are deemed necessary) for the upcoming crop. USDA is recommending that both dates be removed.

These changes are non-substantive in nature. They remove unnecessary criteria and obsolete dates from the order. As such, they will have no economic impact on growers or handlers.

Sales History Calculations Under the Producer Allotment Program

The proposed amendment to modify the method for calculating sales histories would provide growers with additional sales histories to compensate them for expected increases in yields on newer acres during a year of volume regulation, which would result in sales histories more reflective of actual sales. This proposed amendment would also allow more flexibility in recommending changes to the formula and add the authority to calculate fresh and processed cranberries separately.

The proposed amendment to the sales history calculations would benefit a majority of growers, especially growers who planted some or all of their acreage within the previous 5 years. The proposal would also help ensure that growers with mature acres who also have newer acreage and growers with only newer acres are treated equitably.

During the 2000 volume regulation, many growers, particularly those with acreage 4 years old or less, indicated that the method of sales history calculation placed them at a disadvantage because they realized more production on their acreage than their sales history indicated. With the volume of new acres within the industry, this would affect many growers.

The Committee determined that something needed to be done to address the concerns associated in the 2000 crop year with growers with newer acreage. The Committee discussed other alternatives to this method. One suggestion was to allow growers with newer acreage to add a percentage of the State average yield to their sales history each year up to the fourth year. The example presented was that acreage being harvested for the second time during a year of volume regulation would receive a sales history that was 25 percent of the State average yield, a third year harvest would receive 50 percent of State average yield, and a fourth year harvest would receive 75 percent of State average yield. Although this method would address some of the problems experienced in 2000, it was determined that the method established by this action would be a simpler and more practical method for growers to obtain the most realistic sales history.

This action addresses grower concerns regarding determination of their sales histories. The method provides additional sales history for growers with newer acres to account for increased yields for each growing year up to the fifth year by factoring in appropriate adjustments to reflect rapidly increasing production during initial harvests. The adjustments are in the form of additional sales histories based on the year of planting.

An appeals process would be in place for growers to request a redetermination of their sales histories. For the 2000–2001 volume regulation, over 250 appeals were received by the appeals subcommittee (the first level of review for appeals). In 2001–2002, a total of 49 appeals were filed. The decrease in appeals filed was a direct result of the formula for calculating sales histories that was implemented in 2001. This proposed amendment represents a generic version of the formula that was used in 2001.

This proposal, if adopted, would not impose any immediate regulations on large or small growers and handlers. It would only modify the formula for calculating sales histories in the event volume regulations are implemented in the future. Adopting this proposal would benefit small businesses by allowing them more flexibility in receiving a more equitable sales history if volume regulations are recommended and implemented in future years. If this proposal is adopted, growers and handlers would know specifically how sales histories would be calculated so that they can be informed and make business decisions well ahead of the future season.

The proposal also includes that sales histories, starting with the crop year following adoption of this amendment, would be calculated separately for fresh and processed cranberries. Fresh and organic fruit were exempt from the 2000 and 2001 volume regulations because it was determined that they did not contribute to the surplus. In both years, fresh fruit sales were deducted from sales histories and each grower's sales history represented processed sales only. To have sales histories more reflective of sales, the Committee proposed calculating separate sales histories for fresh and processed cranberries. Also, in future years, fresh cranberry sales could contribute to the surplus. This proposed change would make sales history calculations more equitable.

These changes will have a positive effect on all growers and handlers because they will result in a more equitable allocation of the marketable quantity among growers. The proposal would be favorable to both large and small entities.

Catastrophic Events That Impact Growers' Sales Histories

The proposed amendment would provide more flexibility in the provision under the sales history calculations that compensates growers with additional sales histories for losses on acreage due to forces beyond the grower's control.

The current provisions require that if a grower has no commercial sales from acreage for 3 consecutive crop years due to forces beyond the grower's control, the Committee shall compute a level of commercial sales for the fourth year for that acreage using an estimated production. The record revealed that this provision was too stringent as evidenced by only one grower meeting these criteria in two years of volume regulation.

The proposal would authorize the Committee to recommend rules and

regulations to allow for adjustments of a grower's sales history to compensate for catastrophic events that impact a grower's crop. The Committee would recommend procedures and guidelines to be followed in each year a volume regulation is implemented. The proposed amendment would have a positive impact on both large and small growers as the Committee would be in a position to compensate more growers who experienced losses due to catastrophic events than the current order provides.

Remove Specified Dates Relating to Issuing Annual Allotments

The order currently provides that when a producer allotment regulation is implemented, USDA establishes an allotment percentage equal to the marketable quantity divided by the total of all growers' sales histories. The allotment percentage is then applied to each grower's sales history to determine that individual's annual allotment. All growers must file an AL–1 form with the Committee on or before April 15 of each year in order to receive their annual allotments. The Committee is required to notify each handler of the annual allotment that can be handled for each grower whose crop will be delivered to such handler on or before June 1.

Experience during the 2000 and 2001 crop years has proven that maintaining a specified date by which growers are to file a form to qualify for their allotment and for the Committee to notify handlers of their growers' annual allotments has been difficult. This proposed change would delete the specified dates and allow the Committee to determine, with the approval of USDA, more appropriate dates by which growers are to file forms and the Committee is to notify handlers of their growers' annual allotments. The Committee would like to have established dates that the industry can realistically meet each season when a volume regulation is implemented.

Because volume regulation was not recommended until the end of March during 2000 and 2001, growers had difficulty in submitting the required reports in a timely manner. Additionally, the rulemaking process to establish the allotment percentage had not been completed by June 1. Therefore, the Committee was unable to notify handlers of their growers' allotment by the specified deadline. With this proposed amendment, dates could be established in line with the timing of the recommendation and establishment of volume regulation. Allowing the Committee to set dates that can realistically be met by the industry would better serve the purposes of the marketing order. Thus, this modification should benefit the entire industry, both large and small entities.

The Committee also recommended clarifying the explanation of how an allotment percentage is calculated. Currently, § 929.49(b) states that such allotment percentage shall equal the marketable quantity divided by the total of all growers' sales histories. It does not specify that "all growers' sales histories" includes the sales histories calculated for new growers. This rule proposes a clarification to ensure that total sales histories (including those of new growers) are used in this calculation. To the extent this clarification makes the terms of the order easier to understand, it should benefit cranberry growers and handlers.

This rule also proposes revising the information to be submitted by growers to qualify for an annual allotment. Currently, all growers must qualify for allotment by filing with the Committee a form including the following information: (1) The location of their cranberry producing acreage from which their annual allotment will be produced; (2) the amount of acreage which will be harvested; (3) changes in location, if any, of annual allotment; and (4) such other information, including a copy of any lease agreement, as is necessary for the Committee to administer the order. Such information is gathered by the Committee on a form specified as the AL–1 form.

The proposed amendment would modify these criteria by not including information that is not pertinent. Currently, growers are assigned a grower number and the amount of acreage on which cranberries are being produced is maintained. The location of the cranberry producing acreage is not maintained. Therefore, there is no need to specify this information on the form. It is also unnecessary to include changes in location, if any, of growers' annual allotment including the lease agreement. Annual allotment is linked to a grower's cranberry producing acreage and, since the acreage cannot be moved from one location to another, information on changes in location is not relevant.

Therefore, the information to be submitted by growers is being recommended for revision by removing the information that the Committee does not need to operate a producer allotment program. Other information that is currently requested (including identifying the handler(s) to whom the grower will assign his or her allotment) would remain unchanged.

The AL–1 form was modified (and approved by OMB) prior to the 2001 volume regulation. At that time, the Committee did not include this information on the form. Therefore, there is no reporting burden change as a result of this amendment. This change removes the unnecessary information from the order language.

Clarify How the Committee Allocates Unused Allotment to Handlers

The proposed amendment would change the method by which the Committee allocates unused allotment to handlers having excess cranberries to proportional distribution of each handler's total allotment.

Currently under the producer allotment volume regulation features of the order, section 929.49(h) provides that handlers who receive cranberries more than the sum of their growers' annual allotments have "excess cranberries" and shall notify the Committee. Handlers who have remaining unused allotment are "deficient" and shall notify the Committee. The Committee shall equitably distribute unused allotment to all handlers having excess cranberries.

The proponents testified that there has been a debate in the industry on the interpretation of what equitable distribution means and how it should be accomplished. To add specificity, the Committee proposed replacing the words "equitably distribute" with "proportional to each handler's total allotment".

The proponents testified that the distribution of unused allotment would only be given to those handlers who have excess fruit and are in need of allotment to cover that fruit. Allotment is only distributed proportionately to handlers when there are more requests for unused allotment than available unused allotment. In this situation, handlers would then receive the allotment in proportion to the volume of cranberries they handle.

This amendment would have a positive impact on large and small handlers since handlers may be able to acquire the additional allotment they need for their excess berries than they would have under the current provisions.

Growers' Assignment of Allotment if No Crop Is Produced

The proposed amendment to authorize growers who choose not to produce a crop in years of volume regulation to not assign their allotment to their handler would provide growers with flexibility to decide what happens with their unused allotment. Currently,

the order requires the allotment to go to the handlers.

Prior to implementing this provision, the Committee would consider what would happen to the unused allotment and recommend, with USDA approval, implementing regulations. This amendment would benefit growers who choose not to grow a crop by providing them with input into the allocation of that allotment. This proposal should be favorable to both large and small growers.

Transfers of Allotment During Years of Volume Regulation

The proposed amendment would allow growers to transfer allotment during a year of volume regulation and allow the sales history to remain with the lessor when there is a total or partial lease of cranberry acreage to another grower. Currently, growers are not allowed to transfer allotment to other growers. The only option available to growers to accomplish a transfer of allotment is to complete a lease agreement between the two growers. This involves filing paperwork, including signed leases and only transferring the sales history, not the allotment. Many of the lease agreements were initiated during the two years of volume regulation and created a burden on Committee staff. It also made recalculations of growers sales histories difficult.

This proposal would simplify the process for growers by authorizing growers to transfer all or part of his or her allotment to another grower. Safeguards are in place to ensure that the transferred allotment remains with the same handler unless consent is provided by both handlers. In addition, the Committee may establish dates by which transfers may take place.

This proposal would be beneficial to both large and small growers as it provides flexibility in transferring allotment.

Implementing Both Forms of Volume Regulation in the Same Year

The proposal to require authorizing both forms of volume regulation in the same year was proposed in accordance with an amendment to the Act in November 2001. The amendment specified that USDA is authorized to implement a producer allotment program and a handler withholding program in the same crop year through informal rulemaking based on a recommendation and supporting economic analysis submitted by the Committee. If such recommendation is made by the Committee, it must be made no later than March 1 of each year. The amendment would provide additional flexibility to the Committee when considering its marketing policy each year.

This proposal should be favorable to both large and small entities.

Dates for Recommending Volume Regulation

The proposal to require the Committee to recommend a producer allotment program by March 1 each year would allow growers to alter their cultural practices in an efficient manner in the event that a producer allotment is implemented. Growers have indicated that they need to know as soon as possible whether the Committee is going to recommend a regulation since a producer allotment program requires growers to only deliver a portion of their crop. The Committee's decision influences whether growers can cut back on purchases of chemicals, fertilizer or possibly take acreage out of production. This can result in growers' savings. The later the decision is made, the chances are growers will have already invested these costs on their acreage.

The proposal to require the Committee to recommend a handler withholding program by August 31 each year would provide the Committee staff with ample time to prepare reports based on handler inventory reports and crop projection data received from the National Agricultural Statistics Service (NASS). Because the withholding program does not impact grower deliveries, this date is more appropriate for making an informed decision on whether to recommend this type of program.

Another proposal would authorize both forms of volume regulation to be implemented each year in accordance with an amendment to the Act authorizing such proposal. The amendment states that if both forms of volume regulation are recommended, it should be done by March 1. Therefore, this proposed amendment would require that if both forms of regulation are recommended in the same year that it be recommended by March 1. The same reasoning for recommending a producer allotment alone would apply to this proposed requirement. Growers need to know as soon as possible if production costs can be mitigated if a producer allotment is recommended. All growers, both large and small, should benefit from this change.

Exemptions From Order Provisions

The proposed amendment recommending that specific authority be added to exempt fresh, organic or other forms of cranberries from order provisions would clarify the current language and provide guidelines for the specific forms or types of cranberries that could be exempted.

Fresh and organic cranberries were exempted from the 2000 and 2001 volume regulations under the minimum quantity exemption authority of the order. This proposal would merely clarify that authority in the order to ensure that fresh and organic and other forms of cranberries could be exempted if warranted in the future. This proposal should be beneficial to large and small entities.

Expand Outlets for Excess Cranberries

The proposed amendment to the outlets for excess cranberries provisions would broaden the scope of noncommercial and noncompetitive outlets for excess cranberries. Adoption of this proposal would provide the Committee, with USDA's approval, the ability to recognize and authorize the used of additional or new noncommercial and/or noncompetitive outlets for excess cranberries through informal rulemaking.

Because competitive markets can change from season to season and new and different research ideas can be devised, the Committee would develop guidelines each year a volume regulation is recommended that would be used in determining appropriate outlets for excess cranberries. This would benefit growers and handlers by providing flexibility in determining outlets. This proposal would be particularly useful in determining which foreign markets can be used as outlets for excess cranberries. Foreign markets are one area where growth is occurring and demand is increasing. Exports of cranberries have increased from 184,000 barrels in 1988 to 824,000 barrels in 2000. Both large and small entities should benefit from this proposal.

General Withholding Provisions

Section 929.54 of the order sets forth the general parameters pertaining to withholding regulations. Under this form of regulation, free and restricted percentages are established, based on market needs and anticipated supplies. The free percentage is applied to handlers' acquisitions of cranberries in a given season. A handler may market free percentage cranberries in any chosen manner, while restricted berries must be withheld from handling.

The withholding provisions of the order were used briefly over three decades ago. Although the cranberry industry has not used the authority for

withholding regulations in quite some time, the record evidence supports maintaining this tool for possible future use. However, substantive changes in industry practices have rendered current withholding provisions in need of revision. Thus, this decision recommends updating and streamlining those provisions.

The record shows that at the time the withholding provisions were designed, the cranberry industry was much smaller, producing and handling much lower volumes of fruit than it does now. In 1960, production was about 1.3 million barrels; by 1999, a record 6.3 million barrels were grown. A much higher percentage of the crop was marketed fresh—about 40 percent in the early 1960's versus less than 10 percent in recent years.

Changes in harvesting and handling procedures have been made so the industry is better able to process higher volumes of cranberries. Forty years ago, virtually all cranberries were harvested dry, and water harvesting was in an experimental stage of development. Water harvesting is currently widespread in certain growing regions; cranberries harvested under this method must be handled immediately as they are subject to rapid deterioration.

In the early 1960's, handlers acquired some cranberries that had been "screened" to remove extraneous material that was picked up with the berries as they were being harvested, and "unscreened" berries from which the extraneous material (including culls) had not been removed. The handler cleaned some of the unscreened berries immediately upon receipt, while others were placed in storage and screened just prior to processing.

The order currently provides that when a withholding regulation is implemented, the restricted percentage will be applied to the volume of "screened" berries acquired by handlers. Since the term "screening" is obsolete, all references to that term are being deleted.

The order also currently provides that withheld cranberries must meet such quality standards as recommended by the Committee and established by USDA. The Federal or Federal-State Inspection Service must inspect such cranberries and certify that they meet the prescribed quality standards. The intent of these provisions is, again, to ensure that the withholding regulations reduce the volume of cranberries in the marketplace by not allowing culls to be used to meeting withholding obligations. The inspection and certification process is also meant to assist the Committee in monitoring the proper disposition of restricted cranberries, thereby ensuring handler compliance with any established withholding requirements.

The need for inspection and certification of withheld cranberries is not as great today as in the past. Additionally, it could be costly, particularly since most withheld berries would subsequently be dumped, generating no revenue for growers or handlers. The inspection process could also inordinately slow down handling operations, and there could be differential impacts of such requirements because some handling facilities operate in ways that lend themselves to more efficient methods of pulling representative samples (for inspection purposes) than others.

Removing the requirements for mandatory inspection and certification requirements would allow the industry to develop alternative safeguards to achieve its objectives at lower cost. While the inspection process may be deemed the best method by the Committee, this proposal provides flexibility by allowing the Committee to consider other, less costly alternatives.

Eliminating the mandatory inspection under the withholding program and deleting obsolete terminology would make the program more flexible for the industry and allow the Committee to operate more efficiently. As such, this amendment should benefit cranberry growers and handlers by providing an additional tool they could use in times of cumbersome oversupply.

Buy-Back Provisions Under the Handler Withholding Program

Section 929.56 of the order, entitled "Special provisions relating to withheld (restricted) cranberries," sets forth procedures under which handlers may have their restricted cranberries released to them. These provisions are commonly referred to in the industry as the buy-back provisions.

Under the current buy-back provisions, a handler can request the Committee to release all or a portion of his or her restricted cranberries for use as free cranberries. The handler request has to be accompanied by a deposit equal to the fair market value of those cranberries. The Committee then attempts to purchase as nearly an equal amount of free cranberries from other handlers. Cranberries so purchased by the Committee are transferred to the restricted percentage and disposed of by the Committee in outlets that are noncompetitive to outlets for free cranberries. The provision that each handler deposit a fair market price with the Committee for each barrel of cranberries released and that the Committee use such funds to purchase an equal amount or as nearly an equal amount as possible of free cranberries is designed to ensure that the percentage of berries withheld from handling remains at the quantity established by the withholding regulation for the crop year.

The Committee has the authority to establish a fair market price for the release of restricted cranberries under the buy-back program. The money deposited with the Committee by handlers requesting release of their restricted cranberries is the only money the Committee has available for acquiring free cranberries. Thus, the amount deposited must be equal to the then current market price or the Committee will have insufficient funds to purchase a like quantity of free cranberries.

The Committee is required to release the restricted cranberries within 72 hours of receipt of a proper request (including the deposit of a fair market value). This release was made automatic so that handlers would be able to plan their operations, and very little delay would be encountered.

If the Committee is unable to purchase free berries to replace restricted cranberries that are released under these provisions, the funds deposited with the Committee are required to be returned to all handlers in proportion to the volume withheld by each handler.

This rule proposes authorizing direct buy-back between handlers. With this option, a handler would not have to go through the Committee to have his or her restricted berries released. Instead, that handler could arrange for the purchase of another handler's free cranberries directly. All terms, including the price paid, would be between the two parties involved and would not be prescribed by the Committee. This change would add flexibility to the order and could offer a more efficient method of buying back cranberries. Also, no Committee administrative costs would be incurred. Handlers would have the option of using this method, or they could buy back their berries through the Committee, as is currently provided.

There are four criteria the Committee needs to consider in establishing a fair market price under the buy-back program for purchasing restricted cranberries. These include prices at which growers are selling their cranberries to handlers; prices at which handlers are selling fresh berries to dealers; prices at which cranberries are being sold to processors; and prices at

which the Committee has purchased free berries to replace released restricted berries.

This action proposes adding two criteria to the list—the prices at which handlers are selling cranberry concentrate and growers' costs of production. Both of these items are relevant to consider in determining a fair market value. Consideration of these criteria by the Committee would benefit handlers.

Under the current buy-back provisions, handlers are required to deposit with the Committee the full market value of the berries they are asking to be released. This decision proposes a different payment schedule so that handlers would not have to make a large cash payment prior to the sale of their restricted cranberries. Twenty percent of the total amount would be due at the time of the request, with an additional 10 percent due each month thereafter. This change would facilitate handlers buying back their restricted berries by reducing the costs of such a venture. Thus, handlers should benefit.

If the Committee is unable to purchase free berries under the buy-back system, it is currently required to refund the money back to all handlers proportionate to the amount each handler withheld under regulation. USDA is proposing a modification that would provide that the money be returned to the handler who deposited it for distribution to the growers whose fruit was sold. This should benefit growers whose fruit was sold. Additionally, this change could provide an incentive for handlers to make available free cranberries for purchase to replace restricted cranberries that are released under the buy-back provisions. For these reasons, this change should benefit the cranberry industry.

Paid Advertising

The proposal to add authority for paid advertising under the research and development provisions of the order would provide the Committee the flexibility to use paid advertising to assist, improve, or promote the marketing, distribution, and consumption of cranberries in either its export or domestic programs. The authority for authorizing paid advertising under the cranberry marketing order was added to the Act in October, 1999.

If a paid advertising program is recommended by the Committee, it could entail an increase in assessments to administer the program, which would have an impact on handlers. According to testimony, it is the Committee's intent to use paid advertising sparingly as a means to provide consumers with relevant information to the health-related benefits of cranberries. Paid advertising authority is viewed as an additional tool available to the Committee to meet its objectives of increasing demand and consumption of cranberries and cranberry products. It is anticipated that any additional costs incurred to all handlers, both large and small, would be outweighed by the benefits of increasing demand for cranberries. Any paid advertising program and increase of assessment must proceed through notice and comment rulemaking before it is implemented.

Definition of Handle

The proposal to modify the definition of handle under the order would clarify that the transporting of fresh cranberries to foreign markets other than Canada is also considered handling. This proposed change would merely clarify language.

The proposal would also modify the definition by including the cold storage or freezing of withheld cranberries as an exemption from handling for the purpose of temporary cold storage during periods when withholding provisions are in effect prior to their disposal. The provision already applies this exemption to excess cranberries under the producer allotment program and it was determined that handlers could benefit from this provision under a withholding program as well. This would benefit large and small handlers by allowing temporary storage of withheld cranberries, which could be critical during a withholding volume regulation.

Reporting Requirements

The proposal to modify the reporting requirements would relocate a paragraph on a grower reporting requirement to the section on Reports for ease of referencing and is only administrative in nature.

The proposal would also add more specific information under the grower reporting provisions to incorporate additional information necessary from growers if the sales history and transfer of allotment proposals are adopted. This will assist the Committee in assembling the most accurate and effective information as possible. Orders with producer allotment programs are unique in that specific information is needed from growers in order to implement a program. Both large and small growers benefit from reporting the information by being provided accurate and timely sales histories that reflect their production and allow equitable allotments to be determined on their acreage during years of volume regulation. The failure of growers to file these reports could be detrimental to them in the event volume regulations are implemented. Any additional reporting requirements resulting from adoption of this proposed amendment would be submitted to the Office of Management and Budget prior to implementation.

The proposal would also include that handlers report on the quantities of excess cranberries as well as withheld cranberries. This is a clarification and administrative in nature. The proposal would also simplify and clarify the provision on verification of reports. The proposal should be favorable to large and small growers.

Obsolete Provision

The proposal to delete an obsolete provision relating to preliminary regulation is administrative in nature and is being recommending for adoption. There would be no impact on growers or handlers.

Proposed Amendments Not Recommended For Adoption in This Decision

Five proposed amendments are not being recommended for adoption. Therefore, there would be no economic impact resulting from these proposals.

The proposed amendments not recommended would have: (1) Incorporated a handler marketing pool and/or buy-back provisions to the producer allotment program (Material Issue 15); (2) authorized an exemption from order provisions for the first 1,000 barrels of cranberries produced by each grower (Material Issue 16); (3) expanded the production area to include the States of Maine and Delaware and the entire State of New York (Material Issue 17); and (4) modified the definition of cranberry by adding the species *Vaccinium oxycoccus* to the definition (Material Issue 19).

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 35), the reporting and recordkeeping provisions that would be generated by the proposed amendments would be submitted to the Office of Management and Budget (OMB).

None of the changes, if implemented, would generate any reporting burden to growers or handlers.

Many of the changes have no reporting ramifications if they are established. As examples, adding the authority for redistricting and reapportionment of the Committee,

changing the deadlines for filing volume regulations, or adding the authority for paid advertising would not create any additional reporting requirements.

Some of the proposed amendments would not generate any reporting burdens by amendment of the order alone. If these authorities were added to the order, reporting burdens would occur at the time regulations were established to activate the order authority. Examples of these amendments are those that impact the two forms of volume regulations. If a producer allotment volume regulation were implemented, regulations would be needed to set forth any forms of cranberries exempt from the volume regulation or what outlets (and appropriate safeguards) would be established for excess cranberries. Also, at the time of recommendation, the process for making adjustments for catastrophic events would need to be recommended by the Committee. In these instances, the reporting burdens, if any, would not exist until the volume regulation was in place. In addition, if a handler withholding volume regulation is established, additional reporting burdens may be necessary to cover the handler-to-handler buy-back program.

Reporting burdens that would be immediately generated by these amendments are the grower reporting requirements. However, prior to the 2001 volume regulation, the Committee modified the AL–1 form to accommodate needed requirements for implementing the producer allotment volume regulation.

Specifically, the way growers' sales histories were calculated that is being recommended to be added to the order was used in the 2001 volume regulation. The AL–1 form was modified at that time (and approved by OMB) to include the additional information required, such as year of planting and year of first harvest.

Likewise, growers are already reporting fresh and processed sales separately on form GSAR–1. This information was included on the form prior to the 2001 volume regulation to accommodate the regulations.

The amendment to remove dates regarding issuance of annual allotments does not require a modification of the form as no dates are specified on the form.

Therefore, there would be no modification to reporting and recordkeeping burdens generated from these proposed amendments. Current information collection requirements for part 929 are approved by OMB under OMB number 0581–0189.

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.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule. These amendments are designed to enhance the administration and functioning of the marketing order to the benefit of the industry.

Committee meetings regarding these proposals as well as the hearing dates were widely publicized throughout the cranberry industry, and all interested persons were invited to attend the meetings and the hearing and participate in Committee deliberations on all issues. All Committee meetings and the hearing were public forums and all entities, both large and small, were able to express views on these issues. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

A 30-day comment period is provided to allow interested persons to respond to this proposal. Thirty days is deemed appropriate so that this rulemaking may be completed prior to the 2005–2006 season. All written exceptions timely received will be considered and a grower referendum will be conducted before these proposals are implemented.

Civil Justice Reform

The amendments proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. If adopted, the proposed amendments would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with the amendments.

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. A 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 date of the entry of the ruling.

Rulings on Briefs of Interested Persons

Briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth in this recommended decision. To the extent that the suggested findings and conclusions filed by interested persons are inconsistent with the findings and conclusions of this recommended decision, the requests to make such findings or to reach such conclusions are denied.

General Findings

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the marketing agreement and order; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

(1) The marketing agreement and order, as amended, and as hereby proposed to be further amended, and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

(2) The marketing agreement and order, as amended, and as hereby proposed to be further amended, regulate the handling of cranberries grown in the production area in the same manner as, and are applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing agreement and order upon which a hearing has been held;

(3) The marketing agreement and order, as amended, and as hereby proposed to be further amended, are limited in their application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

(4) The marketing agreement and order, as amended, and as hereby proposed to be further amended, prescribe, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of cranberries grown in the production area; and

(5) All handling of cranberries grown in the production area as defined in the

marketing agreement and order, as amended, and as hereby proposed to be further amended, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

List of Subjects in 7 CFR Part 929

Cranberries, Marketing agreements, Reporting and recordkeeping requirements.

Recommended Amendment of the Marketing Agreement and Order

For the reasons set out in the preamble, 7 CFR part 929 is proposed to be amended as follows:

PART 929—CRANBERRIES GROWN IN THE STATES OF MASSACHUSETTS, RHODE ISLAND, CONNECTICUT, NEW JERSEY, WISCONSIN, MICHIGAN, MINNESOTA, OREGON, WASHINGTON, AND LONG ISLAND IN THE STATE OF NEW YORK

1. The authority citation for 7 CFR part 929 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Amend § 929.10 by revising paragraphs (a)(2) and (b)(4) to read as follows:

§ 929.10 Handle.

(a) * * *

(2) To sell, consign, deliver, or transport (except as a common or contract carrier of cranberries owned by another person) fresh cranberries or any other way to place fresh cranberries in the current of commerce within the production area or between the production area and any point outside thereof.

(b) * * *

(4) The cold storage or freezing of excess or restricted cranberries for the purpose of temporary storage during periods when an annual allotment percentage and/or a handler withholding program is in effect prior to their disposal, pursuant to §§ 929.54 or 929.59.

3. Add a new § 929.28 to read as follows:

§ 929.28 Redistricting and reapportionment.

(a) The committee, with the approval of the Secretary, may reestablish districts within the production area and reapportion membership among the districts. In recommending such changes, the committee shall give consideration to:

(1) The relative volume of cranberries produced within each district.

(2) The relative number of cranberry producers within each district.

(3) Cranberry acreage within each district.

(4) Other relevant factors.

(b) The committee may establish, with the approval of the Secretary, rules and regulations for the implementation and operation of this section.

4. Revise § 929.45 to read as follows:

§ 929.45 Research and development.

(a) The committee, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research, and market development projects, including paid advertising, designed to assist, improve, or promote the marketing, distribution, consumption, or efficient production of cranberries. The expense of such projects shall be paid from funds collected pursuant to § 929.41, or from such other funds as approved by the Secretary.

(b) The committee may, with the approval of the Secretary, establish rules and regulations as necessary for the implementation and operation of this section.

5. Revise § 929.46 to read as follows:

§ 929.46 Marketing policy.

Each season prior to making any recommendation pursuant to § 929.51, the committee shall submit to the Secretary a report setting forth its marketing policy for the crop year. Such marketing policy shall contain the following information for the current crop year:

(a) The estimated total production of cranberries;

(b) The expected general quality of such cranberry production;

(c) The estimated carryover, as of September 1, of frozen cranberries and other cranberry products;

(d) The expected demand conditions for cranberries in different market outlets;

(e) The recommended desirable total marketable quantity of cranberries including a recommended adequate carryover into the following crop year of frozen cranberries and other cranberry products;

(f) Other factors having a bearing on the marketing of cranberries.

§ 929.47 [Removed]

6. Remove § 929.47.

7. Revise § 929.48 to read as follows:

§ 929.48 Sales history.

(a) A sales history for each grower shall be computed by the committee in the following manner:

(1) For growers with acreage with 6 or more years of sales history, the sales history shall be computed using an average of the highest four of the most recent six years of sales.

(2) For growers with 5 years of sales history from acreage planted or replanted 2 years prior to the first harvest on that acreage, the sales history is computed by averaging the highest 4 of the 5 years.

(3) For growers with 5 years of sales history from acreage planted or replanted 1 year prior to the first harvest on that acreage, the sales history is computed by averaging the highest 4 of the 5 years and shall be adjusted as provided in paragraph (a)(6) of this section.

(4) For a grower with 4 years or less of sales history, the sales history shall be computed by dividing the total sales from that acreage by 4 and shall be adjusted as provided in paragraph (a)(6).

(5) For growers with acreage having no sales history, or for the first harvest of replanted acres, the sales history will be the average first year yields (depending on whether first harvested 1 or 2 years after planting or replanting) as established by the committee and multiplied by the number of acres.

(6) In addition to the sales history computed in accordance with paragraphs (a)(3) and (4) of this section, additional sales history shall be assigned to growers using the formula $x=(a-b)c$. The letter "x" constitutes the additional number of barrels to be added to the grower's sales history. The value "a" is the expected yield for the forthcoming year harvested acreage as established by the committee. The value "b" is the total sales from that acreage as established by the committee divided by four. The value "c" is the number of acres planted or replanted in the specified year. For acreage with five years of sales history: a = the expected yield for the forthcoming sixth year harvested acreage (as established by the committee); b = an average of the most recent 4 years of expected yields (as established by the committee); and c = the number of acres with 5 years of sales history.

(b) A new sales history shall be calculated for each grower after each crop year, using the formulas established in paragraph (a) of this section, or such other formula(s) as determined by the committee, with the approval of the Secretary.

(c) The committee, with the approval of the Secretary, may adopt regulations to change the number and identity of years to be used in computing sales histories, including the number of years to be used in computing the average. The committee may establish, with the approval of the Secretary, rules and

regulations necessary for the implementation and operation of this section.

(d) Sales histories, starting with the crop year following adoption of this part, shall be calculated separately for fresh and processed cranberries. The amount of fresh fruit sales history may be calculated based on either the delivered weight of the barrels paid for by the handler (excluding trash and unusable fruit) or on the weight of the fruit paid for by the handler after cleaning and sorting for the retail market. Handlers using the former calculation shall allocate delivered fresh fruit subsequently used for processing to growers' processing sales. Fresh fruit sales history, in whole or in part, may be added to process fruit sales history with the approval of the committee in the event that the grower's fruit does not qualify as fresh fruit at delivery.

(e) The committee may recommend rules and regulations, with the approval of the Secretary, to adjust a grower's sales history to compensate for catastrophic events that impact the grower's crop.

8. Revise § 929.49 to read as follows:

§ 929.49 Marketable quantity, allotment percentage, and annual allotment.

(a) Marketable quantity and allotment percentage. If the Secretary finds, from the recommendation of the committee or from other available information, that limiting the quantity of cranberries purchased from or handled on behalf of growers during a crop year would tend to effectuate the declared policy of the Act, the Secretary shall determine and establish a marketable quantity for that crop year.

(b) The marketable quantity shall be apportioned among growers by applying the allotment percentage to each grower's sales history, established pursuant to " 929.48. Such allotment percentage shall be established by the Secretary and shall equal the marketable quantity divided by the total of all growers' sales histories including the estimated total sales history for new growers. Except as provided in paragraph (g) of this section, no handler shall purchase or handle on behalf of any grower cranberries not within such grower's annual allotment.

(c) In any crop year in which the production of cranberries is estimated by the committee to be equal to or less than its recommended marketable quantity, the committee may recommend that the Secretary increase or suspend the allotment percentage applicable to that year. In the event it is found that market demand is greater than the marketable quantity previously set, the committee may recommend that the Secretary increase such quantity.

(d) *Issuance of annual allotments.* The committee shall require all growers to qualify for such allotment by filing with the committee a form wherein growers include the following information:

(1) The amount of acreage which will be harvested;

(2) A copy of any lease agreement covering cranberry acreage;

(3) The name of the handler(s) to whom their annual allotment will be delivered;

(4) Such other information as may be necessary for the implementation and operation of this section.

(e) On or before such date as determined by the committee, with the approval of the Secretary, the committee shall issue to each grower an annual allotment determined by applying the allotment percentage established pursuant to paragraph (b) of this section to the grower's sales history.

(f) On or before such date as determined by the committee, with the approval of the Secretary, in which an allotment percentage is established by the Secretary, the committee shall notify each handler of the annual allotment that can be handled for each grower whose total crop will be delivered to that handler. In cases where a grower delivers a crop to more than one handler, the grower must specify how the annual allotment will be apportioned among the handlers.

(g) Growers who do not produce cranberries equal to their computed annual allotment shall transfer their unused allotment to such growers' handlers. The handler shall equitably allocate the unused annual allotment to growers with excess cranberries who deliver to such handler. Unused annual allotment remaining after all such transfers have occurred shall be reported and transferred to the committee by such date as established by the committee with the approval of the Secretary.

(h) Handlers who receive cranberries more than the sum of their growers' annual allotments have "excess cranberries," pursuant to § 929.59, and shall so notify the committee. Handlers who have remaining unused allotment pursuant to paragraph (g) of this section are "deficient" and shall so notify the committee. The committee shall allocate unused allotment to all handlers having excess cranberries, proportional to each handler's total allotment.

(i) Growers who decide not to grow a crop, during any crop year in which a volume regulation is in effect, may choose not to assign their allotment to a handler.

(j) The committee may establish, with the approval of the Secretary, rules and regulations necessary for the implementation and operation of this section.

9. Revise § 929.50 to read as follows:

§ 929.50 Transfers of sales histories and annual allotments.

(a) Leases and sales of cranberry acreage.

(1) *Total or partial lease of cranberry acreage.* When total or partial lease of cranberry acreage occurs, sales history attributable to the acreage being leased shall remain with the lessor.

(2) *Total sale of cranberry acreage.* When there is a sale of a grower's total cranberry producing acreage, the committee shall transfer all owned acreage and all associated sales history to such acreage to the buyer. The seller and buyer shall file a sales transfer form providing the committee with such information as may be requested so that the buyer will have immediate access to the sales history computation process.

(3) *Partial sale of cranberry acreage.* When less than the total cranberry producing acreage is sold, sales history associated with that portion of the acreage being sold shall be transferred with the acreage. The seller shall provide the committee with a sales transfer form containing, but not limited to the distribution of acreage and the percentage of sales history, as defined in § 929.48(a)(1), attributable to the acreage being sold.

(4) No sale of cranberry acreage shall be recognized unless the committee is notified in writing.

(b) *Allotment transfers.* During a year of volume regulation, a grower may transfer all or part of his/her allotment to another grower. If a lease is in effect the lessee shall receive allotment from lessor attributable to the acreage leased. *Provided,* That the transferred allotment shall remain assigned to the same handler and that the transfer shall take place prior to a date to be recommended by the Committee and approved by the Secretary. Transfers of allotment between growers having different handlers may occur with the consent of both handlers.

(c) The committee may establish, with the approval of the Secretary, rules and regulations, as needed, for the implementation and operation of this section.

10. Revise § 929.51 to read as follows:

§ 929.51 Recommendations for regulation.

(a) Except as otherwise provided in paragraph (b) of this section, if the

committee deems it advisable to regulate the handling of cranberries in the manner provided in § 929.52, it shall so recommend to the Secretary by the following appropriate dates:

(1) An allotment percentage regulation must be recommended by no later than March 1;

(2) A handler withholding program must be recommended by not later than August 31. Such recommendation shall include the free and restricted percentages for the crop year;

(3) If both programs are recommended in the same year, the Committee shall submit with its recommendation an economic analysis to the USDA prior to March 1 of the year in which the programs are recommended.

(b) An exception to the requirement in paragraph (a)(1) of this section may be made in a crop year in which, due to unforeseen circumstances, a producer allotment regulation is deemed necessary subsequent to the March 1 deadline.

(c) In arriving at its recommendations for regulation pursuant to paragraph (a) of this section, the committee shall give consideration to current information with respect to the factors affecting the supply of and demand for cranberries during the period when it is proposed that such regulation should be imposed. With each such recommendation for regulation, the committee shall submit to the Secretary the data and information on which such recommendation is based and any other information the Secretary may request.

11. Revise § 929.52 to read as follows:

§ 929.52 Issuance of regulations.

(a) The Secretary shall regulate, in the manner specified in this section, the handling of cranberries whenever the Secretary finds, from the recommendations and information submitted by the committee, or from other available information, that such regulation will tend to effectuate the declared policy of the Act. Such regulation shall limit the total quantity of cranberries which may be handled during any fiscal period by fixing the free and restricted percentages, applied to cranberries acquired by handlers in accordance with § 929.54, and/or by establishing an allotment percentage in accordance with § 929.49.

(b) The committee shall be informed immediately of any such regulation issued by the Secretary, and the committee shall promptly give notice thereof to handlers.

12. Revise § 929.54 to read as follows:

§ 929.54 Withholding.

(a) Whenever the Secretary has fixed the free and restricted percentages for any fiscal period, as provided for in § 929.52(a), each handler shall withhold from handling a portion of the cranberries acquired during such period. The withheld portion shall be equal to the restricted percentage multiplied by the volume of marketable cranberries acquired. Such withholding requirements shall not apply to any lot of cranberries for which such withholding requirement previously has been met by another handler in accordance with § 929.55.

(b) The committee, with the approval of the Secretary, shall prescribe the manner in which, and date or dates during the fiscal period by which, handlers shall have complied with the withholding requirements specified in paragraph (a) of this section.

(c) Withheld cranberries may meet such standards of grade, size, quality, or condition as the committee, with the approval of the Secretary, may prescribe. The Federal or Federal-State Inspection Service shall inspect all such cranberries. A certificate of such inspection shall be issued which shall include the name and address of the handler, the number and type of containers in the lot, the location where the lot is stored, identification marks (including lot stamp, if used), and the quantity of cranberries in such lot that meet the prescribed standards. Promptly after inspection and certification, each such handler shall submit to the committee a copy of the certificate of inspection issued with respect to such cranberries.

(d) Any handler who withholds from handling a quantity of cranberries in excess of that required pursuant to paragraph (a) of this section shall have such excess quantity credited toward the next fiscal year's withholding obligation, if any—provided that such credit shall be applicable only if the restricted percentage established pursuant to § 929.52 was modified pursuant to § 929.53; to the extent such excess was disposed of prior to such modification; and after such handler furnishes the committee with such information as it prescribes regarding such withholding and disposition.

(e) The Committee, with the approval of the Secretary, may establish rules and regulations necessary and incidental to the administration of this section.

13. Revise § 929.56 to read as follows:

§ 929.56 Special provisions relating to withheld (restricted) cranberries.

(a) A handler shall make a written request to the committee for the release of all or part of the cranberries that the handler is withholding from handling pursuant to § 929.54(a). Each request shall state the quantity of cranberries for which release is requested and shall provide such additional information as the committee may require. Handlers may replace the quantity of withheld cranberries requested for release as provided under either paragraph (b) or (c) of this section.

(b) The handler may contract with another handler for an amount of free cranberries to be converted to restricted cranberries that is equal to the volume of cranberries that the handler wishes to have converted from his own restricted cranberries to free cranberries.

(1) The handlers involved in such an agreement shall provide the committee with such information as may be requested prior to the release of any restricted cranberries.

(2) The committee shall establish guidelines to ensure that all necessary documentation is provided to the committee, including but not limited to, the amount of cranberries being converted and the identities of the handlers assuming the responsibility for withholding and disposing of the free cranberries being converted to restricted cranberries.

(3) Cranberries converted to replace released cranberries may be required to be inspected and meet such standards as may be prescribed for withheld cranberries prior to disposal.

(4) Transactions and agreements negotiated between handlers shall include all costs associated with such transactions including the purchase of the free cranberries to be converted to restricted cranberries and all costs associated with inspection (if applicable) and disposal of such restricted cranberries. No costs shall be incurred by the committee other than for the normal activities associated with the implementation and operation of a volume regulation program.

(5) Free cranberries belonging to one handler and converted to restricted cranberries on the behalf of another handler shall be reported to the committee in such manner as prescribed by the committee.

(c) Except as otherwise directed by the Secretary, as near as practicable to the beginning of the marketing season of each fiscal period with respect to which the marketing policy proposes regulation pursuant to § 929.52(a), the committee shall determine the amount per barrel each handler shall deposit with the committee for it to release to him, in accordance with this section, all or part of the cranberries he is withholding; and the committee shall

give notice of such amount of deposit to handlers. Such notice shall state the period during which such amount of deposit shall be in effect. Whenever the committee determines that, by reason of changed conditions or other factors, a different amount should therefore be deposited for the release of withheld cranberries, it shall give notice to handlers of the new amount and the effective period thereof. Each determination as to the amount of deposit shall be on the basis of the committee's evaluation of the following factors:

(1) The prices at which growers are selling cranberries to handlers,

(2) The prices at which handlers are selling fresh market cranberries to dealers,

(3) The prices at which cranberries are being sold for processing in products,

(4) The prices at which handlers are selling cranberry concentrate,

(5) The prices the committee has paid to purchase cranberries to replace released cranberries in accordance with this section, and

(6) The costs incurred by growers in producing cranberries.

(7) Each request for release of withheld cranberries shall include, in addition to all other information as may be prescribed by the committee, the quantity of cranberries the release is requested and shall be accompanied by a deposit (a cashier's or certified check made payable to the Cranberry Marketing Committee) in an amount equal to the twenty percent of the amount determined by multiplying the number of barrels stated in the request by the then effective amount per barrel as determined in this paragraph (c).

(8) Subsequent deposits equal to, but not less than, the ten percent of the remaining outstanding balance shall be payable to the committee on a monthly basis commencing on January 1, and concluding by no later than August 31 of the fiscal period.

(9) If the committee determines such a release request is properly filled out, is accompanied by the required deposit, and contains a certification that the handler.is withholding such cranberries, it shall release to such handler the quantity of cranberries specified in his request.

(d) Funds deposited for the release of withheld cranberries, pursuant to paragraph (c) of this section, shall be used by the committee to purchase from handlers unrestricted (free percentage) cranberries in an aggregate amount as nearly equal to, but not in excess of, the total quantity of the released cranberries as it is possible to purchase to replace the released cranberries.

(e) All handlers shall be given an equal opportunity to participate in such purchase of unrestricted (free percentage) cranberries. If a larger quantity is offered than can be purchased, the purchases shall be made at the lowest price possible. If two or more handlers offer unrestricted (free percentage) cranberries at the same price, purchases from such handlers shall be in proportion to the quantity of their respective offerings insofar as such division is practicable. The committee shall dispose of cranberries purchased as restricted cranberries in accordance with § 929.57. Any funds received by the committee for cranberries so disposed of, which are in excess of the costs incurred by the committee in making such disposition, will accrue to the committee's general fund.

(f) In the event any portion of the funds deposited with the committee pursuant to paragraph (c) of this section cannot, for reasons beyond the committee's control, be expended to purchase unrestricted (free percentage) cranberries to replace those withheld cranberries requested to be released, such unexpended funds shall, after deducting expenses incurred by the committee, be refunded to the handler who deposited the funds. The handler shall equitably distribute such refund among the growers delivering to such handler.

(g) Inspection for restricted (withheld) cranberries released to a handler is not required.

(h) The committee may establish, with the approval of the Secretary, rules and regulations for the implementation of this section. Such rules and regulations may include, but are not limited to, revisions in the payment schedule specified in paragraphs (c)(7) and (c)(8) of this section.

14. Revise § 929.58 to read as follows:

§ 929.58 Exemptions.

(a) Upon the basis of the recommendation and information submitted by the committee, or from other available information, the Secretary may relieve from any or all requirements pursuant to this part the handling of cranberries in such minimum quantities as the committee, with the approval of the Secretary, may prescribe.

(b) Upon the basis of the recommendation and information submitted by the committee, or from other available information, the Secretary may relieve from any or all requirements pursuant to this part the handling of such forms or types of cranberries as the committee, with the approval of the Secretary, may prescribe. Forms of cranberries could include cranberries intended for fresh sales or organically grown cranberries.

(c) The committee, with the approval of the Secretary, shall prescribe such rules, regulations, and safeguards as it may deem necessary to ensure that cranberries handled under the provisions of this section are handled only as authorized.

15. Revise § 929.61 to read as follows:

§ 929.61 Outlets for excess cranberries.

(a) *Noncommercial outlets.* Excess cranberries may be disposed of in noncommercial outlets that the committee finds, with the approval of the Secretary, meet the requirements outlined in paragraph (c) of this section. Noncommercial outlets include, but are not limited to:

(1) Charitable institutions; and

(2) Research and development projects.

(b) *Noncompetitive outlets.* Excess cranberries may be sold in outlets that the committee finds, with the approval of the Secretary, are noncompetitive with established markets for regulated cranberries and meet the requirements outlined in paragraph (c) of this section. Noncompetitive outlets include but are not limited to:

(1) Any nonhuman food use; and

(2) Other outlets established by the committee with the approval of the Secretary.

(c) *Requirements.* The handler disposing of or selling excess cranberries into noncompetitive or noncommercial outlets shall meet the following requirements, as applicable:

(1) *Charitable institutions.* A statement from the charitable institution shall be submitted to the committee showing the quantity of cranberries received and certifying that the institution will consume the cranberries;

(2) *Research and development projects.* A report shall be given to the committee describing the project, quantity of cranberries contributed, and date of disposition;

(3) *Nonhuman food use.* Notification shall be given to the committee at least 48 hours prior to such disposition;

(4) *Other outlets established by the committee with the approval of the Secretary.* A report shall be given to the committee describing the project, quantity of cranberries contributed, and date of disposition.

(d) The storage and disposition of all excess cranberries withheld from handling shall be subject to the supervision and accounting control of the committee.

(e) The committee, with the approval of the Secretary, may establish rules and

regulations for the implementation and operation of this section.

16. Revise § 929.62 to read as follows:

§ 929.62 Reports.

(a) *Grower report.* Each grower shall file a report with the committee by January 15 of each crop year, or such other date as determined by the committee, with the approval of the Secretary, indicating the following:

(1) Total acreage harvested and whether owned or leased.

(2) Total commercial cranberry sales in barrels from such acreage.

(3) Amount of acreage either in production, but not harvested or taken out of production and the reason(s) why.

(4) Amount of new or replanted acreage coming into production.

(5) Name of the handler(s) to whom commercial cranberry sales were made.

(6) Such other information as may be needed for implementation and operation of this section.

(b) *Inventory.* Each handler engaged in the handling of cranberries or cranberry products shall, upon request of the committee, file promptly with the committee a certified report, showing such information as the committee shall specify with respect to any cranberries and cranberry products which were held by them on such date as the committee may designate.

(c) *Receipts.* Each handler shall, upon request of the committee, file promptly with the committee a certified report as to each quantity of cranberries acquired during such period as may be specified, and the place of production.

(d) *Handling reports.* Each handler shall, upon request of the committee, file promptly with the committee a certified report as to the quantity of cranberries handled during any designated period or periods.

(e) *Withheld and excess cranberries.* Each handler shall, upon request of the committee, file promptly with the committee a certified report showing, for such period as the committee may specify, the total quantity of cranberries withheld from handling or held in excess, in accordance with §§ 929.49 and 929.54, the portion of such withheld or excess cranberries on hand, and the quantity and manner of disposition of any such withheld or excess cranberries disposed of.

(f) *Other reports.* Upon the request of the committee, with the approval of the Secretary, each handler shall furnish to the committee such other information with respect to the cranberries and cranberry products acquired and disposed of by such person as may be necessary to enable the committee to exercise its powers and perform its duties under this part.

(g) The committee may establish, with the approval of the Secretary, rules and regulations for the implementation and operation of this section.

17. Revise § 929.64 to read as follows:

§ 929.64 Verification of reports and records.

The committee, through its duly authorized agents, during reasonable business hours, shall have access to any handler's premises where applicable records are maintained for the purpose of assuring compliance and checking and verifying records and reports filed by such handler.

Dated: April 21, 2004.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 04–9424 Filed 4–27–04; 8:45 am]

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Part IV

Federal Trade Commission

16 CFR Parts 603, 613, and 614
Related Identity Theft Definitions, Duration of Active Duty Alerts, and Appropriate Proof of Identity Under the Fair Credit Reporting Act; Proposed Rule

FEDERAL TRADE COMMISSION

16 CFR Parts 603, 613, and 614

RIN 3084–AA94

Related Identity Theft Definitions, Duration of Active Duty Alerts, and Appropriate Proof of Identity Under the Fair Credit Reporting Act

AGENCY: Federal Trade Commission (FTC or the Commission).

ACTION: Notice of proposed rulemaking; request for public comment.

SUMMARY: The recently enacted Fair and Accurate Credit Transactions Act of 2003 (FACT Act or the Act), amending the Fair Credit Reporting Act (FCRA), establishes requirements for consumer reporting agencies, creditors, and others to help remedy identity theft. In this action, pursuant to authority in the Act, the Commission is proposing rules that would establish definitions for the terms "identity theft" and "identity theft report;" the duration of an "active duty alert;" and the "appropriate proof of identity" for purposes of sections 605A (fraud alerts and active duty alerts), 605B (consumer report information blocks), and 609(a)(1) (truncation of Social Security numbers) of the FCRA, as amended by the Act.

DATES: Written comments must be received on or before June 15, 2004.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to "FACTA Identity Theft Rule, Matter No. R411011" to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed to the following address: Post Office Box 1030, Merrifield, VA 22116–1030. Please note that courier and overnight deliveries cannot be accepted at this address. Courier and overnight deliveries should be delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H–159 (Annex J), 600 Pennsylvania Avenue, NW., Washington, DC 20580. Comments containing confidential material must be filed in paper form.

An electronic comment can be filed by (1) clicking on *http://www.regulations.gov*; (2) selecting "Federal Trade Commission" at "Search for Open Regulations;" (3) locating the summary of this Notice; (4) clicking on "Submit a Comment on this Regulation;" and (5) completing the form. For a given electronic comment, any information placed in the following fields—"Title," "First Name," "Last Name," "Organization Name," "State," "Comment," and "Attachment"—will be publicly available on the FTC Web site. The fields marked with an asterisk on the form are required in order for the FTC to fully consider a particular comment. Commenters may choose not to fill in one or more of those fields, but if they do so, their comments may not be considered.

Comments on any proposed filing, recordkeeping, or disclosure requirements that are subject to paperwork burden review under the Paperwork Reduction Act should additionally be submitted to: Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Federal Trade Commission. Comments should be submitted via facsimile to (202) 395–6974 because U.S. postal mail at the Office of Management and Budget is subject to lengthy delays due to heightened security precautions. Such comments should also be mailed to: FACTA Identity Theft Rule, Matter No. R411011, Post Office Box 1030, Merrifield, VA 22116–1030 or, if sent by courier or overnight delivery, delivered to: Federal Trade Commission/Office of the Secretary, Room H–159 (Annex J), 600 Pennsylvania Avenue, NW., Washington, DC 20580.

The Federal Trade Commission Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC Web site, to the extent practicable, at *www.ftc.gov*. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm*.

FOR FURTHER INFORMATION CONTACT: Naomi B. Lefkovitz, Attorney, Division of Planning and Information, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580. (202) 326–3228.

SUPPLEMENTARY INFORMATION:

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I. Introduction

The FACT Act was signed into law on December 4, 2003. Public Law 108–159, 117 Stat. 1952. Portions of the Act amend the FCRA to enhance the ability of consumers to resolve problems caused by identity theft. Section 111 of the Act adds a number of new definitions to the FCRA, including "identity theft" and "identity theft report." The Act permits the Commission to further define the term "identity theft," and requires the Commission to determine the meaning of the term "identity theft report," although the Act does provide a minimum definition. Section 112 of the Act requires the Commission to determine the duration of an "active duty alert," which the Act sets at a minimum of 12 months. Section 112 also requires the Commission to determine the "appropriate proof of identity" for purposes of sections 605A (fraud alerts and active duty alerts), 605B (consumer report information blocks), and 609(a)(1) (truncation of Social Security numbers) of the FCRA, as amended by the Act.

II. Overview of the Rules

A. Definition of Identity Theft

The Act confers certain rights on victims of identity theft designed to assist them in resolving problems caused by the identity theft (*see* sections 605A and 605B, and subsection 623(a)(B) of the FCRA).[1] In addition, the

[1] For example, an identity thief often will use victims' identifying information to open credit accounts on which he or she never pays the

Act creates certain requirements designed to reduce the occurrence of identity theft itself (*see* subsection 615(e) of the FCRA).[2] Thus, the definition of "identity theft" is critical because it defines the scope of fraudulent conduct that entities must take steps to prevent, and the definition determines who is, in fact, a victim entitled to take advantage of the rights conferred by the Act. The Commission believes that the definition should be sufficiently broad to cover all bona fide victims and conduct, but should be tailored to prevent individuals who are not identity theft victims from using the Act for unscrupulous purposes such as clearing negative, but legitimate, information from their credit records.

Section 111 of the Act defines the term "identity theft" to mean "a fraud committed using the identifying information of another person, subject to such further definition as the Commission may prescribe, by regulation." The Commission believes that additional definition of the term is warranted and proposes that the term "identifying information" have the same meaning as "means of identification" in 18 U.S.C. 1028(d)(7). The criminal code's definition of "means of identification" covers the appropriate range of identifying information and ensures that the term "identity theft" addresses the relevant permutations of fraud that might occur. It also ensures consistency with existing Federal law defining what constitutes identity theft, which promotes clarity and ease of application.

The Commission further proposes defining "identity theft" as a fraud which is attempted to be committed. Although identity thieves do not always succeed in opening new accounts, their attempts may be recorded as inquiries on victims' consumer reports. These inquiries may have an adverse affect on their credit scores,[3] therefore, victims should be entitled to take advantage of the Act to have these inquiries removed. In addition, victims who have learned of attempts by an identity thief and want to reduce the likelihood that the identity thief will succeed in opening new accounts, may want to place an "initial fraud alert" on their consumer reports.[4]

Finally, the Commission proposes to require that a person's identifying information must be used without lawful authority. Adding "without lawful authority" prevents individuals from colluding with each other to obtain goods or services without paying for them, and then availing themselves of the rights conferred by the Act to clear their credit records of the negative, but legitimate information.[5]

B. Definition of Identity Theft Report

Under section 111 of the Act, the Commission is required to determine the meaning of the term "identity theft report." The Act provides that the term means "at a minimum, a report—(A) that alleges identity theft; (B) that is a copy of an official, valid report filed by the consumer with an appropriate Federal, State, or local law enforcement agency, including the United States Postal Inspection Service, or such other government agency deemed appropriate by the Commission; and (C) the filing of which subjects the person filing the report to criminal penalties relating to the filing of false information, if, in fact, the information in the report is false."

Under the Act, an identity theft victim can use an "identity theft report" to mitigate a number of specific harms resulting from identity theft. First, under section 605A of the FCRA, victims can obtain an extended fraud alert, if they provide an "identity theft report" to consumer reporting agencies. An extended fraud alert is an alert placed in the consumer's file for seven years, which notifies users that the consumer may be a victim of fraud or identity theft and requires users to contact the consumer in person or by the contact method designated by the consumer before extending credit.[6] Thus, this fraud alert can prevent further occurrences of identity theft.

Second, under section 605B of the FCRA, victims can provide an "identity theft report" to consumer reporting agencies to have information resulting from identity theft that may adversely affect their credit histories blocked from their consumer reports. Notably, once an information furnisher is notified by a consumer reporting agency under section 605B of the FCRA that the consumer reporting agency is blocking information resulting from identity theft, the information furnisher must use reasonable procedures to prevent refurnishing this information, and cannot sell, transfer for consideration or place for collection debt resulting from the identity theft.[7]

Third, under subsection 623(a)(6)(B) of the FCRA, victims can provide an "identity theft report" directly to information furnishers to prevent these information furnishers from continuing to provide information resulting from identity theft to the consumer reporting agencies.

As a consequence of these uses, the identity theft report can be a powerful tool for identity theft victims in mitigating the harm resulting from identity theft. At the same time, it could provide a powerful tool for misuse, allowing persons to engage in illegal activities in an effort to remove or block accurate, but negative, information in their consumer reports.

In part to deter such possible misuse, the Act contains the requirement that the filing of the report be subject to criminal penalties for the filing of false information. As a further safeguard, the Act provides consumer reporting agencies and information furnishers with some ability to reject or reinstate a block or continue furnishing information. Specifically, a consumer reporting agency can decline or rescind a block if it reasonably determines that there is an error, a material misrepresentation of fact by the consumer, or the consumer obtained

charges. Eventually these accounts are reported as delinquent on the victims' credit records with the result that the victims may be denied the ability to obtain housing, job opportunities, or credit (or credit may be offered on less beneficial terms). To restore their records' accuracy, the victims need to be able to remove the fraudulent information from their consumer reports. The Act assists victims by enabling them to block the information resulting from identity theft from appearing on their consumer reports and to prevent information furnishers from continuing to furnish such information. (*See* sections 605B and 154(a) of the Act).

[2] Subsection 615(e) of the FCRA requires the Federal banking agencies, the National Credit Union Administration, and the Commission, jointly, to prescribe regulations with respect to "red flags" that financial institutions and creditors must implement in order to monitor for identity theft activity being perpetrated at their institutions.

[3] *Understanding Your Credit Score*, p. 14 at *http://www.myfico.com/Offers/myFICO_UYCS%20booklet.pdf*

[4] Under section 605A of the FCRA, "initial fraud alerts" which last for not less than 90 days, may be placed by consumers who can assert in good faith that they are or may be about to become victims of fraud or identity theft. Since users of consumers reports with these alerts who wish to extend credit (*see infra* n. 6) must take certain steps to verify the consumer's identity, these alerts can prevent identity thieves from opening new accounts.

[5] The Commission notes that the authority of a guardian, trustee, attorney-in-fact, or other person legally authorized to act on behalf of another does not extend to the commission of fraud. For example, in the case of a minor, the parent or guardian would have lawful authority to open a financial account *on behalf* of the minor, but no lawful authority to open the financial account *as* the minor, *i.e.*, pretending to be the minor. Thus, minors or other persons lacking legal capacity in such situations would still have rights under this Act.

[6] Extending credit is defined as establishing a new credit plan or extension of credit, other than under an open-end credit plan (as defined in section 103(i) of the Truth in Lending Act) or issuing an additional card on an existing credit account requested by a consumer, or granting any increase in credit limit on an existing credit account requested by a consumer.

[7] Subsections 623(a)(6)(A) and 615(f) of the FCRA.

possession of goods, services, or money as a result of the blocked transaction. *See* section 605B(c) of the FCRA. An information furnisher may continue to furnish the information if it knows or is informed by the consumer that the information is correct. *See* section 623(a)(6)(B) of the FCRA.

The Commission is concerned whether these safeguards provide sufficient protection from misuse. Traditionally, creditors and consumer reporting agencies have accepted police reports as a basis for blocking the record of an allegedly fraudulent transaction.[8] Under the Act, however, consumers could obtain an identity theft report by filing an allegation of identity theft with federal law enforcement agencies in a wholly automated manner, without any direct contact with a law enforcement officer.[9] Furthermore, the Commission anticipates that, over time, even local police departments that previously took in-person reports may increasingly turn to automated systems. If a consumer reporting agency or an information furnisher receives an identity theft report based on a copy of a law enforcement report filed by means of an automated system with little detail about the identity theft,[10] it may be difficult for it to determine whether the consumer presenting the identity theft report is a bona fide victim or an individual with delinquent debts seeking to clear his or her credit record. The potential for abuse of the credit reporting system is significant. At the same time, it is critical that victims be able to obtain the full benefits conferred by the Act in order to recover from the damage inflicted upon them by identity theft.

To address these concerns, the Commission is proposing to define "identity theft report" to include two additional elements. These elements are balanced to prevent abuse of the credit reporting system, without creating road blocks to a victim's recovery process or compensating for lax credit issuing practices. These additional safeguards work together to reinforce the existing protections of FCRA sections 605B(c)(1) and 623(a)(6)(B), *see supra*, which allow consumer reporting agencies and information furnishers leeway to reject requests for blocks.

First, the proposal would add to the definition of "identity theft report" a requirement that the consumer allege the identity theft with as much specificity as possible. The proposed rule provides four examples of types of information that the Commission considers helpful in investigating allegations of identity theft. These examples are for illustrative purposes only. Detailed information is critically important to law enforcement and, equally important, can help consumer reporting agencies and information furnishers distinguish between victims and those seeking to abuse the system. The Commission believes that this added specificity requirement will not disadvantage bona fide victims: they have to provide only what they know about the incident.

The proposal also would allow information furnishers or consumer reporting agencies to request additional information or documentation to help them determine the validity of the alleged identity theft. The request, however, must be reasonable, it must be for the purpose of determining the validity of the identity theft, and it must be made not later than five business days after the date of receipt of the copy of the law enforcement agency report or the request by the consumer for the particular service, whichever shall come later.[11] These limitations balance businesses' legitimate need to protect against fraud with bona fide victims' need to resolve the problems resulting from the crime without undue delay.

The proposed rule provides examples of when it may or may not be reasonable for information furnishers or consumer reporting agencies to request additional information or documentation. These examples are illustrative, and not exhaustive, and because they cannot take into account every unique circumstance, they are intended merely to provide general guidance. The examples demonstrate a range of law enforcement reports which a consumer might present to a consumer reporting agency or an information furnisher. In general, the request for additional information is intended to compensate for a report which does not rise to the level of the ideal law enforcement report (*i.e.*, a detailed report taken by a law enforcement officer face-to-face with the consumer which contains identifying or other contact information for the officer).

C. Duration of the Active Duty Alert

Section 112 of the Act provides certain consumers with the ability to place three types of alerts in their files maintained by a nationwide consumer reporting agency covered under the definition of section 603(p) of the FCRA. Two of the types of alerts are designed for consumers who are either victims of identity theft or who can assert in good faith that they are or may be about to become victims of fraud or identity theft.[12] The third type of alert is the

[8] Prior to the Act, creditors often requested a police report as proof that the consumer was a victim and not a delinquent debtor. A number of states, including California, Colorado, Idaho, and Washington had enacted laws which required consumer reporting agencies to block fraudulent information from consumer reports upon receipt of a police report. Presumably, police reports were relied upon because it was understood (perhaps not correctly in all cases) that in order to file a police report, an individual would need to go to the local police station and sit down with an officer, and that it was this face-to-face interaction with law enforcement that provided a sufficient level of deterrence against individuals who might seek to abuse the system.

The Act, however, expands valid law enforcement reports to include reports filed with state and federal law enforcement agencies as well as local law enforcement agencies. This expansion is a positive measure for victims because not all victims have been able to obtain reports from local police departments. The Commission found in its survey conducted by Synovate, in March-April 2003, that in the previous year, of the 26% of victims who sought to report their identity theft to a police department, 24% were not able to obtain a copy of a police report, *see* Synovate survey at *http://www.ftc.gov/os/2003/09/synovatereport.pdf* (data underlying the Synovate survey indicated that of this 24%, 9% of consumers did not know whether a police report was taken. Therefore, the Commission has inferred that these consumers did not obtain a copy of the report).

[9] Under these automated systems, consumers do not meet face-to-face with a law enforcement officer to provide the information about the identity theft. Consumers may mail in the reports, file them via the Internet, or provide the information over the telephone to staff who may not be criminal investigators.

Indeed, the Commission's own identity theft complaint collection system is an example of this kind of automated system and illustrates the possibility for abuse. Under the 1998 Identity Theft Assumption and Deterrence Act, Pub. L. No. 105–318, 112 Stat. 3007 (1998) (codified at 18 U.S.C. 1028), Congress directed the Commission to collect complaints about identity theft from victims and to make those complaints available to other law enforcement agencies for use in their criminal investigations. In response, the Commission established its Identity Theft Data Clearinghouse, a centralized database that accepts identity theft complaints from consumers. The Commission's complaint system, however, is not designed to vouch for the truth of each individual complaint. It is simply designed to provide a central collection point for identity theft data. Victims who have filed complaints with the Clearinghouse have done so voluntarily, with no guarantee of obtaining any immediate, direct benefit such as the investigation of their cases. Now under the Act, a consumer could opt to use a copy of a complaint filed with the Commission's Clearinghouse as an "identity theft report" because such a copy would technically meet the statutory definition: it alleges identity theft, is filed with a federal law enforcement agency (*i.e.*, the Commission), and, like all documents filed with federal agencies, is subject to criminal penalties for false filing (*see* 18 U.S.C. 1001).

[10] The section 111 definition requires only that an identity theft be alleged.

[11] A consumer reporting agency may accept an identity theft report for the purpose of placing an extended fraud alert without a request for additional information or documentation, but may want such additional information or documentation should the consumer, at a later date, request that certain information be blocked from appearing on his or consumer report.

[12] The first type is an "initial alert" which lasts for not less than 90 days and may be placed by

active duty alert. Military personnel who meet the definition of an active duty military consumer [13] are permitted to request it. This active duty alert was not designed to be a specific response to a threat of identity theft, but rather to be a preventive measure [14] for service members who are deployed in locations or situations in which they are unlikely to be able either to apply for credit or to monitor their financial accounts. The Act sets a minimum period of 12 months for the duration of the active duty alert, but requires the Commission to determine if this period should be longer.

The Commission considers that the duration of the active duty alert should be balanced between a length of time sufficient to meet the needs of the active duty military consumer as contemplated by the Act and a length of time that is not unduly burdensome to consumers [15] or creditors.[16] Although deployments for military personnel covered under the definition of an active duty military consumer are generally 12 months, some service members, such as members of the United States Air Force, may be deployed for shorter periods of time. Alternately, some reservists may spend up to 6 months prior to deployment in intensive training. This intensive training may take place in locations or situations similar to the deployment such that the reservists would have limited ability either to seek credit or to monitor their financial accounts. There also may be active duty military consumers who receive back-to-back or extended deployments. The Commission, however, understands that these consumers generally do not learn of their extended deployments until near the end of their initial deployments so it is impossible to anticipate who will receive them.

The Commission proposes that the duration of an active duty alert remain at the 12 months set forth by the Act. The Commission believes that 12 months will cover adequately the time period for which the majority of service members will be deployed. The Commission recognizes that 12 months may not sufficiently cover those active duty military consumers who receive extended deployments or who undergo intensive training prior to a 12-month deployment, however, these active duty military consumers may place another 12-month active duty alert after their first alert expires if they consider the additional period of protection to be necessary.[17] At the same time, the 12-month period will be too long for certain service members. The Commission seeks comment on whether it would be appropriate to establish a longer period of time for active duty fraud alerts.[18]

D. Appropriate Proof of Identity

Subsection 112(b) of the Act requires the Commission to determine what constitutes appropriate proof of identity for purposes of sections 605A (request by a consumer, or an individual acting on behalf of or as a personal representative of a consumer, for placing and removing fraud and active duty alerts), 605B (request by a consumer for blocking fraudulent information on consumer reports), and 609(a)(1) (request by a consumer for Social Security number truncation on file disclosures) of the FCRA, as amended by the Act.

In determining what should constitute "appropriate proof of identity," the Commission has considered the risks associated with misidentifying a consumer. The two greatest apparent risks are that the file of the consumer making the request is confused with another consumer's file, or that a person pretending to be the consumer makes the request without the consumer's knowledge. The first instance can be prevented by requiring that consumers provide information sufficient to match them with their files. The second instance could be prevented by requiring an even greater degree of information sufficient to prove that the consumers are truly who they claim to be. Yet the information needed, in most instances to make an accurate file match, is relatively limited and easily produced by a consumer,[19] whereas the information necessary to prove that a consumer is who he or she claims to be could be substantially more burdensome for a consumer to produce, and might result in delays or even failure of the consumer to obtain the requested service, if the consumer reporting agency is unable ultimately to identify the consumer.

Therefore, the Commission proposes that the determination of "appropriate proof of identity" should balance the harm to the consumer that might arise from inadequate identification with the harm that might arise from delayed, or failed fulfillment of requested services due to greater levels of scrutiny. The Commission believes that the risk of consumer harm may differ depending on the service being requested or the method by which the request is made (*i.e.*, Internet, telephone, or mail), or may change over time, and that these risks may not apply equally to each consumer reporting agency. Consequently, the Commission believes that the standard of proof should be reasonably flexible to accommodate these differences, and that the consumer reporting agencies are in the best position to assess them. Thus, the proposed rule would require consumer reporting agencies to develop reasonable requirements to identify consumers in accordance with the risk of harm that may arise from a misidentification, but which, at a minimum, should be sufficient to match consumers with their files. The proposal provides examples of information for illustrative purposes only, that might constitute such reasonable requirements as follows:

(i) Consumer file match: The identification information of the victim including his or her full name (first,

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consumers who can assert in good faith that they are or may be about to become victims of fraud or identity theft. The second type is an "extended alert," which lasts for 7 years and may be placed by consumers who can allege that they are victims of identity theft. Users of consumers reports with these alerts who wish to extend credit must take certain steps to verify the consumer's identity. *See* section 605A of the FCRA.

[13] The term "active duty military consumer" means a consumer in military service who—

(A) is on active duty (as defined in section 101(d)(1) of Title 10 U.S.C.) or is a reservist performing duty under a call or order to active duty under a provision of law referred to in section 101(a)(13) of Title 10 U.S.C.; and

(B) is assigned to service away from the usual duty station of the consumer. FACT Act sec. 111, *codified at* FCRA sec. 603(q)(1), 15 U.S.C. 1681a(q)(1).

[14] Statement of Hon. Michael G. Oxley, Congressional Record, Extension of Remarks, E2513, December 8, 2002.

[15] Service members who return from their deployments prior to the expiration of the active duty alert may experience delays when attempting to enter into new credit transactions because of the presence of the alert. Although they can remedy this inconvenience by removing the alert, it is likely that removing an alert will be more difficult than placing an alert. *See infra* paragraph IID(1).

[16] The Act creates a new obligation for users of consumer reports that include these alerts. Users of consumer reports that include these alerts who are seeking to extend credit (*see supra* n.6) must use reasonable policies and procedures to form a reasonable belief that the user knows the identity of the person seeking the credit. These procedures may include contacting the consumer by telephone. FACT Act sec. 112, *codified at* FCRA sec. 605A(h)(1), 15 U.S.C. 1681cA(h)(1).

[17] The Commission believes that because service members may go on deployments that trigger the elements of the definition of the term "active duty military consumer" several times during their service careers, they can place sequential active duty alerts. The Act is silent on this issue, but it would be illogical to read the Act otherwise.

[18] The Commission is of the view that the statutory language ("12 months or such longer period as the Commission shall determine") requires a single, fixed period of time for the duration of active duty fraud alerts, and not a "tiered" system or other series of optional time periods.

[19] For example, such information may be limited to a name, date of birth, Social Security number, and current address.

middle initial, last, suffix), any other or previously used names, full address (street number and name, apt. no., city, State, and ZIP Code), full 9 digits of Social Security number, and/or date of birth.

(ii) Additional proof of identity: copies of government issued identification documents, utility bills, and/or other current methods of authentication of a person's identity including, but not limited to answering questions to which only the consumer might be expected to know the answer.

(1) Fraud and Active Duty Alerts

It appears to the Commission that the appropriate proof of identity for placing a fraud or active duty alert may need to be only the information necessary for a consumer reporting agency to match consumers with their files. At this time, the Commission believes that the harm that would result from a delay in the placement of an alert would be greater than the harm resulting from an alert that is improperly placed in a consumer's file.[20] The consumer who has an alert improperly placed in his or her consumer file may experience some delay in obtaining an extension of credit while the user of the consumer report takes additional steps to verify the consumer's identity, however, the consumer can rectify the situation by removing the alert once he or she becomes aware of it. In comparison, the value of a functioning alert can be substantial as it has the potential to thwart identity theft before it begins or to prevent further damage.

Appropriate proof of identity also is required to remove an alert prior to its expiration. The principal risk of harm in this situation is that someone other than the consumer removes the alert. For example, an identity thief might seek to remove an alert in order to gain access to the consumer's credit.[21] In this instance, a delay in the removal of an alert might be the lesser harm. Hence, appropriate proof of identity in the context of removing an alert may call for a greater level of scrutiny than merely the information necessary to match consumers with their files.

(2) Fraudulent Information Blocking

Under section 605B of the FCRA, consumers who want to block information resulting from identity theft on their consumer reports need to provide appropriate proof of identity to the consumer reporting agency. To block this information, however, a consumer also must provide an "identity theft report"[22] and identify the specific information to be blocked. Therefore, in applying the balancing test, the risk that the wrong information will be blocked or that information will be blocked by a person other than the consumer seems relatively small. Consequently, it seems reasonable that appropriate proof of identity in the context of blocking information resulting from identity theft may need to be only the information necessary for the particular consumer reporting agency to match consumers with their files.

(3) Social Security Number Truncation

Under section 609(a)(1) of the FCRA, consumers who request that the first five digits of their Social Security numbers be truncated when requesting a file disclosure must provide appropriate proof of identity to the consumer reporting agency. However, under section 610 of the FCRA, the consumer reporting agency already must require the consumer to furnish proper identification before making any file disclosures to the consumer pursuant to section 609. Because of this underlying identification requirement, the risk of misidentifying the consumer appears small enough such that increasing the level of scrutiny to allow the consumer to truncate his or her Social Security number on the disclosed file does not seem reasonable.

III. Invitation to Comment

The Commission invites interested members of the public to submit written data, views, facts, and arguments addressing the issues raised by this Notice. Written comments must be received on or before June 15, 2004. Comments should refer to "FACTA Identity Theft Rule, Matter No. R411011" to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed to the following address: Post Office Box 1030, Merrifield, VA 22116–1030. Please note that courier and overnight deliveries cannot be accepted at this address. Courier and overnight deliveries should be delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H–159 (Annex J), 600 Pennsylvania Avenue, NW., Washington, DC 20580. If the comment contains any material for which confidential treatment is requested, it must be filed in paper (rather than electronic) form, and the first page of the document must be clearly labeled "Confidential."[23]

An electronic comment can be filed by (1) clicking on *http://www.regulations.gov;* (2) selecting "Federal Trade Commission" at "Search for Open Regulations;" (3) locating the summary of this Notice; (4) clicking on "Submit a Comment on this Regulation;" and (5) completing the form. For a given electronic comment, any information placed in the following fields—"Title," "First Name," "Last Name," "Organization Name," "State," "Comment," and "Attachment"—will be publicly available on the Commission Web site. The fields marked with an asterisk on the form are required in order for the Commission to fully consider a particular comment. Commenters may choose not to fill in one or more of those fields, but if they do so, their comments may not be considered.

Comments on any proposed filing, recordkeeping, or disclosure requirements that are subject to paperwork burden review under the Paperwork Reduction Act should additionally be submitted to: Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Federal Trade Commission. Comments should be submitted via facsimile to (202) 395–6974 because U.S. postal mail at the Office of Management and Budget is subject to lengthy delays due to heightened security precautions. Such comments should also be mailed to: FACTA Identity Theft Rule, Matter No. R411011, Post Office Box 1030 Merrifield, VA 22116–1030 or, if sent by courier or overnight delivery, delivered to: Federal Trade Commission/Office of the Secretary, Room H–159 (Annex J), 600 Pennsylvania Avenue, NW., Washington, DC 20580.

The Federal Trade Commission Act and other laws the Commission

[20] The Commission has not been made aware of any concern that under the consumer reporting agencies' current practice of placing fraud alerts, fraud alerts have been improperly placed or consumers would be harmed more by the improper placement than by a delay in their placement. The concept of the "active duty" alert did not exist prior to the Act.

[21] Currently, there is no evidence of such occurrences, but such a pattern might evolve, especially if fraud prevention efforts in other areas become more effective.

[22] Consumers must comply with certain requirements that are designed to ensure that only the true victims of identity theft obtain an identity theft report. *See* section 111 of the Act.

[23] Commission Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c).

administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the Commission Web site, to the extent practicable, at *www.ftc.gov*. As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the Commission Web site. More information, including routine uses permitted by the Privacy Act, may be found in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm*.

IV. Communications by Outside Parties to Commissioners or Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding from any outside party to any Commissioner or Commissioner's advisor will be placed on the public record. *See* 16 CFR 1.26(b)(5).

V. Paperwork Reduction Act

The Commission has submitted this proposed Rule and a Supporting Statement for Information Collection Provisions to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3520. As required by the FACT Act, the proposed rule defines the term "identity theft report." Under the Act, an identity theft victim can mitigate a number of specific harms resulting from identity theft by providing an identity theft report to consumer reporting agencies and information furnishers.

The Commission staff estimates the paperwork burden of the Act and proposed rule based on its knowledge of identity theft trends and a recent identity theft study report, *Federal Trade Commission—Identity Theft Survey Report* (Survey Report), prepared for the Commission by Synovate, and issued in September, 2003.[24] Overall, the Commission staff has estimated that the average annual burden during the three-year period for which OMB clearance is sought will be 459,000 burden hours. The estimated annual labor cost associated with these paperwork burdens is $7.89 million.

Increase in number of individuals who obtain identity theft reports. The Survey Report indicates that there are 9.91 million individuals victimized by identity theft each year. Survey Report at 7. Twenty-six percent of those individuals, or 2.577 million, contact a local law enforcement agency. *Id.* at 59.[25] Seventy-six percent of the 2.577 million, or 1.958 million, file a police report alleging identity theft. *Id.* Prior to the Act, creditors might request a police report as proof that the individual reporting identity theft was a victim and not a delinquent debtor. The Act and proposed rule's expanded definition of "identity theft report" will allow individuals to obtain law enforcement reports from State and Federal law enforcement agencies, as well as local law enforcement agencies. Thus, the number of individuals who ultimately obtain an identity theft report will likely increase because the proposed rule will facilitate a victim's ability to file a law enforcement report.

First, the Survey Report indicated that 618,000 victims who contacted local law enforcement did not obtain a copy of a police report.[26] Thus, staff estimates that the proposed rule will enable those victims who previously were unable to obtain reports with local law enforcement to now file reports with a State or Federal law enforcement agency. Second, 4.261 million victims currently contact an information furnisher.[27] Staff estimates, based on its knowledge of identity theft trends, that the proposed rule will result in an increase of 10% or 426,000 of these victims obtaining an identity theft report. Third, 646,000 victims do not take any action even though their information was used to open new accounts or to commit other frauds.[28] Staff estimates, based on its knowledge of identity theft trends, that the proposed rule would likely result in 75% or 485,000 of these victims obtaining identity theft reports. In sum, staff estimates that the proposed rule will increase by 1.529 million the number of individuals obtaining identity theft reports. (618,000 + 426,000 + 485,000).

Hours and Cost Burden. Staff estimates, based on the experience of the Commission's Consumer Response Center, that an individual will spend an average of 5 minutes finding and reviewing filing instructions, 8 minutes filing the law enforcement report with the law enforcement agency, and 5 minutes submitting the law enforcement report and any additional information or documentation to the information furnisher or consumer reporting agency, resulting in an average of 18 minutes for each identity theft report.[29] Thus, the annual information collection burden for the estimated 1.529 million new identity theft reports due to the proposed rule will be 459,000 hours. [(1.529 million × 18 minutes)/60 minutes]. At an average national wage for individuals of $17.18 per hour,[30] the proposed rule will impose an estimated $7.89 million labor cost burden on individuals who obtain identity theft reports. ($17.18 × 459,000 hours).

The Commission solicits comment on the paperwork burden that the proposed rules may impose to ensure that no additional burden has been overlooked. The Commission invites comments that also will enable it to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who must comply, including through the use of appropriate automated, electronic, mechanical, or other technological techniques or other forms of information technology.

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, requires that the Commission provide an Initial Regulatory Flexibility Analysis (IRFA) with a proposed rule and a Final Regulatory Flexibility Analysis (FRFA), if any, with the final rule, unless the Commission certifies that the rule will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 603–605.

The Commission does not anticipate that the proposed rules will have a significant economic impact on a substantial number of small entities.

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[24] *See* Synovate survey at *http://www.ftc.gov/os/2003/09/synovatereport.pdf.*

[25] All calculations in this section have been rounded to the nearest thousand.

[26] *See* Survey Report at 59 (24% of the 2.577 million victims who contacted law enforcement did not obtain a copy of a police report, *see supra* n.8).

[27] *See* Survey Report at 50 (43% of all victims contact an information furnisher).

[28] The data collected in the survey indicates that these types of victims constitute 20% of the 3.23 million victims each year whose information is used to open new accounts or commit other frauds.

[29] These estimates take into account that the time required to file the report will vary depending on the law enforcement agency used by the individual.

[30] The Bureau of Labor Statistics reports an average wage nationally for individuals of $17.18 per hour.

The Act expressly mandates most of the proposed rules' requirements, and thus accounts for most of the economic impact of the proposed rules. The proposed rule to establish the duration of an active duty alert at 12 months has an indirect impact on nationwide consumer reporting agencies described in section 603(p) of the FCRA, which provide the alert to users of consumer reports, and on users of consumer reports who are seeking to extend credit to consumers.[31] The Commission believes that currently there are no nationwide consumer reporting agencies that are small entities (*i.e.*, with less than $6 million in average annual receipts).[32] The Commission has been unable to determine how many users of consumer reports who are seeking to extend credit to consumers are small entities. Although there may be a number of small entities among these users of consumer reports, and the economic impact of the proposed rule on a particular small entity could be significant, overall the proposed rule likely will not have a significant economic impact on a substantial number of small entities.

The proposed rule directing the consumer reporting agencies to develop and implement reasonable requirements for what information consumers shall provide to constitute proof of identity for purposes of sections 605A (consumer request for placing and removing fraud and active duty alerts), 605B (consumer request for blocking fraudulent information on consumer reports), and 609(a)(1) (consumer request for Social Security number truncation on file disclosures) of the FCRA only applies to the consumer reporting agencies. As discussed above, the Commission believes that currently there are no nationwide consumer reporting agencies that are small entities. The Commission, however, has been unable to determine how many other consumer reporting agencies are small entities. Although there may be a number of small entities among the other consumer reporting agencies, and the economic impact of the proposed rule on a particular small entity could be significant, overall the proposed rule likely will not have a significant economic impact on a substantial number of small entities. The minimal impact on consumer reporting agencies would likely consist of merely applying a reasonable flexibility to existing, customary requirements developed in the normal course of their activities to ensure that they are providing the service requested by the consumer correctly.

Accordingly, this document serves as notice to the Small Business Administration of the agency's certification of no effect. To ensure the accuracy of this certification, however, the Commission requests comment on whether the proposed rules will have a significant impact on a substantial number of small entities, including specific information on the number of entities in each category that would be covered by the proposed rules, the number of these companies that are "small entities," and the average annual burden for each entity. Although the Commission certifies under RFA that the rules proposed in this notice would not, if promulgated, have a significant impact on a substantial number of small entities, the Commission has determined, nonetheless, that it is appropriate to publish an IRFA in order to inquire into the impact of the proposed rule on small entities. Therefore, the Commission has prepared the following analysis:

A. Description of the Reasons That Action by the Agency Is Being Taken

The FACT Act permits or directs the Commission to adopt rules that would establish: (1) Definitions for the terms "identity theft" and "identity theft report;" (2) the duration of an "active duty alert;" and (3) the appropriate proof of identity for purposes of sections 605A (fraud alerts and active duty alerts), 605B (consumer report information blocks), and 609(a)(1) (truncation of Social Security numbers) of the FCRA, as amended by the Act. In this action, the Commission proposes, and seeks comment on, rules that would fulfill the statutory authorization and mandates.

B. Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The objective of the proposed rules is to establish: (1) Definitions for the terms "identity theft" and "identity theft report;" (2) the duration of an "active duty alert;" and (3) the appropriate proof of identity for purposes of sections 605A (fraud alerts and active duty alerts), 605B (consumer report information blocks), and 609(a)(1) (truncation of Social Security numbers) of the FCRA, as amended by the Act. The proposed rules are authorized by and based upon sections 111 and 112 of the FACT Act, Public Law 108–159, 117 Stat. 1952.

C. Small Entities to Which the Proposed Rule Will Apply

As described above, the proposed rules apply to consumer reporting agencies, including agencies that are small entities, if any, and to users of consumer reports, including users that are small entities, if any. A precise estimate of the number of small entities that are consumer reporting agencies (with less than $6 million in average annual receipts) and users of consumer reports within the meaning of the proposed rules, however, is not currently feasible. The Commission, therefore, invites comment and information on this issue.

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

The Commission has tentatively determined that with respect to small entities, if any, the proposed rules do not include a collection of information subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501; 5 CFR 1320). The Commission, however, seeks comment on any paperwork burden that the proposed rules may impose on small entities to ensure that no burden has been overlooked.

E. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission has not identified any other Federal statutes, rules, or policies that would duplicate, overlap, or conflict with the proposed rules. The Commission invites comment and information on this issue.

F. Significant Alternatives to the Proposed Rule

The Commission is not, at this time, aware of what particular alternative methods of compliance may satisfy the statute and also reduce the impact of the proposed rules on small entities that may be affected by the rules. The nature and number of such entities, if any, is unclear. Therefore, the Commission seeks comment and information with regard to (1) the existence of small business entities for which the proposed rules would have a significant economic impact; and (2) suggested alternative methods of compliance that, consistent with the statutory requirements, would reduce the economic impact of the rules on such small entities. If the comments filed in response to this notice identify small entities that are affected by the rules, as well as alternative methods of compliance that would reduce the economic impact of the rules on such entities, the Commission will consider the feasibility of such alternatives and determine whether they should be incorporated into the final rules.

[31] *See supra* n.6.

[32] *See* 13 CFR 121.201 (Small Business Administration's Table of Small Business Size Standards).

VII. Questions for Comment on the Proposed Rule

The Commission seeks comment on all aspects of the proposed rules. Without limiting the scope of issues on which it seeks comment, the Commission is particularly interested in receiving comments on the questions that follow. Responses to these questions should include detailed, factual supporting information whenever possible.

A. Questions Relating to the Definition of Identity Theft

1. Does the term "identity theft" as defined by the Act need further definition? If so, why? If not, why not?

2. Should the Commission define the term "identifying information" to have the same meaning as "means of identification" in 18 U.S.C. 1028(d)(4)? If so, why? If not, why not?

3. Should the Commission add the element of "attempt" to the definition of the term "identity theft?" If so, why? If not, why not?

4. Should the Commission add the element that a person's identifying information must be used without such person's knowledge to the definition of the term "identity theft?" If so, why? If not, why not?

5. Should the Commission add the element that a person's identifying information must be used without such person's lawful authority to the definition of the term "identity theft?" If so, why? If not, why not?

6. Are there additional elements that the Commission should add to the definition of the term "identity theft?" If so, what should these elements be? What would be the advantages or disadvantages of adding these elements?

B. Questions Relating to the Definition of Identity Theft Report

1. Does the term "identity theft report" as defined by the Act need further definition? If so, why? If not, why not?

2. Should the Commission define what is an "appropriate law enforcement agency"? If so, why? If not, why not?

3. To deter abuse of the credit reporting system, the Act requires that an identity theft report be subject to criminal penalties for false filing and allows consumer reporting agencies and information furnishers to reject a block or continue furnishing information. How likely is it that these safeguards will deter abuse of the credit reporting system? Are these safeguards less likely to deter abuse when automated systems are available to generate reports? If so, why? If not, why not? Are there alternate ways to deter abuse other than what the Commission has proposed? What would be the advantages or disadvantages of these alternate approaches?

4. Are the examples provided by the Commission of when it may or may not be reasonable for information furnishers or consumer reporting agencies to request additional information or documentation useful? If so, why? If not, why not? Are there alternate examples that would be more useful? If so, what would be the advantages or disadvantages of these alternate examples?

C. Questions Relating to the Duration of Active Duty Alerts

1. Should the Commission maintain the duration of the active duty alert at the minimum statutorily determined length of 12 months as proposed? If so, why? If not, why not?

2. Should the Commission set an alternate length of time for the duration of the active duty alert? If so, what should the appropriate length of time be? What would be the advantages or disadvantages of this alternate approach?

3. What fraction of active duty military consumers is likely to find the 12 month duration too short to cover their entire deployment?

4. How difficult will it be for active duty military consumers who receive intensive training or extended deployments to place, or to have a personal representative place another active duty alert if their initial alert expires before the end of the term of their deployment?

D. Questions Relating to the Appropriate Proof of Identity

1. Should the Commission set specific standards for what constitutes appropriate proof of identity? If so, what should those standards be? What would be the advantages or disadvantages of this alternate approach?

2. Are the examples of information that might be required by consumer reporting agencies appropriate or inappropriate? Why? Is there alternate information that should be used for examples? If so, what should the alternate information be? What would be the advantages or disadvantages of this alternate approach?

3. Has the Commission adequately balanced the harm that might arise from the consumer being misidentified and the harm arising from delays in, or potentially failure to provide, the consumers' requests due to greater levels of scrutiny? If so, why, If not, why not? Are there other factors that the Commission should consider? If so, what are these factors? What would be the advantages or disadvantages of these other factors?

List of Subjects in 16 CFR Parts 603, 613, and 614

Consumer reporting agencies, Consumer reports, Credit, Fair Credit Reporting Act, Identity theft, Information furnishers, Trade practices.

Note: Before this proposed rule is adopted as final, FTC expects to publish a rule redesignating the current part 603 with a new part number.

Accordingly, for the reasons set forth in the preamble, the Commission proposes to add parts 603, 613, and 614 of title 16 of the Code of Federal Regulations as follows:

PART 603—DEFINITIONS

Sec.
603.1 [Reserved]
603.2 Identity theft.
603.3 Identity theft report.

Authority: Sec. 111, 117 Stat. 1954, Pub. L. 108–159 (15 U.S.C. 1681a).

§ 603.1 [Reserved]

§ 603.2 Identity theft.

(a) The term "identity theft" means a fraud committed or attempted using the identifying information of another person without lawful authority.

(b) The term "identifying information" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any—

(1) Name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;

(2) Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(3) Unique electronic identification number, address, or routing code; or

(4) Telecommunication identifying information or access device (as defined in 18 U.S.C. 1029(e)).

§ 603.3 Identity theft report.

(a) The term "identity theft report" means a report—

(1) That alleges identity theft with as much specificity as the consumer can provide;

(2) That is a copy of an official, valid report filed by the consumer with a Federal, State, or local law enforcement agency, including the United States Postal Inspection Service, the filing of which subjects the person filing the

report to criminal penalties relating to the filing of false information, if, in fact, the information in the report is false; and

(3) That may include additional information or documentation that an information furnisher or consumer reporting agency reasonably requests for the purpose of determining the validity of the alleged identity theft, provided that the information furnisher or consumer reporting agency makes such request not later than five business days after the date of receipt of the copy of the report form identified in paragraph (a)(2) of this section or the request by the consumer for the particular service, whichever shall be the later.

(b) Examples of the specificity referenced in paragraph (a)(1) of this section are provided for illustrative purposes only, as follows:

(1) Specific dates relating to the identity theft such as when the loss or theft of personal information occurred or when the fraud(s) using the personal information occurred, and how the consumer discovered or otherwise learned of the theft.

(2) Identification information or any other information about the perpetrator, if known.

(3) Name(s) of information furnisher(s), account numbers, or other relevant account information related to the identity theft.

(4) Any other information known to the consumer about the identity theft.

(c) Examples of when it would or would not be reasonable to request additional information or documentation referenced in paragraph (a)(3) of this section are provided for illustrative purposes only, as follows:

(1) A law enforcement report containing detailed information about the identity theft and the signature, badge number or other identification information of the individual law enforcement official taking the report should be sufficient on its face to support a victim's request. In this case, without an identifiable concern, such as an indication that the report was obtained fraudulently, it would not be reasonable for an information furnisher or consumer reporting agency to request additional information or documentation.

(2) A consumer might provide a law enforcement report similar to the report in paragraph (c)(1) of this section, but certain important information such as the consumer's date of birth or Social Security number may be missing because the consumer chose not to provide it. The information furnisher or consumer reporting agency could accept this report, but it would be reasonable to require that the consumer provide the missing information.

(3) A consumer might provide a law enforcement report generated by an automated system with a simple allegation that an identity theft occurred to support a request for a tradeline block or cessation of information furnishing. In such a case, it would be reasonable for an information furnisher or consumer reporting agency to ask that the consumer fill out and have notarized the Commission's ID Theft Affidavit or a similar form and provide some form of identification documentation.

(4) A consumer might provide a law enforcement report generated by an automated system with a simple allegation that an identity theft occurred to support a request for an extended fraud alert. In this case, it would not be reasonable for a consumer reporting agency to require additional documentation or information, such as a notarized affidavit.

(5) If the information the information furnishers or the consumer reporting agencies are seeking is already found in the law enforcement report which is otherwise satisfactory, it would not be reasonable to request that the consumer fill out the same information on a different form.

PART 613—DURATION OF ACTIVE DUTY ALERTS

§ 613.1 Duration of active duty alerts.

The duration of an active duty alert shall be 12 months.

Authority: Sec. 112(a), Pub. L. 108–159, 117 Stat. 1955 (15 U.S.C. 1681c–1).

PART 614—APPROPRIATE PROOF OF IDENTITY

§ 614.1 Appropriate proof of identity.

(a) Consumer reporting agencies shall develop and implement reasonable requirements for what information consumers shall provide to constitute proof of identity for purposes of sections 605A, 605B, and 609(a)(1) of the Fair Credit Reporting Act. In developing these requirements, the consumer reporting agencies must:

(1) Ensure that the information is sufficient to enable the consumer reporting agency to match consumers with their files; and

(2) adjust the information to be commensurate with an identifiable risk of harm arising from misidentifying the consumer.

(b) Examples of information that might constitute reasonable information requirements for proof of identity are provided for illustrative purposes only, as follows:

(1) Consumer file match: The identification information of the consumer including his or her full name (first, middle initial, last, suffix), any other or previously used names, full address (street number and name, apt. no., city, State, and ZIP Code), full 9 digits of Social Security number, and/or date of birth.

(2) Additional proof of identity: copies of government issued identification documents, utility bills, and/or other current methods of authentication of a person's identity which may include, but would not be limited to, answering questions to which only the consumer might be expected to know the answer.

Authority: Sec. 112(b), Pub. L. 108–159, 117 Stat. 1956 (15 U.S.C. 1681c–1).

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 04–9485 Filed 4–27–04; 8:45 am]

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Federal Register

Wednesday,
April 28, 2004

Part V

Department of the Treasury

Office of the Comptroller of the Currency

12 CFR Part 41

Office of Thrift Supervision

12 CFR Part 571

Federal Reserve System

12 CFR Part 222

Federal Deposit Insurance Corporation

12 CFR Part 334

National Credit Union Administration

12 CFR Part 717

Fair Credit Reporting Medical Information Regulations; Proposed Rule

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 41

[Docket No. 04–09]

RIN 1557–AC85

FEDERAL RESERVE SYSTEM

12 CFR Part 222

[Regulation V; Docket No. R–1188]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 334

RIN 3064–AC81

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 571

[No. 2004–16]

RIN 1550–AB88

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 717

Fair Credit Reporting Medical Information Regulations

AGENCIES: Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); Office of Thrift Supervision, Treasury (OTS); National Credit Union Administration (NCUA).

ACTION: Notice of proposed rulemaking.

SUMMARY: The OCC, Board, FDIC, OTS, and NCUA (Agencies) are publishing for comment proposed regulations implementing section 411 of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act). Public Law 108–159, 117 Stat. 1952. The FACT Act substantially amends the Fair Credit Reporting Act (FCRA or Act), 15 U.S.C. 1681 *et seq.* Section 411(a) of the FACT Act adds a new section 603(g)(1) to the FCRA to restrict the circumstances under which consumer reporting agencies may furnish consumer reports that contain medical information about consumers. Section 411(a) of the FACT Act also adds a new section 604(g)(2) to the FCRA to prohibit creditors from obtaining or using medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit. The Agencies are required to prescribe regulations that permit creditors to obtain or use medical information for eligibility purposes where necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs, consistent with the Congressional intent to restrict the use of medical information for inappropriate purposes.

In addition, section 411(b) of the FACT Act adds a new section 603(d)(3) to the FCRA to restrict the sharing of medical information and related lists or descriptions with affiliates. Specifically, section 603(d)(3) provides that the standard exclusions from the definition of "consumer report" contained in section 603(d)(2)—such as sharing transaction or experience information about a consumer among affiliates or sharing other information among affiliates after providing the consumer notice and an opportunity to opt-out—do not apply if medical-related information is disclosed to an affiliate. Medical-related information includes medical information, an individualized list or description based on payment transactions for medical products or services, or an aggregate list of identified consumers based on payment transactions for medical products or services. The provisions of section 603(d)(3) do not apply if the sharing falls within certain exceptions, such as in connection with the business of insurance or annuities or for any purpose described in section 502(e) of the Gramm-Leach-Bliley Act (GLB Act), Public Law 106–102. Section 411(b) authorizes the Agencies to promulgate additional exceptions by regulation or order, as determined by the Agencies to be appropriate or necessary.

The Agencies generally provide a 60-day period for the public to comment on the burdens associated with proposed rules. In this case, however, the Agencies believe that a 30-day comment period is appropriate because the statute was enacted in December 2003 and imposes a statutory deadline for the final rule of June 4, 2004.

DATES: Comments must be received by May 28, 2004.

ADDRESSES: Comments should be directed to:

OCC: You should designate OCC in your comment and include Docket Number 04–09. Because paper mail in the Washington, DC, area and at the OCC may be subject to delays, please submit your comments by e-mail or fax whenever possible. You may submit comments by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- OCC Web site: *http://www.occ.treas.gov.* Click on "Contact the OCC," scroll down and click on "Comments on proposed regulations."
- E-mail address: *regs.comments@occ.treas.gov.*
- Fax: (202) 874–4448.
- Mail: Office of the Comptroller of the Currency, 250 E Street, SW., Public Information Room, Mail Stop 1–5, Washington, DC 20219.
- Hand Delivery/Courier: 250 E Street, SW., Attn: Public Information Room, Mail Stop 1–5, Washington, DC 20219.

Instructions: All submissions received must include the agency name (OCC) and docket number or Regulatory Information Number (RIN) for this notice of proposed rulemaking. In general, the OCC will enter all comments received into the docket without change, including any business or personal information that you provide.

- *Docket:* For access to the docket to read background documents or comments received you may:
- *View docket information in person:* You may personally inspect and photocopy docket information at the OCC's Public Information Room, 250 E Street, SW., Washington, DC. You can make an appointment to inspect the docket by calling (202) 874–5043.
- *View docket information electronically:* You may request that we send electronic copies of docket information to you via e-mail or mail you a CD–ROM containing electronic copies by contacting the OCC at *regs.comments@occ.treas.gov.*
- *Request copies:* You may request copies of docket information by fax at (202) 874–4448, mailing the OCC at 250 E Street, SW., Attn: Public Information Room, Mail Stop 1–5, Washington, DC 20219, or by contacting us at (202) 874–5043.

Board: You may submit comments, identified by Docket No. R–1188, by any of the following methods:

- Agency Web site: *http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- E-mail: *regs.comments@federalreserve.gov.* Include docket number in the subject line of the message.

• Fax: 202/452–3819 or 202/452–3102.

• Mail: Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, except as necessary for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or on paper in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

FDIC: You may submit comments, identified by RIN number by any of the following methods:

• Agency Web site: *http://www.fdic.gov/regulations/laws/federal/propose.html.* Follow instructions for submitting comments on the Agency Web site.

• E-Mail: *Comments@FDIC.gov.* Include the RIN number in the subject line of the message.

• Mail: Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

• Hand Delivery/Courier: Guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

• Instructions: All submissions received must include the agency name and RIN for this rulemaking. All comments received will be posted without change to *http://www.fdic.gov/regulations/laws/federal/propose.html* including any personal information provided.

OTS: You may submit comments, identified by docket number 2004–16, by any of the following methods:

• Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

• E-mail address: *regs.comments@ots.treas.gov.* Please include docket number 2004–16 in the subject line of the message and include your name and telephone number in the message.

• Fax: (202) 906–6518.

• Mail: Regulation Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention: No. 2004–xx.

• Hand Delivery/Courier: Guard's Desk, East Lobby Entrance, 1700 G Street, NW., from 9 a.m. to 4 p.m. on business days, Attention: Regulation Comments, Chief Counsel's Office, Attention: No. 2004–xx.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to the OTS Internet site at *www.ots.treas.gov*, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.ots.treas.gov/pagehtml.cfm?catNumber=67&an=1.* In addition, you may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment for access, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov*, or send a facsimile transmission to (202) 906–7755. (Prior notice identifying the materials you will be requesting will assist us in serving you.) We schedule appointments on business days between 10 a.m. and 4 p.m. In most cases, appointments will be available the next business day following the date we receive a request.

NCUA: You may submit comments by any of the following methods (Please send comments by one method only):

• Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

• NCUA Web site: *http://www.ncua.gov/news/proposed_regs/proposed_regs.html.* Follow the instructions for submitting comments.

• E-mail: Address to *regcomments@ncua.gov.* Include "[Your name] Comments on Proposed Rule Part 717, Fair Credit Reporting—Medical Information" in the e-mail subject line.

• Fax: (703) 518–6319. Use the subject line described above for e-mail.

• Mail: Address to Becky Baker, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.

• Hand Delivery/Courier: Becky Baker, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.

FOR FURTHER INFORMATION CONTACT:

OCC: Amy Friend, Assistant Chief Counsel, (202) 874–5200; Michael Bylsma, Director, or Stephen Van Meter, Assistant Director, Community and Consumer Law, (202) 874–5750; Patrick T. Tierney, Attorney, Legislative and Regulatory Activities Division, (202) 874–5090; or Carol Turner, Compliance Specialist, Compliance Department, (202) 874–4858, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

Board: David A. Stein, Counsel; Minh-Duc T. Le, Ky Tran-Trong, or Krista P. DeLargy, Senior Attorneys, Division of Consumer and Community Affairs, (202) 452–3667 or (202) 452–2412; or Andrew Miller, Counsel, Legal Division, (202) 452–3428, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551.

FDIC: Robert A. Patrick, Counsel, (202) 898–3757, or Richard M. Schwartz, Counsel, Legal Division, (202) 898–7424; David LaFleur, Policy Analyst, (202) 898–6569, or Patricia Cashman, Senior Policy Analyst, Division of Supervision and Consumer Protection, (202) 898–6534, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

OTS: Elizabeth Baltierra, Program Analyst (Compliance), Compliance Policy, (202) 906–6540; Richard Bennett, Counsel (Banking and Finance), (202) 906–7409; or Paul Robin, Special Counsel, Regulations and Legislation Division, (202) 906–6648, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

NCUA: Regina M. Metz, Staff Attorney, Office of General Counsel, (703) 518–6540, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428.

SUPPLEMENTARY INFORMATION:

I. Background

On December 4, 2003, the President signed into law the FACT Act, which amends the FCRA. Public Law 108–159, 117 Stat. 1952. In general, the FACT Act contains provisions designed to enhance the ability of consumers to combat identity theft, increase the accuracy of consumer reports, and allow consumers to exercise greater control regarding the type and amount of marketing solicitations they receive. Section 411 of the FACT Act limits the ability of creditors to obtain or use, of consumer reporting agencies to disclose, and of affiliates to share medical information.

Section 411(a) of the FACT Act adds a new section 604(g)(1) to the FCRA to restrict the circumstances under which consumer reporting agencies may furnish consumer reports that contain medical information about consumers. Specifically, under new section 604(g)(1), a consumer reporting agency may not furnish a consumer report that contains medical information about a consumer unless:

(1) The report is furnished in connection with an insurance transaction, and the consumer

affirmatively consents to the furnishing of the report;

(2) The report is furnished for employment purposes or in connection with a credit transaction, the information to be furnished is relevant to process or effect the employment or credit transaction, and the consumer provides specific written consent for the furnishing of the report that describes in clear and conspicuous language the use for which the information will be furnished; or

(3) The information to be furnished pertains solely to transactions, accounts, or balances relating to debts arising from the receipt of medical services, products, or devices, where such information, other than account status or amounts, is restricted or reported using codes that do not identify, or do not provide information sufficient to infer, the specific provider or the nature of such services, products, or devices.

Section 411(c) of the FACT Act revises the definition of "medical information" in section 603(i) to mean information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to the past, present, or future physical, mental, or behavioral health or condition of an individual, the provision of health care to an individual, or the payment for the provision of health care to an individual. The definition further provides that the term "medical information" does not include the age or gender of a consumer, demographic information about the consumer, including a consumer's residence address or e-mail address, or any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy.

Section 411(a) also amends the FCRA by adding new section 604(g)(2) to prohibit creditors from obtaining or using medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit. Section 604(g)(2) contains two independent prohibitions—a prohibition on obtaining medical information and a prohibition on using medical information. The statute contains no prohibition, however, on obtaining or using medical information other than in connection with a determination of the consumer's eligibility, or continued eligibility, for credit. Thus, section 604(g)(2) does not prohibit a creditor from obtaining medical information for employment purposes, in connection with a determination of a consumer's eligibility for an insurance product or through processing payments for a consumer, maintaining a consumer's account, or performing similar functions. Nevertheless, a creditor that obtains medical information in these circumstances may not use that information in connection with a determination of the consumer's eligibility, or continued eligibility, for credit. For example, medical information about a consumer obtained and used by a creditor for employment purposes may not subsequently be used in connection with any determination of the consumer's eligibility, or continued eligibility, for credit. New section 604(g)(5)(A) requires the Agencies to prescribe regulations that permit transactions that are determined to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (including administrative verification purposes), consistent with congressional intent to restrict the use of medical information for inappropriate purposes.

Section 411(b) of the FACT Act adds a new section 603(d)(3) to the FCRA to restrict the sharing of medical-related information with affiliates if that information meets the definition of "consumer report" in section 603(d)(1) of the FCRA. Specifically, section 603(d)(3) provides that the standard exclusions from the definition of "consumer report" contained in section 603(d)(2)—such as sharing transaction or experience information among affiliates or sharing other eligibility information among affiliates after notice and an opportunity to opt-out—do not apply if medical-related information is disclosed to an affiliate. Medical-related information includes medical information, as described above, as well as an individualized list or description based on payment transactions for medical products or services, and an aggregate list of identified consumers based on payment transactions for medical products or services.

New section 604(g)(3) provides several exceptions that allow creditors to disclose medical information to affiliates according to the same rules that apply to other non-medical information. In particular, section 604(g)(3) provides that medical-related information that is transaction or experience information or that is subject to the FCRA affiliate sharing opt-out provisions or other standard exclusions in section 603(d)(2) may be shared with an affiliate of the creditor if the information is disclosed to an affiliate:

(1) In connection with the business of insurance or annuities (including the activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners, as in effect on January 1, 2003);

(2) For any purpose permitted without authorization under the Standards for Individually Identifiable Health Information promulgated by the Department of Health and Human Services (HHS) pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA);

(3) For any purpose referred to under section 1179 of HIPAA;

(4) For any purpose described in section 502(e) of the Gramm-Leach-Bliley Act; or

(5) As otherwise determined to be necessary and appropriate, by regulation or order, by the Federal Trade Commission (FTC), the Agencies, or an applicable State insurance authority.

Section 604(g)(4), as added by section 411(a)(4) of the FACT Act, also provides that any person that receives medical information from an affiliate pursuant to an exception in section 604(g)(3) or from a consumer reporting agency under section 604(g)(1) must not disclose such information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

II. Proposed Rule

The rule proposed by the Agencies would do two things. First, the proposed regulations would create exceptions to the general prohibition against obtaining or using medical information in connection with credit eligibility determinations, as required by section 604(g)(5)(A). The Agencies believe the proposed exceptions are necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (including administrative verification purposes), and are consistent with the congressional intent to restrict the use of medical information for inappropriate purposes. Second, the proposed regulations would, as permitted by section 604(g)(3)(C), create additional exceptions to the special restrictions in section 603(d)(3) on sharing medical-related information with affiliates that the Agencies believe are necessary and appropriate. The proposed regulations are discussed in more detail in the Section-by-Section Analysis below. The Agencies invite comment on all aspects of the proposal.

III. Section-by-Section Analysis

Section ____.1 Purpose, Scope, and Effective Dates

Proposed § ____.1(b)(2) describes the institutions covered by the provisions of the regulations of each of the respective Agencies.

Section ____.2 Examples

Proposed § ____.2 Discusses the Scope and Effect of the Examples Included in the Proposed Regulation.

Section ____.3 Definitions

Proposed § ____.3 contains definitions for the terms "affiliate" (as well as the related terms "company" and "control"), "consumer," "medical information," and "you."

Affiliate

Several FCRA provisions apply to information sharing with persons "related by common ownership or affiliated by corporate control," "related by common ownership or affiliated by common corporate control," or "affiliated by common ownership or common corporate control." *E.g.*, FCRA, sections 603(d)(2), 615(b)(2), and 624(b)(2). Section 2 of the FACT Act defines the term "affiliate" to mean persons that are related by common ownership or affiliated by corporate control. Proposed paragraph (b) simplifies these various formulations by defining "affiliate" to mean any company that controls, is controlled by, or is under common control with another company. The proposed definition is identical to the definition of "affiliate" in the GLB Act privacy regulations.[1] Consistent with the definitions in the privacy regulations and the practical application of the FCRA, the proposal uses a definition of "control" that applies exclusively to the control of a "company," and defines "company" to include any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization. *See* proposed paragraphs (d) ("company") and (i) ("control").[2] The definition of "company" omits some entities that are "persons" under the FCRA—individuals, estates, cooperatives, governments, and government in which "control" could be exercised over individuals, government agencies, and other persons that do not fit within the definition of "company."

Medical Information

Under proposed paragraph (k), the term "medical information" means information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to (1) the past, present, or future physical, mental, or behavioral health or condition of an individual; (2) the provision of health care to an individual; or (3) the payment for the provision of health care to an individual. The term "medical information" does not include the age or gender of a consumer, demographic information about the consumer, including a consumer's residence address or e-mail address, or any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy. The proposal tracks the statutory definition of "medical information."

Creditors are reminded that other laws, such as the Americans with Disabilities Act, the Fair Housing Act, the GLB Act, and other parts of the FCRA, may limit or regulate the use, collection, and sharing of consumer information, including medical information. In particular, these and other laws, such as the Equal Credit Opportunity Act, also may prohibit creditors from using certain information that is excluded from the restrictions on obtaining or using medical information, such as age or gender information, in determining eligibility for credit or for other purposes.

Section ____.30 Obtaining and Using Medical Information in Connection With a Determination of Eligibility for Credit

Section 411(a) of the FACT Act adds a broad new limitation on the ability of creditors to obtain medical information in connection with credit eligibility determinations or to use medical information in connection with credit eligibility determinations. Specifically, new section 604(g)(2) provides, that except as permitted by regulations, a creditor shall not obtain or use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit.

A. General Prohibition on Obtaining or Using Medical Information

Proposed § ____.30 contains the rules on obtaining or using medical information in connection with a determination of a consumer's eligibility, or continued eligibility, for credit. Proposed paragraph (a)(1) incorporates the general rule prohibiting creditors from obtaining or using medical information pertaining to a consumer in connection with any determination of a consumer's eligibility, or continued eligibility, for credit, except as provided in the regulations under Subpart D. The consumer's eligibility for credit typically would be determined when an initial decision is made on whether to grant or deny credit to the consumer. A determination of a consumer's continued eligibility for credit may also include decisions whether to terminate an account or adjust a credit limit following an account review.

Proposed paragraph (a)(2) clarifies the definition of certain terms used in Subpart D, including "credit" and "creditor." In addition, paragraph (a)(2) provides that the phrase "eligibility, or continued eligibility, for credit" means the consumer's qualification or fitness to receive, or continue to receive, credit, including the terms on which credit is offered, primarily for personal, family, or household purposes.

The paragraph also clarifies that the phrase "eligibility, or continued eligibility, for credit" does not include the consumer's qualification or fitness to be offered employment, insurance products, or other non-credit products or services. Similarly, "eligibility, or continued eligibility, for credit" does not include a determination of whether the provisions of a debt cancellation contract, debt suspension agreement, credit insurance product, or similar forbearance practice or program are triggered. A forbearance practice or program may include circumstances in which a creditor allows a consumer to skip one or more scheduled payments because the consumer is hospitalized for a medical condition. For example, if a consumer is hospitalized on an emergency basis and is temporarily unable to pay his mortgage, the consumer's daughter may contact the consumer's mortgage lender by telephone, inform the lender of the consumer's medical condition, and request that the lender allow the deferral of one or more payments to accommodate the consumer's particular circumstances. The creditor's use of the medical information provided by the consumer's daughter to defer one or more mortgage payments to accommodate the consumer's particular circumstances would constitute a forbearance that is beyond the scope of the prohibition.

[1] For purposes of the proposed regulation, an "affiliate" includes an operating subsidiary of a bank or savings association, and a credit union service organization that is controlled by a federal credit union.

[2] For purposes of the proposed regulation, NCUA will presume a federal credit union has a controlling influence over the management or policies of a credit union service organization if it is 67 percent owned by credit unions.

Comment is requested on whether it is more appropriate to grant an exception to permit creditors to obtain and use medical information in connection with debt cancellation, debt suspension, or credit insurance products or practices, rather than issuing an interpretation that obtaining information necessary to trigger coverage under these products falls outside any determination of eligibility, or continued eligibility, for credit. In addition, comment is solicited on whether a separate exception for accommodating the particular medical condition or circumstances of the consumer should be created in lieu of or in addition to the interpretation that eligibility, or continued eligibility, for credit does not include forbearance.

The proposed regulation also provides that the term "eligibility, or continued eligibility, for credit" does not include authorizing, processing, or documenting a payment or transaction on behalf of a consumer in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit. Finally, the term "eligibility, or continued eligibility, for credit" does not include maintaining or servicing a consumer's account in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit.

The Agencies note that section 604(g)(2) contains two distinct prohibitions—one on obtaining medical information and one on using medical information. Nothing in the statute prohibits a creditor from obtaining medical information if the information is not obtained in connection with a determination of the consumer's eligibility, or continued eligibility, for credit. Thus, there is no prohibition, for example, on a creditor obtaining medical information through authorizing, processing, or documenting a payment or transaction on behalf of the consumer, or managing or servicing the consumer's account. Nevertheless, a creditor that has obtained medical information in these circumstances may not use that information in connection with a determination of the consumer's eligibility, or continued eligibility, for credit, unless permitted by an exception provided in the regulations. However, there is no prohibition in section 411 of the FACT Act on a person that is a creditor from obtaining or using medical information for an employment purpose or in connection with a determination of the consumer's eligibility for an insurance product.

B. Receiving Unsolicited Medical Information

Creditors may receive unsolicited medical information without specifically asking for such information. This may occur, for example, when a consumer informs the loan officer that she needs a loan to pay for treatment for a particular medical condition, or when a consumer, in response to a general request on a credit application for information about outstanding debts, lists debts owed to hospitals and doctors for medical services. The Agencies do not believe that a creditor violates the prohibition on obtaining medical information when the creditor does not specifically ask for or request such information, yet the consumer or other person provides that information to the creditor. However, because the statutory prohibition on obtaining medical information could be interpreted broadly to cover circumstances in which medical information is obtained by a creditor without asking for it, the Agencies have proposed a rule of construction to make clear that a creditor does not violate the prohibition on obtaining medical information if the creditor receives unsolicited medical information.

Proposed paragraph (b) contains this rule of construction for receiving unsolicited medical information. Under proposed paragraph (b)(1), a creditor does not obtain medical information for purposes of proposed paragraph (a)(1) if it receives medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit without specifically requesting medical information, and does not use that information in determining whether to extend credit to the consumer and the terms on which credit is offered or continued. Paragraph (b)(2) provides examples for guidance. The Agencies seek comment on the appropriateness of this rule of construction and on whether this provision should be drafted as an exception to the general prohibition, rather than as a rule of construction.

C. Financial Information Exception for Obtaining and Using Medical Information

As noted above, new section 604(g)(5)(A) of the Act gives the Agencies the authority to prescribe regulations, after notice and opportunity for comment, to permit creditors to obtain and use medical information in connection with determinations of credit eligibility that the Agencies determine to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (including actions necessary for administrative verification purposes), consistent with the intent of the statute to restrict the use of medical information for inappropriate purposes. Applying this standard, the Agencies believe it is necessary and appropriate to permit creditors to obtain and use medical information in a number of circumstances.

Proposed §§ ____.30(c)–(d) contain exceptions to the general prohibition on creditors obtaining or using medical information. Proposed paragraph (c) contains the first exception, and provides that a creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit so long as the following three elements are met. First, the information must relate to debts, expenses, income, benefits, collateral, or the purpose of the loan, including the use of proceeds. Second, the creditor must use the information in a manner and to an extent no less favorable than it would use comparable information that is not medical information in a credit transaction. Third, the creditor must not take the consumer's physical, mental, or behavioral health, condition or history, type of treatment, or prognosis into account as part of any such determination of credit eligibility. This three-part test strikes a balance between permitting creditors to obtain and use certain medical information about consumers when necessary and appropriate to satisfy prudent underwriting criteria and to ensure that credit is extended in a safe and sound manner, while restricting the use of medical information for inappropriate purposes.

The first element of the test identifies certain types of information, specifically debts, expenses, income, benefits, collateral, or the purpose of the loan, that a creditor ordinarily would obtain and evaluate in connection with making a prudent credit decision, regardless of whether that information is medical or non-medical information. A creditor should not be prohibited from obtaining or using information about a debt, for example, in connection with making a credit decision, just because that debt happens to be for medical products or services.

The second element of the test provides that the creditor must use the medical information in a manner and to an extent no less favorable than it would use comparable, non-medical

information in a credit transaction. For example, a creditor may deny credit to the consumer because the consumer owes a debt to a hospital if the creditor would have denied credit to the consumer if the consumer had owed the same amount of debt with the same payment history to a retailer. Nothing in the rule prevents the creditor from treating information about medical debts (or expenses or income) more favorably than non-medical debts.

The third element of the test provides that the creditor may not take the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis into account as part of any determination of the consumer's eligibility, or continued eligibility, for credit. For example, the consumer may owe a debt to a hospital or other facility that specializes in treating a potentially terminal disease. While the creditor may evaluate the debt to the hospital or facility in the same manner and to the same extent as it would evaluate any non-medical debt, the creditor may not take into account the consumer's individual physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis in determining the consumer's eligibility, or continued eligibility for credit, or the terms under which credit will be offered or continued.

The Agencies seek comment on the financial information exception outlined in paragraph (c)(1). In particular, the Agencies seek comment on whether each of the three parts of the exception is necessary and whether the three parts together strike the right balance between permitting creditors to obtain and use medical information where necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (including actions necessary for administrative verification purposes) and restricting the use of medical information for inappropriate purposes.

Proposed paragraph (c)(2) provides several examples of when creditors generally may obtain and use medical information under the financial information exception in proposed paragraph (c)(1). These examples in proposed paragraph (c)(2) are not exclusive. The Agencies seek comment on all of the examples in proposed paragraph (c)(2), including whether any of the examples should be amended or deleted, or whether additional examples should be provided.

Proposed paragraph (c)(2)(i) provides examples of the circumstances in which medical information would relate to debts, expenses, income, benefits, collateral, or the purpose of the loan, including the use of proceeds. A creditor would, for example, be able to obtain and use medical information about—

- The dollar amount, repayment terms, repayment history, and similar information regarding medical debts that is used to calculate, measure, or verify the repayment ability of the consumer, the use of proceeds, or the terms for granting credit;
- The value, condition, and lien status of a medical device that is used as collateral to secure a loan;
- The dollar amount and continued eligibility for disability income or benefits related to health or a medical condition that is relied on as a source of repayment; or
- The identity of creditors to whom outstanding medical debts are owed in connection with an application for credit, including but not limited to a transaction involving the consolidation of medical debts.

The Agencies propose to include five additional examples to illustrate uses of medical information consistent and inconsistent with the financial information exception. Proposed paragraph (c)(2)(ii) provides examples of uses of medical information that are consistent with the exception. The first example involves a consumer who includes two $20,000 debts on an application for credit—one debt to a hospital and the other to a retailer. The creditor contacts the hospital and the retailer in order to verify the amount and payment status of the debts and learns that both are more than 90 days past due. Any two debts of this size that are past due would disqualify the consumer under the creditor's established underwriting criteria. The creditor decides to deny the application on the basis of the consumer's poor repayment history on outstanding debts. Under these circumstances, the creditor obtains and uses information about medical debts the same way it uses information about non-medical debts. Accordingly, the creditor has used medical information in a manner consistent with the exception.

In the second example, a consumer indicates on an application for a $200,000 mortgage loan that she receives $15,000 in long-term disability income each year from her former employer and has no other income. Annual income of $15,000, regardless of source, would not be sufficient to support the requested amount of credit. The creditor denies the application on the basis that the projected debt-to-income ratio of the consumer does not meet the creditor's underwriting criteria. In this example, the creditor analyzes the long-term disability income, which is medical information, the same way it would analyze any other income information of a potential borrower.

The third example in proposed paragraph (c)(2)(ii) involves a consumer who includes on an application for a $10,000 home equity loan that he has a $50,000 debt to a medical facility that specializes in treating a potentially terminal disease. The creditor contacts the medical facility to verify the debt and obtain the repayment history and current status of the loan, and learns that the debt is current and that the applicant meets the income requirements of the creditor's underwriting guidelines. The creditor grants the application. The creditor has used medical information in accordance with the exception.

Proposed paragraph (c)(2)(iii) provides two examples of uses of medical information that are inconsistent with the exception. The first example involves a consumer who includes on an application for $25,000 of credit information about a $50,000 debt to a hospital. The creditor contacts the hospital to verify the amount and payment status of the debt and learns that the debt is current and that the consumer has no delinquencies in her repayment history. If the existing debt were instead owed to a home furnishing retailer, the creditor would approve the application and extend credit based on the amount and repayment history of the outstanding debt. The creditor, however, denies the application because the consumer is indebted to a hospital. The creditor has used medical information, here the identity of the medical creditor, in a manner and to an extent that is less favorable than it would use comparable non-medical information.

In the second example in proposed paragraph (c)(2)(iii), a consumer meets with a loan officer of a creditor to apply for a mortgage loan. While filling out the loan application, the consumer informs the loan officer orally that she has a potentially terminal disease. The consumer meets the creditor's established requirements for the requested mortgage. The loan officer recommends to the credit committee that the consumer be denied credit because the consumer has that disease. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis as part of a determination of

eligibility or continued eligibility for credit.

D. Specific Exceptions for Obtaining and Using Medical Information

Proposed paragraph (d) contains specific exceptions to the general prohibition to allow creditors to obtain and use medical information for a limited number of particular purposes. The Agencies request comment on whether each of these specific exceptions is necessary and appropriate and, if so, whether they are properly defined.

Proposed paragraph (d)(1)(i) provides that a creditor may obtain and use medical information to determine whether the use of a power of attorney or legal representative is necessary and appropriate. This exception would permit a creditor to verify, in connection with a credit eligibility determination, that the exercise of a power of attorney or legal representative is triggered by the consumer's medical condition.

Under proposed paragraph (d)(1)(ii), a creditor may also use medical information to comply with applicable requirements of local, state, or federal laws. For example, some state laws may require creditors to consider medical information in certain circumstances to protect populations that may be vulnerable to financial abuse by caregivers. This exception would permit creditors to obtain and use medical information to comply with those laws.

Proposed paragraph (d)(1)(iii) provides that a creditor may also obtain and use medical information to the extent such information is included in a consumer report from a consumer reporting agency in accordance with section 604(g)(1)(B) of the FCRA, and is used for the purpose for which the consumer provided specific written consent. As noted above, section 411 of the FACT Act prevents consumer reporting agencies from furnishing consumer reports containing medical information, except under specified circumstances. Consumer reports must be furnished with coding that blocks the identity of the provider of medical information and the nature of the services, products, or devices, unless a consumer provides a consumer reporting agency with specific written consent to furnish a report to a creditor containing uncoded medical information. This exception clarifies that a creditor may obtain uncoded medical information from a consumer reporting agency in accordance with section 604(g)(1)(B) of the FCRA, and use that information for the purpose for which the consumer provided specific written consent.

The Agencies have not proposed a separate exception for obtaining and using consumer reports in accordance with section 604(g)(1)(C) of the FCRA, which relates to consumer reports containing coded medical information. The Agencies do not believe that it is necessary to propose a separate exception.

The Agencies have considered three options that would allow creditors to obtain and use consumer reports containing the information described in section 604(g)(1) of the FCRA. The Agencies have considered whether the definition of "medical information" may be interpreted in a manner that would exclude the coded information that may be furnished under section 604(g)(1)(C) of the Act. This approach would permit all creditors to obtain consumer reports with coded information (but not consumer reports with uncoded medical information furnished under section 604(g)(1)(B)) and use that information in connection with a determination of the consumer's eligibility, or continued eligibility, for credit, even in the absence of an exception in the regulations. This approach is based on a statutory interpretation that such coded information would not relate to the physical, mental, or behavioral health of the consumer, and thus, is not medical information.

The Agencies also have considered whether section 604(g) or other provisions of the FCRA may be interpreted in such a manner that no exception would be necessary to permit creditors to obtain and use medical information in consumer reports furnished by consumer reporting agencies in accordance with section 604(g)(1). For example, the Agencies have considered whether the broad prohibition in section 604(g)(2) on obtaining and using medical information in credit eligibility determinations may be construed as being qualified by the specific provisions in section 604(g)(1) that authorize consumer reporting agencies to furnish consumer reports containing medical information under certain limited circumstances. This possible interpretation would be based on the Agencies' observation that (1) it is unlikely that Congress would permit consumer reporting agencies to furnish consumer reports containing medical information in connection with credit transactions without permitting creditors to obtain and use these reports, and (2) in these circumstances, Congress may well have provided the consumer protections it deemed necessary by specifying the limitations under which consumer reporting agencies could furnish reports containing medical information.

The Agencies also have considered whether creditors who intend to obtain and use this coded medical information would be able to do so in accordance with the financial information exception in § ____.30(c) of the proposed regulations. Coded medical information relates to medical debts, and the creditor may use debt information in making credit eligibility determinations in a manner and to an extent that is no less favorable than it would use comparable information that is not medical information. In addition, because the medical information is coded as prescribed in the FCRA, it would not provide the creditor with specific information regarding the consumer's health, condition, history, type of treatment, or prognosis (which may not be taken into account under the financial information exception in proposed § ____.30(c)(1)(iii)).

The Agencies also note that the rule of construction in § ____.30(b) of the proposed regulations would enable creditors to receive consumer reports containing coded medical information without violating the limit on "obtaining" medical information prescribed by section 604(g)(2) of the FCRA, so long as they do not use that medical information in making credit eligibility determinations.

The Agencies specifically request comment on the most appropriate way in which to deal with information contained in consumer reports, and related matters. In particular, comment is requested on these three approaches.

A creditor may also obtain and use medical information for purposes of fraud prevention and detection under proposed paragraph (d)(1)(iv). Comment is solicited as to whether and to what extent it is necessary for creditors to obtain and use medical information for purposes of fraud prevention and detection in connection with the determination of a consumer's credit eligibility and whether the exception could be narrowed to prevent the unnecessary use of medical information without compromising legitimate fraud prevention and detection programs.

Proposed paragraph (d)(1)(v) provides that a creditor may obtain and use medical information in the case of credit for the purpose of financing medical products or services to determine and verify the medical purpose of a loan and the use of proceeds. Certain creditors have established specialized loan programs that finance specific medical procedures, such as vision correction

surgery, but not others. In such cases, the creditor may need to obtain and use medical information in connection with determining whether the purpose of the loan is within the scope of the creditor's established loan program. Proposed paragraph (d)(2) provides examples of this exception. The Agencies invite comment on whether the medical purpose financing exception strikes the appropriate balance between satisfying the legitimate needs of medical finance creditors and the intent of Congress to limit the use of medical information in credit eligibility determinations.

Proposed paragraph (d)(1)(vi) provides that a creditor may obtain and use medical information if the consumer or the consumer's legal representative requests in writing, on a separate document signed by the consumer or the consumer's legal representative, that the creditor use specific medical information for a specific purpose in determining the consumer's eligibility, or continued eligibility, for credit, to accommodate the consumer's particular circumstances. The signed, written request must describe the specific medical information that the consumer requests the creditor to use and the specific purpose for which the information will be used. This exception is designed to accommodate the particular medical condition or circumstances of the individual consumer and is not intended to allow creditors to obtain consent on a routine basis or as a part of loan applications or documentation. This exception would not be met by a form that contains a pre-printed description of various types of medical information and the uses to which it might be put. Instead, it contemplates an individualized process in which the consumer informs the creditor about the specific medical information that the consumer would like the creditor to use and for what purpose. Proposed paragraph (d)(3) provides examples of this consumer request exception.

The Agencies seek comment on the need for a broader exception to permit creditors to make a "medical accommodation" where individual circumstances may warrant such an accommodation. The Agencies note that forbearance practices and programs, as discussed in the explanation of paragraph (a)(2) above, would permit creditors to take into account a consumer's medical condition to defer scheduled payments or take certain other actions on existing accounts as a medical accommodation to the consumer. Comment is requested on whether forbearance plus the consumer request exception provides sufficient flexibility to provide medical accommodations to consumers.

The Agencies also request comment on whether the procedural aspects of the consumer request exception (*i.e.*, the request must be in writing, on a separate form signed by the consumer or the consumer's legal representative) would unnecessarily hinder the ability of a creditor to make a medical accommodation where a consumer's medical condition and financial circumstances may justify such an accommodation, or whether these procedures are necessary to protect consumers.

The Agencies seek comment on whether there is a need to establish an exception for consumer consent whereby a creditor could request that a consumer consent to the specific use of the consumer's medical information. If so, the Agencies request specific comment on when this exception might be used and how the exception should be fashioned to ensure appropriate consumer protection.

Finally, proposed paragraph (d)(1)(vii) provides that a creditor may obtain and use medical information as otherwise permitted by order of the appropriate agency.

E. Limits on Redisclosure

Proposed paragraph (e) incorporates the statutory provision regarding the limits on redisclosure of medical information. This paragraph provides that a person that receives medical information about a consumer from a consumer reporting agency or an affiliate is prohibited from disclosing that information to any other person, except as necessary to carry out the purposes for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

F. Request for Comment

The Agencies solicit comment on each of the proposed provisions of § ____.30. Specifically, the Agencies request comment as to whether each of the proposed exceptions is, in fact, necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (including actions necessary for administrative verification purposes), and consistent with the intent of Congress to restrict the use of medical information for inappropriate purposes. Comment is also requested on the examples used in this section and whether additional or different examples should be included.

The Agencies also invite comment on whether any additional or different exceptions should be included in the final regulation. Commenters that recommend additional or different exceptions should explain why the exception is necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs, and is consistent with the intent of Congress to restrict the use of medical information for inappropriate purposes.

Section ____.31 Sharing Medical Information With Affiliates

Section ____.31(a) provides that the standard exclusions from the definition of "consumer report" contained in section 603(d)(2) of the Act—including the exclusions for sharing transaction or experience information among affiliates or sharing other eligibility information among affiliates after notice and an opportunity to opt-out—do not apply if medical information, an individualized list or description based on payment transactions for medical products or services, or an aggregate list or description based on payment transactions for medical products or services is disclosed to an affiliate.

Paragraph (b) provides that the special restrictions on sharing the information outlined in paragraph (a) with affiliates do not apply, and the standard exclusions from the definition of consumer report remain in effect, if the information is disclosed to an affiliate in certain circumstances. Paragraph (b) incorporates the four statutory exceptions from section 604(g)(3)(A) and (B) of the Act.

The first exception is when the information described in paragraph (a) is shared with an affiliate in connection with the business of insurance or annuities (including the activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners, as in effect on January 1, 2003). The second exception is when the information described in paragraph (a) is shared with an affiliate for any purpose permitted without authorization under the Standards for Individually Identifiable Health Information promulgated by the Department of Health and Human Services (HHS) pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

The third exception is when the information described in paragraph (a) is shared with an affiliate for any purpose referred to under section 1179 of HIPAA. Section 1179 of HIPAA provides that to the extent that an entity is engaged in activities of a financial institution or is engaged in authorizing,

processing, clearing, settling, billing, transferring, reconciling or collecting payments for a financial institution, the HIPAA standards and requirements do not apply to the entity with respect to such activities. Section 1179 also provides as an example of a use or disclosure of information not covered by that statute, the use or disclosure of information for authorizing, processing, clearing, settling, billing, transferring, reconciling, or collection, a payment for, or related to, health care premiums or health care. For purposes of this rulemaking, the phrase "purposes referred to under section 1179" means, at a minimum, authorizing, processing, clearing, settling, billing, transferring, reconciling or collecting payments.

The fourth exception is when the information described in paragraph (a) is shared with an affiliate for any purpose described in section 502(e) of the GLB Act. The Agencies note that some of the purposes described in section 502(e) of the GLB Act may be germane to the sharing of information among affiliates—for example, sharing with the consent of the consumer, for fraud prevention purposes, or as necessary to effect, administer, or enforce a transaction requested or authorized by the consumer—while other purposes described in section 502(e) are not—for example, sharing information with law enforcement or regulatory authorities.

In addition to the statutory exceptions, paragraph (b) also contains two additional exceptions that the Agencies believe are necessary and appropriate. Paragraph (b)(5) provides that the special restrictions on sharing the information described in paragraph (a) with affiliates do not apply, and the standard exclusions from the definition of consumer report remain in effect, if the information is disclosed to an affiliate in connection with a determination of the consumer's eligibility, or continued eligibility, for credit consistent with § ____.30 of this subpart. The Agencies believe it is necessary and appropriate to allow an affiliate to share medical information with another affiliate that obtains or uses it consistent with § ____.30.

Paragraph (b)(6) provides that the special restrictions on sharing medical-related information with affiliates do not apply if otherwise permitted by order of the appropriate agency. This exception incorporates the authority delegated to the Agencies by Congress to create exceptions through orders.

The Agencies note that prohibitions on obtaining or using medical information in § ____.30 operate independent of the exceptions that permit the sharing of that information among affiliates in accordance with the provisions of section 603(d)(2) of the Act. For example, if a mortgage lender has obtained and used medical information in accordance with one of the exceptions in § ____.30(c) or (d), the mortgage lender may share that information with its credit card affiliate without becoming a consumer reporting agency if one of the exceptions in § ____.31(b) applies. However, the credit card affiliate may not obtain or use that information in connection with any determination of the consumer's eligibility, or continued eligibility, for credit, unless consistent with § ____.30.

The Agencies invite comment on the exceptions included in proposed § ____.31(b). Specifically, comment is solicited on whether additional or different exceptions are necessary and appropriate.

Additional Issues

The statute provides that the final rules shall take effect on the later of 90 days after the rules are issued in final form, or the date specified in the regulations. Comment is requested on whether an effective date of 90 days after the final rules are issued is appropriate or whether a different effective date should be established.

III. Regulatory Analysis

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320), the Agencies reviewed the proposed rule to implement section 411 of the Fair and Accurate Credit Transactions Act of 2003 as required by the Office of Management and Budget. No collections of information pursuant to the Paperwork Reduction Act are contained in the proposed rule.

Initial Regulatory Flexibility Analysis

OCC: The Regulatory Flexibility Act (5 U.S.C. 601–612) (RFA) requires an agency to either provide an Initial Regulatory Flexibility Analysis with a proposed rule or certify that the proposed rule will not have a significant economic impact on a substantial number of small entities (defined for purposes of the RFA to include banks with less than $150 million in assets).

A. Reasons for Proposed Rule

Section 411 of the FACT Act requires the OCC, together with the other Agencies, to publish rules that are determined to be necessary and appropriate to protect legitimate operational, transactional risk, consumer, and other needs, including actions necessary for administrative verification, consistent with the intent of the section to restrict the use of medical information for inappropriate purposes, that permit the use of medical information in connection with any determination of a consumer's eligibility, or continued eligibility for credit. Section 411 also authorizes the OCC to issue regulations that are determined to be necessary and appropriate so as to exclude medical information shared by a covered entity with an affiliate from the definition of a consumer report in section 603(d) of the Fair Credit Reporting Act, and to address the reuse and redisclosure of medical information.

The OCC does not expect that this rule, if adopted, would have a significant economic impact on small entities. The proposed rule implements section 411 of the FACT Act and imposes only minimal economic impact on national banks. The proposed rule would create exceptions to the FACT Act's prohibition against national banks obtaining and using a consumer's medical information in connection with credit determinations. Additionally, the proposed rule would implement the FACT Act's restrictions on the sharing of medical information among affiliates and would include exceptions to permit the sharing of medical information in certain circumstances. The proposed rule would apply to all national banks that obtain or use medical information in connection with credit determinations, regardless of bank size. However, it is likely that small national banks, because of the nature and size of their operations, will encounter fewer instances where they might obtain or use medical information. Therefore, no group of national banks, particularly small national banks, is expected to encounter a significant economic impact. However, the OCC invites comment on whether these assumptions are correct. Also, the OCC invites comment on the burden that likely will result on small institutions from this rulemaking, and has prepared the following analysis.

B. Statement of Objectives and Legal Basis

The objectives of the proposed rule are described in the **SUPPLEMENTARY INFORMATION** section. In sum, the objectives are: (1) To implement the general statutory prohibition on creditors obtaining and using medical information in connection with credit eligibility determinations; (2) to fulfill the statutory mandate to prescribe regulations that permit creditors to obtain and use medical information for eligibility purposes when necessary and

appropriate to protect legitimate operational, transaction, risk, consumer, and other needs by granting exceptions; and (3) to implement the statutory exceptions to the special restrictions on sharing medical information with affiliates and to propose two additional exceptions the Agencies believe may be necessary and appropriate. The legal bases for the proposed rule are the National Bank Act found at 12 U.S.C. 1 *et seq.*, 24(Seventh), 481, and 484, the Depository Institutions Deregulation and Monetary Control Act of 1980 found at 12 U.S.C. 93a, and the Federal Deposit Insurance Act found at 12 U.S.C. 1818; and the Fair Credit Reporting Act found at 15 U.S.C. 1681a, 1681b, and 1681s.

C. Description of Small Entities to Which the Rule Will Apply

The proposed rule would apply to 1,214 national banks, Federal branches, and Federal agencies of foreign banks with assets under $150 million.

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

The OCC does not believe that the proposed rule imposes any reporting or any specific recordkeeping requirements within the meaning of the RFA. Section 411 requires that all covered entities have the ability to identify medical information as defined by the FACT Act in order to avoid the general prohibition against obtaining or using it in connection with any eligibility determination. This may entail some training costs.

However, the OCC believes that training costs will be minimal for a variety of reasons. One reason is the OCC does not believe that covered entities presently obtain or use medical information in making credit eligibility determinations on a broad basis. Another is that bank staff would already be trained on complying with other laws governing obtaining and using confidential information, including medical information, as discussed below.

Further, entities have the option of complying with the general statutory prohibition on obtaining and using medical information or an applicable exception. Thus, any burden that may be associated with complying with the exceptions can be avoided entirely by complying with the general prohibition. The OCC contemplates that those entities that find the exceptions to be burden reducing would opt to use them.

The OCC solicits information and comment on these assumptions. The OCC also seeks information and comment on any costs, such as training costs, compliance requirements, or changes in operating procedures arising from the application of the proposed rule in addition to or which may differ from those arising from the application of the statute generally.

E. Identification of Duplicative, Overlapping, or Conflicting Federal Rules

The OCC is unable to identify any statutes or rules, which would overlap or conflict with the proposed regulation. The OCC seeks comment and information about any such statutes or rules, as well as any other state, local, or industry rules or policies that require a covered institution to implement business practices that would comply with the requirements of the proposed rule.

F. Discussion of Significant Alternatives

The proposed rule creates exceptions to the general prohibition on the use of medical information in determining the eligibility of a consumer for an initial extension or the continuation of an extension of credit. The proposed rule attempts to harmonize the circumstances under which a credit reporting agency may transfer medical information to a user of consumer reports with the ability of a financial institution to obtain and use that information. The proposed rule also provides exceptions, in addition to those contained in section 411, under which a financial institution may share medical information with an affiliate and not become a consumer reporting agency.

In developing the proposal, the Agencies considered numerous alternatives. In particular, the Agencies considered creating a wide variety of possible exceptions to the general prohibition on obtaining and using medical information and numerous alternatives. A number of these are discussed in the **SUPPLEMENTARY INFORMATION**, including the following:

1. The Agencies considered clarifying through an exception that obtaining and using medical information in connection with debt cancellation, debt suspension, or credit insurance products or similar forbearance practices or programs, is not prohibited, but are proposing to clarify this point through interpretation instead;

2. The Agencies considered three options that would allow creditors to obtain and use consumer reports containing the various types of information described in section 604(g)(1) of the FCRA and are soliciting comment on these approaches;

3. The Agencies considered the need for a broader exception to permit creditors to make a "medical accommodation" where individual circumstances may warrant such an accommodation; and

4. The Agencies further considered the need to establish an exception for consumer consent whereby a creditor could request that a consumer consent to the specific use of the consumer's medical information.

In all these cases and others, the Agencies have described relevant alternatives and are inviting comment on them in the **SUPPLEMENTARY INFORMATION** section.

The relatively narrow scope of the exceptions proposed reflects the statutory mandate to create only those exceptions "determined to be necessary and appropriate." While the Agencies believe that the proposed exceptions would be among those useful to small entities as well as large, we are not proposing a general exception that would apply only to small entities. Comment is solicited on whether such an exception would be necessary and appropriate and whether the risk is different for a small entity than a large entity that medical information obtained might be used for the type of "inappropriate purposes" the statute prohibits.

The OCC welcomes comments on any significant alternatives, consistent with the mandate in section 411 to protect the privacy of medical information, that would minimize the impact of the proposed rule on small entities.

Board: Subject to certain exceptions, the Regulatory Flexibility Act (5 U.S.C. 601–612) (RFA) requires an agency to publish an initial regulatory flexibility analysis with a proposed rule whenever the agency is required to publish a general notice of proposed rulemaking for a proposed rule. The **SUPPLEMENTARY INFORMATION** above describes the reasons why the regulations are being proposed and the objectives and the legal basis of the proposed rule. The **SUPPLEMENTARY INFORMATION** section also describes the compliance requirements of the proposed rule and identifies other relevant Federal rules which may duplicate or overlap with the proposed rule. The Board, in connection with its initial regulatory flexibility analysis, requests public comment in the following areas.

A. Reasons for the Proposed Rule

Section 411 of the FACT Act requires the Board, together with the other Agencies, to publish rules that are determined to be necessary and appropriate to protect legitimate

operational, transactional risk, consumer, and other needs, including actions necessary for administrative verification, consistent with the intent of the section to restrict the use of medical information for inappropriate purposes, that permit the use of medical information in connection with any determination of a consumer's eligibility, or continued eligibility for credit. It permits the Board to issue regulations that are determined to be necessary and appropriate so as to exclude medical information shared by a covered entity with an affiliate from the definition of a consumer report in section 603(d) of the FCRA, and to address the reuse and redisclosure of medical information.

B. Statement of Objectives and Legal Basis

The **SUPPLEMENTARY INFORMATION** above contains this information. The legal basis for the proposed rule is section 411 of the FACT Act.

C. Description of Small Entities to Which the Rule Applies

The proposed rule would apply to all banks that are members of the Federal Reserve System (other than national banks), branches and Agencies of foreign banks (other than Federal branches, Federal Agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, organizations operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq.*, and 611 *et seq.*), bank holding companies and affiliates (other than depository institutions and consumer reporting agencies) of such holding companies. The Board's proposed rule will apply to the following institutions (numbers approximate): State member banks (932), bank holding companies (5,152), holding company non-bank subsidiaries (2,131), U.S. branches and agencies of foreign banks (289), Edge and agreement corporations (75), for a total of approximately 8,579 institutions. The Board estimates that over 5,000 of these institutions could be considered small institutions with assets less than $150 million.

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

The Board does not believe that the proposed rule imposes any new reporting or recordkeeping requirements, as defined in section 603 of the RFA. Section 411 requires that all covered entities have the ability to identify medical information as defined in order to avoid the general prohibition against obtaining or using it in connection with any eligibility determination. The Board believes that identifying that information for the purpose of either using it in eligibility determinations pursuant to the exceptions or to share the information with affiliates places no additional compliance burdens or costs on financial institutions.

The Board seeks information and comment on any costs, compliance requirements, or changes in operating procedures arising from the application of the proposed rule in addition to or which may differ from those arising from the application of the statute generally.

E. Identification of Duplicative, Overlapping, or Conflicting Federal Rules

The Board is unable to identify any federal statutes or regulations that would duplicate, overlap, or conflict with the proposed rule. The Board seeks comment regarding any statues or regulations, including state or local statutes or regulations, that would duplicate, overlap, or conflict with the proposed rule, including particularly any that address situations in which medical information may be: (i) Obtained or used in connection with a determination of credit eligibility; or (ii) shared among financial institutions and their affiliates.

F. Discussion of Significant Alternatives

The proposed rule creates exceptions to the general prohibition to the use of medical information in determining the eligibility of a consumer for an initial extension or the continuation of an extension of credit. The proposed rule attempts to harmonize the circumstances under which a credit reporting agency may transfer medical information to a user of consumer reports with the ability of a financial institution to obtain and use that information. The proposed rule also provides exceptions, in addition to those contained in section 411, under which a financial institution may share medical information with an affiliate and not become a consumer reporting agency.

The Board welcomes comments on any significant alternatives, consistent with the mandate in section 411 to protect the privacy of medical information, that would minimize the impact of the proposed rule on small entities.

FDIC: Subject to certain exceptions, the Regulatory Flexibility Act (5 U.S.C. 601–612) (RFA) requires an agency to publish an initial regulatory flexibility analysis with a proposed rule whenever the agency is required to publish a general notice of proposed rulemaking for a proposed rule. The FDIC, in connection with its initial regulatory flexibility analysis, requests public comment in the following areas.

A. Reasons for the Proposed Rule

Section 411 of the FACT Act requires the FDIC, together with the other Agencies, to publish rules that are determined to be necessary and appropriate to protect legitimate operational, transactional risk, consumer, and other needs, including actions necessary for administrative verification, consistent with the intent of the section to restrict the use of medical information for inappropriate purposes, that permit the use of medical information in connection with any determination of a consumer's eligibility, or continued eligibility for credit. It permits the FDIC to issue regulations that are determined to be necessary and appropriate so as to exclude medical information shared by a covered entity with an affiliate from the definition of a consumer report in section 603(d) of the FCRA, and to address the reuse and redisclosure of medical information.

B. Statement of Objectives and Legal Basis

The **SUPPLEMENTARY INFORMATION** above contains this information. The legal basis for the proposed rule is section 411 of the FACT Act.

C. Description of Small Entities to Which the Rule Applies

The proposed rule would apply to all state non-member banks, approximately 3,700 of which are small entities as defined by the RFA.

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

The FDIC does not believe that the proposed rule imposes any new reporting or recordkeeping requirements, as defined in section 603 of the RFA. Section 411 requires that all covered entities have the ability to identify medical information as defined in order to avoid the general prohibition against obtaining or using it in connection with any eligibility determination. The FDIC believes that identifying that information for the purpose of either using it in eligibility determinations pursuant to the exceptions or to share the information with affiliates places no additional compliance burdens or costs on financial institutions.

The FDIC seeks information and comment on any costs, compliance requirements, or changes in operating procedures arising from the application of the proposed rule in addition to or which may differ from those arising from the application of the statute generally.

E. Identification of Duplicative, Overlapping, or Conflicting Federal Rules

The FDIC is unable to identify any federal statutes or regulations that would duplicate, overlap, or conflict with the proposed rule. The FDIC seeks comment regarding any statues or regulations, including state or local statutes or regulations, that would duplicate, overlap, or conflict with the proposed rule, including particularly any that address situations in which medical information may be: (i) Obtained or used in connection with a determination of credit eligibility; or (ii) shared among financial institutions and their affiliates.

F. Discussion of Significant Alternatives

The proposed rule creates exceptions to the general prohibition to the use of medical information in determining the eligibility of a consumer for an initial extension or the continuation of an extension of credit. The proposed rule attempts to harmonize the circumstances under which a credit reporting agency may transfer medical information to a user of consumer reports with the ability of a financial institution to obtain and use that information. The proposed rule also provides exceptions, in addition to those contained in section 411, under which a financial institution may share medical information with an affiliate and not become a consumer reporting agency.

The FDIC welcomes comments on any significant alternatives, consistent with the mandate in section 411 to protect the privacy of medical information, that would minimize the impact of the proposed rule on small entities.

OTS: The Regulatory Flexibility Act (5 U.S.C. 601–612) (RFA) requires an agency to either provide an Initial Regulatory Flexibility Analysis (IRFA) with a proposed rule or certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. As discussed below, OTS does not expect that this rule, if adopted, would have a significant economic impact on a substantial number of small entities. Nonetheless, it is providing this IRFA.

The proposed rule implements section 411 of the FACT Act. The proposed rule would implement the statutory prohibition on creditors obtaining and using a consumer's medical information in connection with credit determinations, while creating exceptions in certain circumstances. Additionally, the proposed rule would implement the FACT Act's restrictions on the sharing of medical information among affiliates, while including exceptions to permit the sharing of medical information in certain circumstances. As discussed below, the proposed rule would apply to savings associations or their subsidiaries, savings and loan holding companies, or affiliates of savings associations or savings and loan holding companies other than bank holding companies, banks, or subsidiaries of bank holding companies or banks.

OTS does not expect that this rule, if adopted, would have a significant economic impact on a substantial number of small entities. The general statutory prohibition on obtaining and using medical information incorporated into the rule will only apply impact entities that obtain or use medical information in connection with credit determinations, regardless of size. OTS does not believe that obtaining and using medical information for credit eligibility determinations is a widespread practice today among creditors it regulates. Small entities, because of the nature and size of their operations, may be less likely than larger institutions to do so. Therefore, no group of covered entities, particularly small ones, is expected to encounter a significant economic impact. However, OTS invites comment whether these assumptions are correct. OTS further invites comment on the burden that will result on small entities from this rulemaking, and has prepared the following analysis.

A. Reasons for the Proposed Rule

Section 411 of the FACT Act requires OTS, together with the other Agencies, to publish rules that are determined to be necessary and appropriate to protect legitimate operational, transactional risk, consumer, and other needs, including actions necessary for administrative verification, consistent with the intent of the section to restrict the use of medical information for inappropriate purposes, that permit the use of medical information in connection with any determination of a consumer's eligibility, or continued eligibility for credit. Section 411 also authorizes OTS to issue regulations that are determined to be necessary and appropriate so as to exclude medical information shared by a covered entity with an affiliate from the definition of a consumer report in section 603(d) of the Fair Credit Reporting Act, and to address the reuse and redisclosure of medical information.

B. Statement of Objectives and Legal Basis

The objectives of the proposed rule are described in the **SUPPLEMENTARY INFORMATION** section. In sum, the objectives are: (1) To implement the general statutory prohibition on creditors obtaining and using medical information in connection with credit eligibility determinations, (2) to fulfill the statutory mandate to prescribe regulations that permit creditors to obtain and use medical information for eligibility purposes when necessary and appropriate to protect legitimate operational, transaction, risk, consumer, and other needs by granting exceptions, and (3) to implement the statutory exceptions to the special restrictions on sharing medical information with affiliates and to propose two additional exceptions the Agencies believe may be necessary and appropriate.

The legal bases for the proposed rule are provisions of: (1) The Home Owners' Loan Act found at 12 U.S.C. 1462a, 1463, 1464, and 1467a; (2) the Federal Deposit Insurance Act, the Bank Protection Act, and other banking laws found at 12 U.S.C. 1828, 1831p–1, and 1881–1884; (3) the Fair Credit Reporting Act found at 15 U.S.C. 1681s and 1681w; and (4) the Gramm-Leach-Bliley Act found at 15 U.S.C. 6801 and 6805(b)(1).

C. Description of Small Entities to Which the Rule Applies

Section 571.30(a)–(d) of the proposed rule would apply to those creditors, as defined in § 571.30(a)(2), that are savings associations or their subsidiaries, savings and loan holding companies, or affiliates of savings associations or savings and loan holding companies other than bank holding companies, banks, or subsidiaries of bank holding companies or banks.

Sections 571.30(e) and 571.31 of the proposed rule would apply to all savings associations and, in accordance with 12 CFR 559.3(h)(1), to federal savings association operating subsidiaries as well.

Small savings associations are generally defined, for RFA purposes, as those with assets of $150 million or less. 13 CFR 121.201 (2003). OTS calculates that of the 921 savings associations, a maximum of 479 of these are small savings associations. OTS also calculates that these 479 savings associations hold 122 subordinate

organizations that could possibly qualify as small entities.

With regard to savings and loan holding companies, the Small Business Administration (SBA) prescribes size standards for various economic activities and industries using the North American Industry Classification System (NAICS). 13 CFR part 121. Under the SBA's standards, companies that are primarily engaged in holding securities of (or other equity interests in) depository institutions for the purpose of controlling those companies are addressed at NAICS Codes 551111 and 551112 (Office of Bank Holding Companies and Office of Other Holding Companies). Companies within this group are considered to be small if they have annual receipts of $6 million or less. Companies that are primarily engaged in holding the securities of depository institutions and operating these entities are classified under NAICS Codes 522110–522190. Companies classified in this group are considered to be small if their total assets are less than $150 million.

In this IRFA, OTS has analyzed the impact of this rule using both the $150 million asset size standard and the $6 million annual receipts standard. OTS specifically requests comment on its use of these standards. Commenters are invited to address whether these or other size standards are appropriate.

OTS calculates that there are approximately 969 OTS-regulated savings and loan holding companies. OTS further calculates that there are maximum of 381 savings and loan holding companies that could possibly qualify as small entities. OTS estimates that there are 151 small savings and loan holding companies under an asset-based definition of $150 million or less of assets and 381 small savings and loan holding companies under a revenue-based definition of $6 million or less in annual receipts.

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

OTS does not believe that the proposed rule imposes any new reporting or any specific recordkeeping requirements within the meaning of the RFA. Implicitly, however, section 411 requires that all covered entities have the ability to identify medical information as defined by the FACT Act in order to avoid the general prohibition against obtaining or using it in connection with any eligibility determination. This may entail some training costs.

However, OTS believes that training costs will be minimal for a variety of reasons. One reason is OTS does not believe that covered entities currently widely obtain or use medical information in making credit eligibility determinations. Another is that staff would already be trained on complying with other laws governing obtaining and using confidential information, including medical information, as discussed below.

Further, entities have the option of complying with the general statutory prohibition on obtaining and using medical information or an applicable exception. Thus, any additional burden that may be associated with complying with the exceptions can be avoided entirely by complying with the general prohibition instead. OTS contemplates that entities that find the exceptions to be burden reducing would opt to use them and that others would choose to comply with the general prohibition.

OTS solicits information and comments on these assumptions. OTS also solicits information and comment on any costs, such as training costs, as well as compliance requirements, or changes in operating procedures arising from the application of the proposed rule in addition to or which may differ from those arising from the application of the statute generally.

E. Identification of Duplicative, Overlapping, or Conflicting Federal Rules

The **SUPPLEMENTARY INFORMATION** section describes the compliance requirements of the proposed rule and identifies other relevant Federal rules that may duplicate or overlap with the proposed rule. As discussed in the **SUPPLEMENTARY INFORMATION**, other laws and rules issued under these laws, such as the Americans with Disabilities Act, the Fair Housing Act, the Gramm-Leach-Bliley Act, and other parts of the FCRA, may limit or regulate the use, collection, and sharing of consumer information, including medical information. In particular, these and other laws and rules, such as the Equal Credit Opportunity Act and Regulation B, also may prohibit creditors from using certain information that is excluded from the restrictions on obtaining or using medical information, such as age or gender information, in determining eligibility for credit or for other purposes. In this sense, there may be some overlap between these federal statutes and regulations and the proposed rule.

OTS seeks comment and information regarding any statues or rules, including state or local statutes or regulations, that would duplicate, overlap, or conflict with the proposed rule, including particularly any that address situations in which medical information may be: (i) Obtained or used in connection with a determination of credit eligibility; or (ii) shared among financial institutions and their affiliates.

F. Discussion of Significant Alternatives

The proposed rule creates exceptions to the general prohibition to the use of medical information in determining the eligibility of a consumer for an initial extension or the continuation of an extension of credit. The proposed rule attempts to harmonize the circumstances under which a credit reporting agency may transfer medical information to a user of consumer reports with the ability of a financial institution to obtain and use that information. The proposed rule also provides exceptions, in addition to those contained in section 411, under which a financial institution may share medical information with an affiliate and not become a consumer reporting agency.

In developing the proposal, the Agencies considered numerous alternatives. In particular, it considered a wide variety of possible exceptions to create to the general prohibition on obtaining and using medical information and numerous alternatives. A number of these are discussed in the **SUPPLEMENTARY INFORMATION**, including the following:

1. The Agencies considered clarifying through an exception that obtaining and using medical information in connection with debt cancellation, debt suspension, or credit insurance products or similar forbearance practices or programs, is not prohibited, but are proposing to clarify this point through interpretation instead.

2. The Agencies considered three options that would allow creditors to obtain and use consumer reports containing the various types of information described in section 604(g)(1) of the FCRA and are soliciting comment on these approaches.

3. The Agencies considered the need for a broader exception to permit creditors to make a "medical accommodation" where individual circumstances may warrant such an accommodation.

4. The Agencies further considered the need to establish an exception for consumer consent whereby a creditor could request that a consumer consent to the specific use of the consumer's medical information.

In all these cases and others, the Agencies have described relevant alternatives and are inviting comment on them in the **SUPPLEMENTARY INFORMATION** section.

The relatively narrow scope of the exceptions proposed reflects the statutory mandate to create only those exceptions "determined to be necessary and appropriate." While the Agencies believe that the proposed exceptions would be among those useful to small entities as well as large, we are not proposing a general exception that would apply only to small entities. Comment is solicited on whether such an exception would be necessary and appropriate and whether the risk is different for a small entity than a large entity that medical information obtained might be used for the type of "inappropriate purposes" the statute prohibits.

OTS welcomes comments on any significant alternatives, consistent with the mandate in section 411 to protect the privacy of medical information, which would minimize the impact of the proposed rule on small entities.

NCUA: The Regulatory Flexibility Act requires the NCUA to prepare an analysis to describe any significant economic impact a proposed rule may have on a substantial number of small credit unions (those under $10 million in assets).

Section 411 of the FACT Act limits the ability of creditors to obtain or use medical information in connection with credit eligibility determinations and narrows when any person can share medical information and medical-related information with affiliates without becoming a consumer reporting agency for purposes of the FCRA. The statute requires the NCUA and the federal banking agencies to prescribe regulations that create exceptions to permit creditors to obtain or use medical information in connection with credit eligibility determinations where necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (including administrative verification purposes), consistent with congressional intent to restrict the use of medical information for inappropriate purposes. Furthermore, the statute grants discretionary rulemaking authority to the NCUA, the federal banking agencies, and the Federal Trade Commission to create exceptions, in addition to those already provided in the statute, to allow affiliates to share medical information and medical-related information.

Proposed §§ 717.30 and 717.31 of the NCUA's proposed regulations would apply to all federal credit unions, regardless of their size. The proposed rule would contain restrictions set forth in section 411 of the FACT Act on federal credit unions obtaining and using medical information in connection with credit eligibility determinations and the sharing of medical information and medical-related information with affiliates. The proposed regulations, however, also would grant exceptions to the statutory limitations to allow creditors to obtain or use medical information in enumerated situations in connection with determinations of consumer eligibility or continued eligibility for credit. The proposal would also enumerate the situations in which federal credit unions would be permitted to share medical information among affiliates.

NCUA is not aware of any other federal rules that duplicate, overlap, or conflict with the proposed rule. NCUA specifically requests comment on the impact of the proposed rule on small federal credit unions.

OCC and OTS Executive Order 12866 Determination

The OCC and OTS each has determined that its portion of the proposed rulemaking is not a significant regulatory action under Executive Order 12866. OCC and OTS Unfunded Mandates Reform Act of 1995 Determination.

OCC Executive Order 13132 Determination

The OCC has determined that this proposal does not have any Federalism implications, as required by Executive Order 13132.

NCUA Executive Order 13132 Determination

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, the NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. The proposed rule applies only to federally chartered credit unions and would not have substantial direct effects on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The NCUA has determined that this proposed rule does not constitute a policy that has federalism implications for purposes of the executive order.

OCC and OTS Unfunded Mandates Reform Act of 1995 Determination

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (Unfunded Mandates Act) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC and OTS each has determined that this proposed rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of $100 million or more. Accordingly, neither the OCC nor the OTS has prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

NCUA: The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this proposed rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998).

NCUA: Interpretive Ruling and Policy Statement (IRPS) 87–2, as Amended by IRPS 03–2

Under NCUA's IRPS 87–2, as amended by IRPS 03–2, the NCUA Board's general policy is to provide a 60-day comment period for a proposed regulation. In this case, the NCUA Board believes that a 30-day comment period will be adequate and is appropriate given that the statutory deadline for the final rule is June 4, 2004. NCUA IRPS 87–2, 52 FR 35231, Sept. 18, 1987, as amended by IRPS 03–2, 68 FR 31949, May 29, 2003.

OCC Community Bank Comment Request

The OCC invites your comments on the impact of this proposal on community banks. The OCC recognizes that community banks operate with more limited resources than larger institutions and may present a different risk profile. Thus, the OCC specifically requests comment on the impact of the proposal on community banks' current resources and available personnel with the requisite expertise, and whether the goals of the proposal could be achieved, for community banks, through an alternative approach.

IV. Solicitation of Comments on Use of Plain Language

Section 722 of the GLB Act requires the Agencies [3] to use plain language in all proposed and final rules published after January 1, 2000. We invite your comments on how to make this proposed rule easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the rule clearly stated? If not, how could the rule be more clearly stated?
- Do the regulations contain technical language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?
- Would more, but shorter, sections be better? If so, which sections should be changed?
- What else could we do to make the regulation easier to understand?

List of Subjects

12 CFR Part 41

Banks, Banking, Consumer protection, National banks, Reporting and recordkeeping requirements.

12 CFR Part 222

Banks, Banking, Consumer protection, Credit, Fair Credit Reporting Act, Holding companies, Privacy, Reporting and recordkeeping requirements, State member banks.

12 CFR Part 334

Administrative practice and procedure, Bank deposit insurance, Banks, Banking, Reporting and recordkeeping requirements, Safety and soundness.

12 CFR Part 571

Consumer protection, Credit, Fair Credit Reporting Act, Privacy, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 717

Consumer protection, Credit unions, Fair credit reporting, Medical information, Privacy, Reporting and recordkeeping requirements.

[3] Section 722 of the GLB Act does not apply to NCUA, but NCUA has a similar Agency Regulatory Goal to promote clear and understandable regulations that impose minimal regulatory burden.

Office of the Comptroller of the Currency

12 CFR Chapter I

Authority and Issuance

For the reasons set forth in the preamble, the OCC proposes to amend Chapter I of Title 12 of the Code of Federal Regulations as follows:

1. Add part 41 to read as follows:

PART 41—FAIR CREDIT

Subpart A—General Provisions

Sec.

41.1 Purpose and scope.
41.2 Examples.
41.3 Definitions.

Subpart B—[Reserved]

Subpart C—[Reserved]

Subpart D—Medical Information

41.30 Obtaining or using medical information in connection with a determination of eligibility for credit.
41.31 Sharing medical information with affiliates.

Authority: 12 U.S.C. 1 *et seq.*, 24 (Seventh), 93a, 481, 484, and 1818; 15 U.S.C. 1681a, 1681b, and 1681s.

Subpart A—General Provisions

§ 41.1 Purpose and scope.

(a) *Purpose.* The purpose of this part is to establish standards for national banks in key areas of regulation regarding consumer report information and fair credit. In addition, the purpose of this part is to specify the type of information, including medical information, national banks may obtain, use, or share among affiliates. This part also contains a number of measures national banks must take to combat consumer fraud and related crimes, including identity theft.

(b) *Scope.*

(1) [Reserved]

(2) *Institutions covered.* Except as otherwise provided in this part, these regulations apply to national banks, Federal branches and Agencies of foreign banks, and their respective operating subsidiaries that are not functionally regulated within the meaning of section 5(c)(5) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1844(c)(5)).

§ 41.2 Examples.

The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part. Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise in this part.

§ 41.3 Definitions.

As used in this part, unless the context requires otherwise:

(a) *Act* means the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*).

(b) *Affiliate* means any company that controls, is controlled by, or is under common control with another company.

(c) [Reserved]

(d) *Company* means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

(e) *Consumer* means an individual.

(f) [Reserved]

(g) [Reserved]

(h) [Reserved]

(i) *Control* of a company means:

(1) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of the company, directly or indirectly, or acting through one or more other persons;

(2) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of the company; or

(3) The power to exercise, directly or indirectly, a controlling influence over the management or policies of the company, as the OCC determines.

(j) [Reserved]

(k) *Medical information* means:

(1) Information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to:

(i) The past, present, or future physical, mental, or behavioral health or condition of an individual;

(ii) The provision of health care to an individual; or

(iii) The payment for the provision of health care to an individual.

(2) The term does not include:

(i) The age or gender of a consumer;

(ii) Demographic information about the consumer, including a consumer's residence address or e-mail address; or

(iii) Any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy.

(l) [Reserved]

(m) [Reserved]

(n) [Reserved]

* * * * *

Subpart B—[Reserved]

Subpart C—[Reserved]

Subpart D—Medical Information

§ 41.30 Obtaining or using medical information in connection with a determination of eligibility for credit.

(a) *General prohibition on obtaining or using medical information*—(1) *In general.* A bank may not obtain or use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit, except as provided in this subpart.

(2) *Definitions as used in this subpart*—(i) *Eligibility, or continued eligibility, for credit* means the consumer's qualification or fitness to receive, or continue to receive, credit, including the terms on which credit is offered, primarily for personal, family, or household purposes. The term does not include:

(A) The consumer's qualification or fitness to be offered employment, insurance products, or other non-credit products or services;

(B) Any determination of whether the provisions of a debt cancellation contract, debt suspension agreement, credit insurance product, or similar forbearance practice or program are triggered;

(C) Authorizing, processing, or documenting a payment or transaction on behalf of the consumer in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit; or

(D) Maintaining or servicing the consumer's account in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit.

(ii) *Bank* means an institution that:

(A) is covered by this part in § 41.1(b)(2); and

(B) is a "creditor" as that term is defined by section 702 of the Equal Credit Opportunity Act (15 U.S.C. 1691a).

(iii) *Credit* has the same meaning as in section 702 of the Equal Credit Opportunity Act (15 U.S.C. 1691a).

(b) *Rule of construction for receiving unsolicited medical information*—(1) *In general.* A bank does not obtain medical information for purposes of paragraph (a)(1) of this section if it:

(i) Receives medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit without specifically requesting medical information; and

(ii) Does not use that information in determining whether to extend or continue to extend credit to the consumer and the terms on which credit is offered or continued.

(2) *Examples of receiving unsolicited medical information.* A bank receives unsolicited medical information if, for example:

(i) In response to a general question regarding a consumer's debts or expenses, the bank receives information that the consumer has a particular medical condition and does not use that information in determining whether to extend credit to the consumer or the terms on which credit is offered.

(ii) In conversation with the loan officer, the consumer informs the bank that the consumer has a particular medical condition, and the bank does not use that information in determining whether to extend credit to the consumer or the terms on which credit is offered.

(c) *Financial information exception for obtaining and using medical information*—(1) *In general.* A bank may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit so long as:

(i) The information relates to debts, expenses, income, benefits, collateral, or the purpose of the loan, including the use of proceeds;

(ii) The bank uses the medical information in a manner and to an extent that is no less favorable than it would use comparable information that is not medical information in a credit transaction; and

(iii) The bank does not take the consumer's physical, mental, or behavioral health, condition or history, type of treatment, or prognosis into account as part of any such determination.

(2) *Examples*—(i) *Examples of information related to debts, expenses, income, benefits, collateral, or the purpose of the loan.* Paragraph (c)(1)(i) of this section permits a bank, for example, to obtain and use information about:

(A) The dollar amount, repayment terms, repayment history, and similar information regarding medical debts that is used to calculate, measure, or verify the repayment ability of the consumer, the use of proceeds, or the terms for granting credit;

(B) The value, condition, and lien status of a medical device that is used as collateral to secure a loan;

(C) The dollar amount and continued eligibility for disability income or benefits related to health or a medical condition that is relied on as a source of repayment; or

(D) The identity of entities to whom outstanding medical debts are owed in connection with an application for credit, including but not limited to a transaction involving the consolidation of medical debts.

(ii) *Examples of uses of medical information consistent with the exception.* (A) A consumer includes on an application for credit information about two $20,000 debts. One debt is to a hospital; the other debt is to a retailer. The bank contacts the hospital and the retailer to verify the amount and payment status of the debts. The bank learns that both debts are more than 90 days past due. Any two debts of this size that are past due would disqualify the consumer under the bank's established underwriting criteria. The bank denies the application on the basis that the consumer has a poor repayment history on outstanding debts. The bank has used medical information in a manner and to an extent no less favorable than it would use comparable non-medical information.

(B) A consumer indicates on an application for a $200,000 mortgage loan that she receives $15,000 in long-term disability income each year from her former employer and has no other income. Annual income of $15,000, regardless of source, would not be sufficient to support the requested amount of credit. The bank denies the application on the basis that the projected debt-to-income ratio of the consumer does not meet the bank's underwriting criteria. The bank has used medical information in a manner and to an extent that is no less favorable than it would use comparable non-medical information.

(C) A consumer includes on an application for a $10,000 home equity loan that he has a $50,000 debt to a medical facility that specializes in treating a potentially terminal disease. The bank contacts the medical facility to verify the debt and obtain the repayment history and current status of the loan. The bank learns that the debt is current and that the applicant meets the income requirements of the bank's underwriting guidelines. The bank grants the application. The bank has used medical information in accordance with the exception.

(iii) *Examples of uses of medical information inconsistent with the exception.*

(A) A consumer applies for $25,000 of credit and includes on the application information about a $50,000 debt to a hospital. The bank contacts the hospital to verify the amount and payment status

of the debt, and learns that the debt is current and that the consumer has no delinquencies in her repayment history. If the existing debt were instead owed to a home furnishing retailer, the bank would approve the application and extend credit based on the amount and repayment history of the outstanding debt. The bank, however, denies the application because the consumer is indebted to a hospital. The bank has used medical information, here the identity of the hospital, in a manner and to an extent that is less favorable than it would use comparable non-medical information.

(B) A consumer meets with a loan officer of a bank to apply for a mortgage loan. While filling out the loan application, the consumer informs the loan officer orally that she has a potentially terminal disease. The consumer meets the bank's established requirements for the requested mortgage. The loan officer recommends to the credit committee that the consumer be denied credit because the consumer has that disease. The bank has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis as part of a determination of eligibility or continued eligibility for credit.

(d) *Specific exceptions for obtaining and using medical information*—(1) *In general.* A bank may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit:

(i) To determine whether the use of a power of attorney or legal representative is necessary and appropriate;

(ii) To comply with applicable requirements of local, state, or federal laws;

(iii) To the extent such information is included in a consumer report from a consumer reporting agency, in accordance with 15 U.S.C. 1681b(g)(1)(B), and is used for the purpose(s) for which the consumer provided specific written consent;

(iv) For purposes of fraud prevention and detection;

(v) In the case of credit for the purpose of financing medical products or services, to determine and verify the medical purpose of a loan and the use of proceeds;

(vi) If the consumer or the consumer's legal representative requests in writing, on a separate form signed by the consumer or the consumer's legal representative that the bank use specific medical information for a specific purpose in determining the consumer's eligibility, or continued eligibility, for credit, to accommodate the consumer's particular circumstances. The signed written request must describe the specific medical information that the consumer requests the bank to use and the specific purpose for which the information will be used; or

(vii) As otherwise permitted by order of the OCC.

(2) *Examples of determining the medical purpose of the loan or the use of proceeds.* (i) If a consumer applies for $10,000 of credit for the purpose of financing vision correction surgery, the bank may confirm the consumer's medical eligibility to undergo that procedure with the surgeon. If the surgeon reports that surgery will not be performed on the consumer, the bank may use that medical information to deny the consumer's application for credit, because the loan would not be used for the stated purpose.

(ii) If a consumer applies for $10,000 of credit for the purpose of financing cosmetic surgery, the bank may confirm the cost of the procedure with the surgeon. If the surgeon reports that the cost of the procedure is $5,000, the bank may use that medical information to offer the consumer only $5,000 of credit.

(iii) A bank has an established medical loan program for financing particular elective surgical procedures. The bank receives a loan application from a consumer requesting $10,000 of credit under the established loan program for an elective surgical procedure. The consumer indicates on the application that the purpose of the loan is to finance an elective surgical procedure not eligible for funding under the guidelines of the established loan program. The bank may deny the consumer's application because the purpose of the loan is not for a particular procedure funded by the established loan program.

(3) *Examples of obtaining and using medical information at the request of the consumer.* Consistent with safe and sound practices, and after obtaining from the consumer a signed, written document that describes the specific medical information that the consumer requests the bank to use and the specific purpose for which the information will be used, the bank may obtain and use the specific medical information for the specific purpose described in the request:

(i) If a consumer applies for a loan and requests that the bank consider the consumer's medical disability at the relevant time as an explanation for adverse payment history information in his credit report, the bank may consider such medical information in evaluating the consumer's willingness and ability to repay the requested loan.

(ii) If a consumer applies for a loan and explains that his income has been and will continue to be interrupted on account of a medical condition and that he expects to repay the loan from liquidation of assets, the bank may evaluate the application using the sale of assets as the primary source of repayment.

(e) *Limits on redisclosure of information.* If the bank receives medical information about a consumer from a consumer reporting agency or its affiliate, the bank must not disclose that information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

§ 41.31 Sharing medical information with affiliates.

(a) *In general.* The exclusions from the term "consumer report" in section 603(d)(2) of the Act that allow the sharing of information with affiliates do not apply if the bank communicates to an affiliate:

(1) Medical information;

(2) An individualized list or description based on the payment transactions of the consumer for medical products or services; or

(3) An aggregate list of identified consumers based on payment transactions for medical products or services.

(b) *Exceptions.* The bank may rely on the exclusions from the term "consumer report" in section 603(d)(2) of the Act to communicate the information in paragraph (a) of this section to an affiliate:

(1) In connection with the business of insurance or annuities (including the activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners, as in effect on January 1, 2003);

(2) For any purpose permitted without authorization under the regulations promulgated by the U.S. Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA);

(3) For any purpose referred to in section 1179 of HIPAA;

(4) For any purpose described in section 502(e) of the Gramm-Leach-Bliley Act;

(5) In connection with a determination of the consumer's eligibility, or continued eligibility, for credit consistent with § 41.30; or

(6) As otherwise permitted by order of the OCC.

Board of Governors of the Federal Reserve System

12 CFR Chapter II

Authority and Issuance

For the reasons set forth in the joint preamble, title 12, chapter II, of the Code of Federal Regulations is proposed to be amended by revising part 222 to read as follows:

PART 222—FAIR CREDIT REPORTING (REGULATION V)

1. The authority citation for part 222 is amended to read as follows:

Authority: 15 U.S.C. 1681b and 1681s; Secs. 3 and 217, Pub. L. 108–159, 117 Stat. 1952.

2. In subpart A to part 222, the following amendments are made:

a. Section 222.1 is amended by adding a new paragraph (b).

b. Section 222.2 is added.

c. Section 222.3 is added.

3. A new subpart D is added to part 222.

Subpart A—General Provisions

§ 222.1 Purpose, scope, and effective dates

* * * * *

(b) *Scope.*

(1) [Reserved]

(2) *Institutions covered.* (i) Except as otherwise provided in paragraph (b)(2) of this section, these regulations apply to banks that are members of the Federal Reserve System (other than national banks), branches and Agencies of foreign banks (other than Federal branches, Federal Agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, organizations operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq.*, and 611 *et seq.*), and bank holding companies and affiliates of such holding companies.

(ii) [Reserved]

(iii) Section 222.30(a)–(d) of this part applies to persons listed in paragraph (b)(2)(i) of this section that are creditors.

(iv) Section 222.31 of this part applies to banks that are members of the Federal Reserve System (other than national banks), branches and Agencies of foreign banks (other than Federal branches, Federal Agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, organizations operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq.*, and 611 *et seq.*).

* * * * *

§ 222.2 Examples.

The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part. Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise in this part.

§ 222.3 Definitions.

As used in this part, unless the context requires otherwise:

(a) *Act* means the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*).

(b) *Affiliate* means any company that controls, is controlled by, or is under common control with another company.

(c) [Reserved]

(d) *Company* means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

(e) *Consumer* means an individual.

(f) [Reserved]

(g) [Reserved]

(h) [Reserved]

(i) *Control* of a company means:

(1) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of the company, directly or indirectly, or acting through one or more other persons;

(2) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of the company; or

(3) The power to exercise, directly or indirectly, a controlling influence over the management or policies of the company, as the Board determines.

(j) [Reserved]

(k) *Medical information* means:

(1) Information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to—

(i) The past, present, or future physical, mental, or behavioral health or condition of an individual;

(ii) The provision of health care to an individual; or

(iii) The payment for the provision of health care to an individual.

(2) The term does not include:

(i) The age or gender of a consumer;

(ii) Demographic information about the consumer, including a consumer's residence address or e-mail address; or

(iii) Any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy.

(l) [Reserved]

(m) [Reserved]

(n) [Reserved]

(o) *You* means member banks of the Federal Reserve System (other than national banks), branches and Agencies of foreign banks (other than Federal branches, Federal Agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, organizations operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq.*, and 611 *et seq.*), and bank holding companies and affiliates of such holding companies (other than depository institutions and consumer reporting agencies).

Subpart B—[Reserved]

Subpart C—[Reserved]

Subpart D—Medical Information

Sec.

Subpart D—Medical Information

§ 222.30 Obtaining or using medical information in connection with a determination of eligibility for credit.

(a) *General prohibition on obtaining or using medical information*—(1) *In general.* A creditor may not obtain or use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit, except as provided in this subpart.

(2) *Definitions as used in this subpart*—(i) *Eligibility, or continued eligibility, for credit* means the consumer's qualification or fitness to receive, or continue to receive, credit, including the terms on which credit is offered, primarily for personal, family, or household purposes. The term does not include:

(A) The consumer's qualification or fitness to be offered employment, insurance products, or other non-credit products or services;

(B) Any determination of whether the provisions of a debt cancellation contract, debt suspension agreement, credit insurance product, or similar forbearance practice or program are triggered;

(C) Authorizing, processing, or documenting a payment or transaction on behalf of the consumer in a manner

that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit; or

(D) Maintaining or servicing the consumer's account in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit.

(ii) *Creditor* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(iii) *Credit* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(b) *Rule of construction for receiving unsolicited medical information*—(1) *In general.* A creditor does not obtain medical information for purposes of paragraph (a)(1) of this section if it—

(i) Receives medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit without specifically requesting medical information; and

(ii) Does not use that information in determining whether to extend or continue to extend credit to the consumer and the terms on which credit is offered or continued.

(2) *Examples of receiving unsolicited medical information.* A creditor receives unsolicited medical information if, for example:

(i) In response to a general question regarding a consumer's debts or expenses, the creditor receives information that the consumer has a particular medical condition and does not use that information in determining whether to extend credit to the consumer or the terms on which credit is offered.

(ii) In conversation with the loan officer, the consumer informs the creditor that the consumer has a particular medical condition, and the creditor does not use that information in determining whether to extend credit to the consumer or the terms on which credit is offered.

(c) *Financial information exception for obtaining and using medical information*—(1) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit so long as:

(i) The information relates to debts, expenses, income, benefits, collateral, or the purpose of the loan, including the use of proceeds;

(ii) The creditor uses the medical information in a manner and to an extent that is no less favorable than it would use comparable information that is not medical information in a credit transaction; and

(iii) The creditor does not take the consumer's physical, mental, or behavioral health, condition or history, type of treatment, or prognosis into account as part of any such determination.

(2) *Examples*—(i) *Examples of information related to debts, expenses, income, benefits, collateral, or the purpose of the loan.* Paragraph (c)(1)(i) of this section permits a creditor, for example, to obtain and use information about:

(A) The dollar amount, repayment terms, repayment history, and similar information regarding medical debts that is used to calculate, measure, or verify the repayment ability of the consumer, the use of proceeds, or the terms for granting credit;

(B) The value, condition, and lien status of a medical device that is used as collateral to secure a loan;

(C) The dollar amount and continued eligibility for disability income or benefits related to health or a medical condition that is relied on as a source of repayment; or

(D) The identity of creditors to whom outstanding medical debts are owed in connection with an application for credit, including but not limited to a transaction involving the consolidation of medical debts.

(ii) *Examples of uses of medical information consistent with the exception.* (A) A consumer includes on an application for credit information about two $20,000 debts. One debt is to a hospital; the other debt is to a retailer. The creditor contacts the hospital and the retailer to verify the amount and payment status of the debts. The creditor learns that both debts are more than 90 days past due. Any two debts of this size that are past due would disqualify the consumer under the creditor's established underwriting criteria. The creditor denies the application on the basis that the consumer has a poor repayment history on outstanding debts. The creditor has used medical information in a manner and to an extent no less favorable than it would use comparable non-medical information.

(B) A consumer indicates on an application for a $200,000 mortgage loan that she receives $15,000 in long-term disability income each year from her former employer and has no other income. Annual income of $15,000, regardless of source, would not be sufficient to support the requested amount of credit. The creditor denies the application on the basis that the projected debt-to-income ratio of the consumer does not meet the creditor's underwriting criteria. The creditor has used medical information in a manner and to an extent that is no less favorable than it would use comparable non-medical information.

(C) A consumer includes on an application for a $10,000 home equity loan that he has a $50,000 debt to a medical facility that specializes in treating a potentially terminal disease. The creditor contacts the medical facility to verify the debt and obtain the repayment history and current status of the loan. The creditor learns that the debt is current and that the applicant meets the income requirements of the creditor's underwriting guidelines. The creditor grants the application. The creditor has used medical information in accordance with the exception.

(iii) *Examples of uses of medical information inconsistent with the exception.*

(A) A consumer applies for $25,000 of credit and includes on the application information about a $50,000 debt to a hospital. The creditor contacts the hospital to verify the amount and payment status of the debt, and learns that the debt is current and that the consumer has no delinquencies in her repayment history. If the existing debt were instead owed to a home furnishing retailer, the creditor would approve the application and extend credit based on the amount and repayment history of the outstanding debt. The creditor, however, denies the application because the consumer is indebted to a hospital. The creditor has used medical information, here the identity of the medical creditor, in a manner and to an extent that is less favorable than it would use comparable non-medical information.

(B) A consumer meets with a loan officer of a creditor to apply for a mortgage loan. While filling out the loan application, the consumer informs the loan officer orally that she has a potentially terminal disease. The consumer meets the creditor's established requirements for the requested mortgage. The loan officer recommends to the credit committee that the consumer be denied credit because the consumer has that disease. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis as part of a determination of eligibility or continued eligibility for credit.

(d) *Specific exceptions for obtaining and using medical information*—(1) *In general.* A creditor may obtain and use medical information pertaining to a

consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit—

(i) To determine whether the use of a power of attorney or legal representative is necessary and appropriate;

(ii) To comply with applicable requirements of local, state, or federal laws;

(iii) To the extent such information is included in a consumer report from a consumer reporting agency, in accordance with 15 U.S.C. 1681b(g)(1)(B), and is used for the purpose(s) for which the consumer provided specific written consent;

(iv) For purposes of fraud prevention and detection;

(v) In the case of credit for the purpose of financing medical products or services, to determine and verify the medical purpose of a loan and the use of proceeds;

(vi) If the consumer or the consumer's legal representative requests in writing, on a separate form signed by the consumer or the consumer's legal representative that the creditor use specific medical information for a specific purpose in determining the consumer's eligibility, or continued eligibility, for credit, to accommodate the consumer's particular circumstances. The signed written request must describe the specific medical information that the consumer requests the creditor to use and the specific purpose for which the information will be used; or

(vii) As otherwise permitted by order of the Board.

(2) *Examples of determining the medical purpose of the loan or the use of proceeds.* (i) If a consumer applies for $10,000 of credit for the purpose of financing vision correction surgery, the creditor may confirm the consumer's medical eligibility to undergo that procedure with the surgeon. If the surgeon reports that surgery will not be performed on the consumer, the creditor may use that medical information to deny the consumer's application for credit, because the loan would not be used for the stated purpose.

(ii) If a consumer applies for $10,000 of credit for the purpose of financing cosmetic surgery, the creditor may confirm the cost of the procedure with the surgeon. If the surgeon reports that the cost of the procedure is $5,000, the creditor may use that medical information to offer the consumer only $5,000 of credit.

(iii) A creditor has an established medical loan program for financing particular elective surgical procedures. The creditor receives a loan application from a consumer requesting $10,000 of credit under the established loan program for an elective surgical procedure. The consumer indicates on the application that the purpose of the loan is to finance an elective surgical procedure not eligible for funding under the guidelines of the established loan program. The creditor may deny the consumer's application because the purpose of the loan is not for a particular procedure funded by the established loan program.

(3) *Examples of obtaining and using medical information at the request of the consumer.* Consistent with safe and sound practices, and after obtaining from the consumer a signed, written document that describes the specific medical information that the consumer requests the creditor to use and the specific purpose for which the information will be used, the creditor may obtain and use the specific medical information for the specific purpose specified in the request:

(i) If a consumer applies for a loan and requests that the creditor consider the consumer's medical disability at the relevant time as an explanation for adverse payment history information in his credit report, the creditor may consider such medical information in evaluating the consumer's willingness and ability to repay the requested loan.

(ii) If a consumer applies for a loan and explains that his income has been and will continue to be interrupted on account of a medical condition and that he expects to repay the loan from liquidation of assets, the creditor may evaluate the application using the sale of assets as the primary source of repayment.

(e) *Limits on redisclosure of information.* If you receive medical information about a consumer from a consumer reporting agency or your affiliate, you must not disclose that information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

§ 222.31 Sharing medical information with affiliates.

(a) *In general.* The exclusions from the term "consumer report" in section 603(d)(2) of the Act that allow the sharing of information with affiliates do not apply to a person described in § 222.1(b)(2)(iv) of this part if that person communicates to an affiliate

(1) Medical information;

(2) An individualized list or description based on the payment transactions of the consumer for medical products or services; or

(3) An aggregate list of identified consumers based on payment transactions for medical products or services.

(b) *Exceptions.* A person described in § 222.1(b)(2)(iv) of this part may rely on the exclusions from the term "consumer report" in section 603(d)(2) of the Act to communicate the information in paragraph (a) to an affiliate—

(1) In connection with the business of insurance or annuities (including the activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners, as in effect on January 1, 2003);

(2) For any purpose permitted without authorization under the regulations promulgated by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA);

(3) For any purpose referred to in section 1179 of HIPAA;

(4) For any purpose described in section 502(e) of the Gramm-Leach-Bliley Act;

(5) In connection with a determination of the consumer's eligibility, or continued eligibility, for credit consistent with § 222.30 of this part; or

(6) As otherwise permitted by order of the Board.

Federal Deposit Insurance Corporation

12 CFR Chapter III

Authority and Issuance

For the reasons set forth in the joint preamble, the Federal Deposit Insurance Corporation proposes to add part 334 of chapter III of title 12 of the Code of Federal Regulations to read as follows:

PART 334—FAIR CREDIT REPORTING

Subpart A—General Provisions

Sec.

Subpart B—[Reserved]

Subpart C—[Reserved]

Subpart D—Medical Information

Authority: 12 U.S.C. 1819(Tenth) and 1818; 15 U.S.C. 1681b and 1681s.

Subpart A—General Provisions

§ 334.1 Purpose, scope, and effective dates.

(a) [Reserved]

(b) *Scope.*

(1) [Reserved]

(2) *Institutions covered.*

(i) Except as otherwise provided in this paragraph, these regulations apply to banks insured by the FDIC (other than District Banks and members of the Federal Reserve System) and insured State branches of foreign banks and any subsidiaries and affiliates of such entities; and other entities or persons with respect to which the FDIC may exercise its enforcement authority under any provision of law. For purposes of this definition, a subsidiary does not include a broker, dealer, person providing insurance, investment company, and investment advisor.

(ii) [Reserved]

(iii) Section 334.30 of this part applies to creditors, as defined in § 334.30(a)(2), that are subject to the jurisdiction of the Federal Deposit Insurance Corporation under paragraph (b)(2)(i) of this section.

§ 334.2 Examples.

The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part. Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise in this part.

§ 334.3 Definitions.

As used in this part, unless the context requires otherwise:

(a) *Act* means the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*).

(b) *Affiliate* means any company that controls, is controlled by, or is under common control with another company.

(c) [Reserved]

(d) *Company* means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

(e) *Consumer* means an individual.

(f) [Reserved]

(g) [Reserved]

(h) [Reserved]

(i) *Control* of a company means:

(1) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of the company, directly or indirectly, or acting through one or more other persons;

(2) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of the company; or

(3) The power to exercise, directly or indirectly, a controlling influence over the management or policies of the company, as the Board determines.

(j) [Reserved]

(k) *Medical information* means:

(1) Information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to—

(i) The past, present, or future physical, mental, or behavioral health or condition of an individual;

(ii) The provision of health care to an individual; or

(iii) The payment for the provision of health care to an individual.

(2) The term does not include:

(i) The age or gender of a consumer;

(ii) Demographic information about the consumer, including a consumer's residence address or e-mail address; or

(iii) Any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy.

(l) [Reserved]

(m) [Reserved]

(n) [Reserved]

(o) *You* means banks insured by the FDIC (other than District Banks and members of the Federal Reserve System) and insured State branches of foreign banks and any subsidiaries and affiliates of such entities; and other entities or persons with respect to which the FDIC may exercise its enforcement authority under any provision of law. For purposes of this definition, a subsidiary does not include a broker, dealer, person providing insurance, investment company, and investment advisor.

Subpart B—[Reserved]

Subpart C—[Reserved]

Subpart D—Medical Information

§ 334.30 Obtaining or using medical information in connection with a determination of eligibility for credit.

(a) *General prohibition on obtaining or using medical information*—(1) *In general.* A creditor may not obtain or use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit, except as provided in this subpart.

(2) *Definitions as used in this subpart*—(i) *Eligibility, or continued eligibility, for credit* means the consumer's qualification or fitness to receive, or continue to receive, credit, including the terms on which credit is offered, primarily for personal, family, or household purposes. The term does not include:

(A) The consumer's qualification or fitness to be offered employment, insurance products, or other non-credit products or services;

(B) Any determination of whether the provisions of a debt cancellation contract, debt suspension agreement, credit insurance product, or similar forbearance practice or program are triggered;

(C) Authorizing, processing, or documenting a payment or transaction on behalf of the consumer in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit; or

(D) Maintaining or servicing the consumer's account in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit.

(ii) *Creditor* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(iii) *Credit* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(b) *Rule of construction for receiving unsolicited medical information*—(1) *In general.* A creditor does not obtain medical information for purposes of paragraph (a)(1) of this section if it—

(i) Receives medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit without specifically requesting medical information; and

(ii) Does not use that information in determining whether to extend or continue to extend credit to the consumer and the terms on which credit is offered or continued.

(2) *Examples of receiving unsolicited medical information.* A creditor receives unsolicited medical information if, for example:

(i) In response to a general question regarding a consumer's debts or expenses, the creditor receives information that the consumer has a particular medical condition and does not use that information in determining whether to extend credit to the consumer or the terms on which credit is offered.

(ii) In conversation with the loan officer, the consumer informs the creditor that the consumer has a particular medical condition, and the creditor does not use that information in determining whether to extend credit to the consumer or the terms on which credit is offered.

(c) *Financial information exception for obtaining and using medical information*—(1) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit so long as:

(i) The information relates to debts, expenses, income, benefits, collateral, or the purpose of the loan, including the use of proceeds;

(ii) The creditor uses the medical information in a manner and to an extent that is no less favorable than it would use comparable information that is not medical information in a credit transaction; and

(iii) The creditor does not take the consumer's physical, mental, or behavioral health, condition or history, type of treatment, or prognosis into account as part of any such determination.

(2) *Examples*—(i) *Examples of information related to debts, expenses, income, benefits, collateral, or the purpose of the loan.* Paragraph (c)(1)(i) of this section permits a creditor, for example, to obtain and use information about:

(A) The dollar amount, repayment terms, repayment history, and similar information regarding medical debts that is used to calculate, measure, or verify the repayment ability of the consumer, the use of proceeds, or the terms for granting credit;

(B) The value, condition, and lien status of a medical device that is used as collateral to secure a loan;

(C) The dollar amount and continued eligibility for disability income or benefits related to health or a medical condition that is relied on as a source of repayment; or

(D) The identity of creditors to whom outstanding medical debts are owed in connection with an application for credit, including but not limited to a transaction involving the consolidation of medical debts.

(ii) *Examples of uses of medical information consistent with the exception.* (A) A consumer includes on an application for credit information about two $20,000 debts. One debt is to a hospital; the other debt is to a retailer. The creditor contacts the hospital and the retailer to verify the amount and payment status of the debts. The creditor learns that both debts are more than 90 days past due. Any two debts of this size that are past due would disqualify the consumer under the creditor's established underwriting criteria. The creditor denies the application on the basis that the consumer has a poor repayment history on outstanding debts. The creditor has used medical information in a manner and to an extent no less favorable than it would use comparable non-medical information.

(B) A consumer indicates on an application for a $200,000 mortgage loan that she receives $15,000 in long-term disability income each year from her former employer and has no other income. Annual income of $15,000, regardless of source, would not be sufficient to support the requested amount of credit. The creditor denies the application on the basis that the projected debt-to-income ratio of the consumer does not meet the creditor's underwriting criteria. The creditor has used medical information in a manner and to an extent that is no less favorable than it would use comparable non-medical information.

(C) A consumer includes on an application for a $10,000 home equity loan that he has a $50,000 debt to a medical facility that specializes in treating a potentially terminal disease. The creditor contacts the medical facility to verify the debt and obtain the repayment history and current status of the loan. The creditor learns that the debt is current and that the applicant meets the income requirements of the creditor's underwriting guidelines. The creditor grants the application. The creditor has used medical information in accordance with the exception.

(iii) *Examples of uses of medical information inconsistent with the exception.*

(A) A consumer applies for $25,000 of credit and includes on the application information about a $50,000 debt to a hospital. The creditor contacts the hospital to verify the amount and payment status of the debt, and learns that the debt is current and that the consumer has no delinquencies in her repayment history. If the existing debt were instead owed to a home furnishing retailer, the creditor would approve the application and extend credit based on the amount and repayment history of the outstanding debt. The creditor, however, denies the application because the consumer is indebted to a hospital. The creditor has used medical information, here the identity of the medical creditor, in a manner and to an extent that is less favorable than it would use comparable non-medical information.

(B) A consumer meets with a loan officer of a creditor to apply for a mortgage loan. While filling out the loan application, the consumer informs the loan officer orally that she has a potentially terminal disease. The consumer meets the creditor's established requirements for the requested mortgage. The loan officer recommends to the credit committee that the consumer be denied credit because the consumer has that disease. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis as part of a determination of eligibility or continued eligibility for credit.

(d) *Specific exceptions for obtaining and using medical information.* (1) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit—

(i) To determine whether the use of a power of attorney or legal representative is necessary and appropriate;

(ii) To comply with applicable requirements of local, state, or federal laws;

(iii) To the extent such information is included in a consumer report from a consumer reporting agency, in accordance with 15 U.S.C. 1681b(g)(1)(B), and is used for the purpose(s) for which the consumer provided specific written consent;

(iv) For purposes of fraud prevention and detection;

(v) In the case of credit for the purpose of financing medical products or services, to determine and verify the medical purpose of a loan and the use of proceeds;

(vi) If the consumer or the consumer's legal representative requests in writing, on a separate form signed by the consumer or the consumer's legal representative that the creditor use specific medical information for a specific purpose in determining the consumer's eligibility, or continued eligibility, for credit, to accommodate the consumer's particular circumstances. The signed written request must describe the specific medical information that the consumer requests the creditor to use and the specific purpose for which the information will be used; or

(vii) As otherwise permitted by order of the Board.

(2) *Examples of determining the medical purpose of the loan or the use of proceeds.* (i) If a consumer applies for $10,000 of credit for the purpose of financing vision correction surgery, the creditor may confirm the consumer's medical eligibility to undergo that procedure with the surgeon. If the surgeon reports that surgery will not be

performed on the consumer, the creditor may use that medical information to deny the consumer's application for credit, because the loan would not be used for the stated purpose.

(ii) If a consumer applies for $10,000 of credit for the purpose of financing cosmetic surgery, the creditor may confirm the cost of the procedure with the surgeon. If the surgeon reports that the cost of the procedure is $5,000, the creditor may use that medical information to offer the consumer only $5,000 of credit.

(iii) A creditor has an established medical loan program for financing particular elective surgical procedures. The creditor receives a loan application from a consumer requesting $10,000 of credit under the established loan program for an elective surgical procedure. The consumer indicates on the application that the purpose of the loan is to finance an elective surgical procedure not eligible for funding under the guidelines of the established loan program. The creditor may deny the consumer's application because the purpose of the loan is not for a particular procedure funded by the established loan program.

(3) *Examples of obtaining and using medical information at the request of the consumer.* Consistent with safe and sound practices, and after obtaining from the consumer a signed, written document that describes the specific medical information that the consumer requests the creditor to use and the specific purpose for which the information will be used, the creditor may obtain and use the specific medical information for the specific purpose specified in the request:

(i) If a consumer applies for a loan and requests that the creditor consider the consumer's medical disability at the relevant time as an explanation for adverse payment history information in his credit report, the creditor may consider such medical information in evaluating the consumer's willingness and ability to repay the requested loan.

(ii) If a consumer applies for a loan and explains that his income has been and will continue to be interrupted on account of a medical condition and that he expects to repay the loan from liquidation of assets, the creditor may evaluate the application using the sale of assets as the primary source of repayment.

(e) *Limits on redisclosure of information.* If you receive medical information about a consumer from a consumer reporting agency or your affiliate, you must not disclose that information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

§ 334.31 Sharing medical information with affiliates.

(a) *In general.* The exclusions from the term "consumer report" in section 603(d)(2) of the Act that allow the sharing of information with affiliates do not apply if you communicate to an affiliate—

(1) Medical information;

(2) An individualized list or description based on the payment transactions of the consumer for medical products or services; or

(3) An aggregate list of identified consumers based on payment transactions for medical products or services.

(b) *Exceptions.* You may rely on the exclusions from the term "consumer report" in section 603(d)(2) of the Act to communicate the information in paragraph (a) to an affiliate—

(1) In connection with the business of insurance or annuities (including the activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners, as in effect on January 1, 2003);

(2) For any purpose permitted without authorization under the regulations promulgated by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA);

(3) For any purpose referred to in section 1179 of HIPAA;

(4) For any purpose described in section 502(e) of the Gramm-Leach-Bliley Act;

(5) In connection with a determination of the consumer's eligibility, or continued eligibility, for credit consistent with § 334.30 of this part; or

(6) As otherwise permitted by order of the Board.

Office of Thrift Supervision

12 CFR Chapter V

Authority and Issuance

For the reasons set forth in the joint preamble, the Office of Thrift Supervision proposes to amend chapter V of title 12 of the Code of Federal Regulations by adding a new part 571 to read as follows:

PART 571—FAIR CREDIT REPORTING

Subpart A—General Provisions

Sec.

Authority: 12 U.S.C. 1462a, 1463, 1464, 1467a, 1828, 1831p-1, 1881–1884; 15 U.S.C. 1681s and 1681w; 15 U.S.C. 6801 and 6805(b)(1).

Subpart A—General Provisions

§ 571.1 Purpose, scope, and effective dates.

(a) [Reserved]

(b) *Scope.*

(1) [Reserved]

(2) *Institutions covered.* (i) Except as otherwise provided in this paragraph (b)(2), this part applies to savings associations whose deposits are insured by the Federal Deposit Insurance Corporation (and federal savings association operating subsidiaries in accordance with § 559.3(h)(1) of this chapter).

(ii) [Reserved]

(iii) Section 571.30(a)–(d) of this part applies to creditors, as defined in § 571.30(a)(2), that are savings associations or their subsidiaries, savings and loan holding companies, or affiliates of savings associations or savings and loan holding companies other than bank holding companies, banks, or subsidiaries of bank holding companies or banks.

§ 571.2 Examples.

The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part. Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise in this part.

§ 571.3 Definitions.

As used in this part, unless the context requires otherwise:

(a) *Act* means the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*).

(b) *Affiliate* means any company that controls, is controlled by, or is under common control with another company.

(c) [Reserved]

(d) *Company* means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

(e) *Consumer* means an individual.

(f) [Reserved]

(g) [Reserved]

(h) [Reserved]

(i) *Control* of a company means:

(1) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of the company, directly or indirectly, or acting through one or more other persons;

(2) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of the company; or

(3) The power to exercise, directly or indirectly, a controlling influence over the management or policies of the company, as OTS determines.

(j) [Reserved]

(k) *Medical information* means:

(1) Information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to—

(i) The past, present, or future physical, mental, or behavioral health or condition of an individual;

(ii) The provision of health care to an individual; or

(iii) The payment for the provision of health care to an individual.

(2) The term does not include:

(i) The age or gender of a consumer;

(ii) Demographic information about the consumer, including a consumer's residence address or e-mail address; or

(iii) Any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy.

(l)–(n) [Reserved]

(o) *You* means savings associations whose deposits are insured by the Federal Deposit Insurance Corporation (and federal savings association operating subsidiaries in accordance with § 559.3(h)(1) of this chapter).

Subpart B—[Reserved]

Subpart C—[Reserved]

Subpart D—Medical Information

§ 571.30 Obtaining or using medical information in connection with a determination of eligibility for credit.

(a) *General prohibition on obtaining or using medical information*—(1) *In general.* A creditor may not obtain or use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit, except as provided in this subpart.

(2) *Definitions as used in this subpart*—(i) *Eligibility, or continued eligibility, for credit* means the consumer's qualification or fitness to receive, or continue to receive, credit, including the terms on which credit is offered, primarily for personal, family, or household purposes. The term does not include:

(A) The consumer's qualification or fitness to be offered employment, insurance products, or other non-credit products or services;

(B) Any determination of whether the provisions of a debt cancellation contract, debt suspension agreement, credit insurance product, or similar forbearance practice or program are triggered;

(C) Authorizing, processing, or documenting a payment or transaction on behalf of the consumer in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit; or

(D) Maintaining or servicing the consumer's account in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit.

(ii) *Creditor* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(iii) *Credit* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(b) *Rule of construction for receiving unsolicited medical information*—(1) *In general.* A creditor does not obtain medical information for purposes of paragraph (a)(1) of this section if it—

(i) Receives medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit without specifically requesting medical information; and

(ii) Does not use that information in determining whether to extend or continue to extend credit to the consumer and the terms on which credit is offered or continued.

(2) *Examples of receiving unsolicited medical information.* A creditor receives unsolicited medical information if, for example:

(i) In response to a general question regarding a consumer's debts or expenses, the creditor receives information that the consumer has a particular medical condition and does not use that information in determining whether to extend credit to the consumer or the terms on which credit is offered.

(ii) In conversation with the loan officer, the consumer informs the creditor that the consumer has a particular medical condition, and the creditor does not use that information in determining whether to extend credit to the consumer or the terms on which credit is offered.

(c) *Financial information exception for obtaining and using medical information*—(1) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit so long as:

(i) The information relates to debts, expenses, income, benefits, collateral, or the purpose of the loan, including the use of proceeds;

(ii) The creditor uses the medical information in a manner and to an extent that is no less favorable than it would use comparable information that is not medical information in a credit transaction; and

(iii) The creditor does not take the consumer's physical, mental, or behavioral health, condition or history, type of treatment, or prognosis into account as part of any such determination.

(2) *Examples*—(i) *Examples of information related to debts, expenses, income, benefits, collateral, or the purpose of the loan.* Paragraph (c)(1)(i) of this section permits a creditor, for example, to obtain and use information about:

(A) The dollar amount, repayment terms, repayment history, and similar information regarding medical debts that is used to calculate, measure, or verify the repayment ability of the consumer, the use of proceeds, or the terms for granting credit;

(B) The value, condition, and lien status of a medical device that is used as collateral to secure a loan;

(C) The dollar amount and continued eligibility for disability income or benefits related to health or a medical condition that is relied on as a source of repayment; or

(D) The identity of creditors to whom outstanding medical debts are owed in connection with an application for credit, including but not limited to a transaction involving the consolidation of medical debts.

(ii) *Examples of uses of medical information consistent with the exception.* (A) A consumer includes on an application for credit information about two $20,000 debts. One debt is to a hospital; the other debt is to a retailer. The creditor contacts the hospital and the retailer to verify the amount and payment status of the debts. The creditor learns that both debts are more than 90 days past due. Any two debts of this size that are past due would disqualify the consumer under the creditor's established underwriting criteria. The creditor denies the

application on the basis that the consumer has a poor repayment history on outstanding debts. The creditor has used medical information in a manner and to an extent no less favorable than it would use comparable non-medical information.

(B) A consumer indicates on an application for a $200,000 mortgage loan that she receives $15,000 in long-term disability income each year from her former employer and has no other income. Annual income of $15,000, regardless of source, would not be sufficient to support the requested amount of credit. The creditor denies the application on the basis that the projected debt-to-income ratio of the consumer does not meet the creditor's underwriting criteria. The creditor has used medical information in a manner and to an extent that is no less favorable than it would use comparable non-medical information.

(C) A consumer includes on an application for a $10,000 home equity loan that he has a $50,000 debt to a medical facility that specializes in treating a potentially terminal disease. The creditor contacts the medical facility to verify the debt and obtain the repayment history and current status of the loan. The creditor learns that the debt is current and that the applicant meets the income requirements of the creditor's underwriting guidelines. The creditor grants the application. The creditor has used medical information in accordance with the exception.

(iii) *Examples of uses of medical information inconsistent with the exception.*

(A) A consumer applies for $25,000 of credit and includes on the application information about a $50,000 debt to a hospital. The creditor contacts the hospital to verify the amount and payment status of the debt, and learns that the debt is current and that the consumer has no delinquencies in her repayment history. If the existing debt were instead owed to a home furnishing retailer, the creditor would approve the application and extend credit based on the amount and repayment history of the outstanding debt. The creditor, however, denies the application because the consumer is indebted to a hospital. The creditor has used medical information, here the identity of the medical creditor, in a manner and to an extent that is less favorable than it would use comparable non-medical information.

(B) A consumer meets with a loan officer of a creditor to apply for a mortgage loan. While filling out the loan application, the consumer informs the loan officer orally that she has a potentially terminal disease. The consumer meets the creditor's established requirements for the requested mortgage. The loan officer recommends to the credit committee that the consumer be denied credit because the consumer has that disease. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis as part of a determination of eligibility or continued eligibility for credit.

(d) *Specific exceptions for obtaining and using medical information*—(1) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit—

(i) To determine whether the use of a power of attorney or legal representative is necessary and appropriate;

(ii) To comply with applicable requirements of local, State, or Federal laws;

(iii) To the extent such information is included in a consumer report from a consumer reporting agency, in accordance with 15 U.S.C. 1681b(g)(1)(B), and is used for the purpose(s) for which the consumer provided specific written consent;

(iv) For purposes of fraud prevention and detection;

(v) In the case of credit for the purpose of financing medical products or services, to determine and verify the medical purpose of a loan and the use of proceeds;

(vi) If the consumer or the consumer's legal representative requests in writing, on a separate form signed by the consumer or the consumer's legal representative that the creditor use specific medical information for a specific purpose in determining the consumer's eligibility, or continued eligibility, for credit, to accommodate the consumer's particular circumstances. The signed written request must describe the specific medical information that the consumer requests the creditor to use and the specific purpose for which the information will be used; or

(vii) As otherwise permitted by order of the Director of OTS.

(2) *Examples of determining the medical purpose of the loan or the use of proceeds.* (i) If a consumer applies for $10,000 of credit for the purpose of financing vision correction surgery, the creditor may confirm the consumer's medical eligibility to undergo that procedure with the surgeon. If the surgeon reports that surgery will not be performed on the consumer, the creditor may use that medical information to deny the consumer's application for credit, because the loan would not be used for the stated purpose.

(ii) If a consumer applies for $10,000 of credit for the purpose of financing cosmetic surgery, the creditor may confirm the cost of the procedure with the surgeon. If the surgeon reports that the cost of the procedure is $5,000, the creditor may use that medical information to offer the consumer only $5,000 of credit.

(iii) A creditor has an established medical loan program for financing particular elective surgical procedures. The creditor receives a loan application from a consumer requesting $10,000 of credit under the established loan program for an elective surgical procedure. The consumer indicates on the application that the purpose of the loan is to finance an elective surgical procedure not eligible for funding under the guidelines of the established loan program. The creditor may deny the consumer's application because the purpose of the loan is not for a particular procedure funded by the established loan program.

(3) *Examples of obtaining and using medical information at the request of the consumer.* Consistent with safe and sound practices, and after obtaining from the consumer a signed, written document that describes the specific medical information that the consumer requests the creditor to use and the specific purpose for which the information will be used, the creditor may obtain and use the specific medical information for the specific purpose specified in the request:

(i) If a consumer applies for a loan and requests that the creditor consider the consumer's medical disability at the relevant time as an explanation for adverse payment history information in his credit report, the creditor may consider such medical information in evaluating the consumer's willingness and ability to repay the requested loan.

(ii) If a consumer applies for a loan and explains that his income has been and will continue to be interrupted on account of a medical condition and that he expects to repay the loan from liquidation of assets, the creditor may evaluate the application using the sale of assets as the primary source of repayment.

(e) *Limits on redisclosure of information.* If you receive medical information about a consumer from a consumer reporting agency or your affiliate, you must not disclose that

information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

§ 571.31 Sharing medical information with affiliates.

(a) *In general.* The exclusions from the term "consumer report" in section 603(d)(2) of the Act that allow the sharing of information with affiliates do not apply if you communicate to an affiliate—

(1) Medical information;

(2) An individualized list or description based on the payment transactions of the consumer for medical products or services; or

(3) An aggregate list of identified consumers based on payment transactions for medical products or services.

(b) *Exceptions.* You may rely on the exclusions from the term "consumer report" in section 603(d)(2) of the Act to communicate the information in paragraph (a) of this section to an affiliate—

(1) In connection with the business of insurance or annuities (including the activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners, as in effect on January 1, 2003);

(2) For any purpose permitted without authorization under the regulations promulgated by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA);

(3) For any purpose referred to in section 1179 of HIPAA;

(4) For any purpose described in section 502(e) of the Gramm-Leach-Bliley Act;

(5) In connection with a determination of the consumer's eligibility, or continued eligibility, for credit consistent with § 571.30 of this part; or

(6) As otherwise permitted by order of the Director of OTS.

National Credit Union Administration

For the reasons set out in the preamble, it is proposed that 12 CFR chapter VII be amended by adding a new part 717 to read as follows:

PART 717—FAIR CREDIT REPORTING

Subpart A—General Provisions

Sec.

Authority: 15 U.S.C. 1681b and 1681s.

Subpart A—General Provisions

§ 717.1 Purpose, scope, and effective dates.

(a) [Reserved]

(b) *Scope.*

(1) [Reserved]

(2) *Institutions covered.* These regulations apply to federal credit unions.

§ 717.2 Examples.

The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part. Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise in this part.

§ 717.3 Definitions.

As used in this part, unless the context requires otherwise:

(a) *Act* means the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*).

(b) *Affiliate* means any company that controls, is controlled by, or is under common control with another company. For example, an affiliate of a federal credit union is a credit union service organization (CUSO), as provided in 12 CFR part 712, that is controlled by the federal credit union.

(c) [Reserved]

(d) *Company* means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

(e) *Consumer* means an individual.

(f) [Reserved]

(g) [Reserved]

(h) [Reserved]

(i) *Control* of a company means:

(1) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of the company, directly or indirectly, or acting through one or more other persons;

(2) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of the company; or

(3) The power to exercise, directly or indirectly, a controlling influence over the management or policies of the company, as the Board determines.

(4) Example. NCUA will presume a credit union has a controlling influence over the management or policies of a CUSO, if the CUSO is 67% owned by credit unions.

(j) [Reserved]

(k) *Medical information* means:

(1) Information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to—

(i) The past, present, or future physical, mental, or behavioral health or condition of an individual;

(ii) The provision of health care to an individual; or

(iii) The payment for the provision of health care to an individual.

(2) The term does not include:

(i) The age or gender of a consumer;

(ii) Demographic information about the consumer, including a consumer's residence address or e-mail address; or

(iii) Any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy.

(l) [Reserved]

(m) [Reserved]

(n) [Reserved]

(o) *You* means a federal credit union.

Subpart B—[Reserved]

Subpart C—[Reserved]

Subpart D—Medical Information

§ 717.30 Obtaining or using medical information in connection with a determination of eligibility for credit.

(a) *General prohibition on obtaining or using medical information*—(1) *In general.* A creditor may not obtain or use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit, except as provided in this subpart.

(2) *Definitions as used in this subpart*—(i) *Eligibility, or continued eligibility, for credit* means the consumer's qualification or fitness to receive, or continue to receive, credit, including the terms on which credit is offered, primarily for personal, family, or household purposes. The term does not include:

(A) The consumer's qualification or fitness to be offered employment, insurance products, or other non-credit products or services;

(B) Any determination of whether the provisions of a debt cancellation contract, debt suspension agreement,

credit insurance product, or similar forbearance practice or program are triggered;

(C) Authorizing, processing, or documenting a payment or transaction on behalf of the consumer in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit; or

(D) Maintaining or servicing the consumer's account in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit.

(ii) *Creditor* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(iii) *Credit* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(b) *Rule of construction for receiving unsolicited medical information*—(1) *In general.* A creditor does not obtain medical information for purposes of paragraph (a)(1) of this section if it—

(i) Receives medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit without specifically requesting medical information; and

(ii) Does not use that information in determining whether to extend or continue to extend credit to the consumer and the terms on which credit is offered or continued.

(2) *Examples of receiving unsolicited medical information.* A creditor receives unsolicited medical information if, for example:

(i) In response to a general question regarding a consumer's debts or expenses, the creditor receives information that the consumer has a particular medical condition and does not use that information in determining whether to extend credit to the consumer or the terms on which credit is offered.

(ii) In conversation with the loan officer, the consumer informs the creditor that the consumer has a particular medical condition, and the creditor does not use that information in determining whether to extend credit to the consumer or the terms on which credit is offered.

(c) *Financial information exception for obtaining and using medical information*—

(1) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit so long as:

(i) The information relates to debts, expenses, income, benefits, collateral, or the purpose of the loan, including the use of proceeds;

(ii) The creditor uses the medical information in a manner and to an extent that is no less favorable than it would use comparable information that is not medical information in a credit transaction; and

(iii) The creditor does not take the consumer's physical, mental, or behavioral health, condition or history, type of treatment, or prognosis into account as part of any such determination.

(2) *Examples*—(i) *Examples of information related to debts, expenses, income, benefits, collateral, or the purpose of the loan.* Paragraph (c)(1)(i) of this section permits a creditor, for example, to obtain and use information about:

(A) The dollar amount, repayment terms, repayment history, and similar information regarding medical debts that is used to calculate, measure, or verify the repayment ability of the consumer, the use of proceeds, or the terms for granting credit;

(B) The value, condition, and lien status of a medical device that is used as collateral to secure a loan;

(C) The dollar amount and continued eligibility for disability income or benefits related to health or a medical condition that is relied on as a source of repayment; or

(D) The identity of creditors to whom outstanding medical debts are owed in connection with an application for credit, including but not limited to a transaction involving the consolidation of medical debts.

(ii) *Examples of uses of medical information consistent with the exception.* (A) A consumer includes on an application for credit information about two $20,000 debts. One debt is to a hospital; the other debt is to a retailer. The creditor contacts the hospital and the retailer to verify the amount and payment status of the debts. The creditor learns that both debts are more than 90 days past due. Any two debts of this size that are past due would disqualify the consumer under the creditor's established underwriting criteria. The creditor denies the application on the basis that the consumer has a poor repayment history on outstanding debts. The creditor has used medical information in a manner and to an extent no less favorable than it would use comparable non-medical information.

(B) A consumer indicates on an application for a $200,000 mortgage loan that she receives $15,000 in long-term disability income each year from her former employer and has no other income. Annual income of $15,000, regardless of source, would not be sufficient to support the requested amount of credit. The creditor denies the application on the basis that the projected debt-to-income ratio of the consumer does not meet the creditor's underwriting criteria. The creditor has used medical information in a manner and to an extent that is no less favorable than it would use comparable non-medical information.

(C) A consumer includes on an application for a $10,000 home equity loan that he has a $50,000 debt to a medical facility that specializes in treating a potentially terminal disease. The creditor contacts the medical facility to verify the debt and obtain the repayment history and current status of the loan. The creditor learns that the debt is current and that the applicant meets the income requirements of the creditor's underwriting guidelines. The creditor grants the application. The creditor has used medical information in accordance with the exception.

(iii) *Examples of uses of medical information inconsistent with the exception.*

(A) A consumer applies for $25,000 of credit and includes on the application information about a $50,000 debt to a hospital. The creditor contacts the hospital to verify the amount and payment status of the debt, and learns that the debt is current and that the consumer has no delinquencies in her repayment history. If the existing debt were instead owed to a home furnishing retailer, the creditor would approve the application and extend credit based on the amount and repayment history of the outstanding debt. The creditor, however, denies the application because the consumer is indebted to a hospital. The creditor has used medical information, here the identity of the medical creditor, in a manner and to an extent that is less favorable than it would use comparable non-medical information.

(B) A consumer meets with a loan officer of a creditor to apply for a mortgage loan. While filling out the loan application, the consumer informs the loan officer orally that she has a potentially terminal disease. The consumer meets the creditor's established requirements for the requested mortgage. The loan officer recommends to the credit committee that the consumer be denied credit because the consumer has that disease. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or

prognosis as part of a determination of eligibility or continued eligibility for credit.

(d) *Specific exceptions for obtaining and using medical information*—(1) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit—

(i) To determine whether the use of a power of attorney or legal representative is necessary and appropriate;

(ii) To comply with applicable requirements of local, state, or federal laws;

(iii) To the extent such information is included in a consumer report from a consumer reporting agency, in accordance with 15 U.S.C. 1681b(g)(1)(B), and is used for the purpose(s) for which the consumer provided specific written consent;

(iv) For purposes of fraud prevention and detection;

(v) In the case of credit for the purpose of financing medical products or services, to determine and verify the medical purpose of a loan and the use of proceeds;

(vi) If the consumer or the consumer's legal representative requests in writing, on a separate form signed by the consumer or the consumer's legal representative that the creditor use specific medical information for a specific purpose in determining the consumer's eligibility, or continued eligibility, for credit, to accommodate the consumer's particular circumstances. The signed written request must describe the specific medical information that the consumer requests the creditor to use and the specific purpose for which the information will be used; or

(vii) As otherwise permitted by order of the NCUA.

(2) *Examples of determining the medical purpose of the loan or the use of proceeds.* (i) If a consumer applies for $10,000 of credit for the purpose of financing vision correction surgery, the creditor may confirm the consumer's medical eligibility to undergo that procedure with the surgeon. If the surgeon reports that surgery will not be performed on the consumer, the creditor may use that medical information to deny the consumer's application for credit, because the loan would not be used for the stated purpose.

(ii) If a consumer applies for $10,000 of credit for the purpose of financing cosmetic surgery, the creditor may confirm the cost of the procedure with the surgeon. If the surgeon reports that the cost of the procedure is $5,000, the creditor may use that medical information to offer the consumer only $5,000 of credit.

(iii) A creditor has an established medical loan program for financing particular elective surgical procedures. The creditor receives a loan application from a consumer requesting $10,000 of credit under the established loan program for an elective surgical procedure. The consumer indicates on the application that the purpose of the loan is to finance an elective surgical procedure not eligible for funding under the guidelines of the established loan program. The creditor may deny the consumer's application because the purpose of the loan is not for a particular procedure funded by the established loan program.

(3) *Examples of obtaining and using medical information at the request of the consumer.* Consistent with safe and sound practices, and after obtaining from the consumer a signed, written document that describes the specific medical information that the consumer requests the creditor to use and the specific purpose for which the information will be used, the creditor may obtain and use the specific medical information for the specific purpose specified in the request:

(i) If a consumer applies for a loan and requests that the creditor consider the consumer's medical disability at the relevant time as an explanation for adverse payment history information in his credit report, the creditor may consider such medical information in evaluating the consumer's willingness and ability to repay the requested loan.

(ii) If a consumer applies for a loan and explains that his income has been and will continue to be interrupted on account of a medical condition and that he expects to repay the loan from liquidation of assets, the creditor may evaluate the application using the sale of assets as the primary source of repayment.

(e) *Limits on redisclosure of information.* If you receive medical information about a consumer from a consumer reporting agency or your affiliate, you must not disclose that information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

§ 717.31 Sharing medical information with affiliates.

(a) *In general.* The exclusions from the term "consumer report" in section 603(d)(2) of the Act that allow the sharing of information with affiliates do not apply if you communicate to an affiliate—

(1) Medical information;

(2) An individualized list or description based on the payment transactions of the consumer for medical products or services; or

(3) An aggregate list of identified consumers based on payment transactions for medical products or services.

(b) *Exceptions.* You may rely on the exclusions from the term "consumer report" in section 603(d)(2) of the Act to communicate the information in paragraph (a) to an affiliate—

(1) In connection with the business of insurance or annuities (including the activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners, as in effect on January 1, 2003);

(2) For any purpose permitted without authorization under the regulations promulgated by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA);

(3) For any purpose referred to in section 1179 of HIPAA;

(4) For any purpose described in section 502(e) of the Gramm-Leach-Bliley Act;

(5) In connection with a determination of the consumer's eligibility, or continued eligibility, for credit consistent with § 717.30 of this part; or

(6) As otherwise permitted by order of the NCUA.

Dated: April 16, 2004.

John D. Hawke, Jr.,

Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System, April 22, 2004.

Jennifer J. Johnson,

Secretary of the Board.

Dated at Washington, DC, the 6th day of April, 2004.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

Dated: April 6, 2004.

By the Office of Thrift Supervision.

James E. Gilleran,

Director.

By the National Credit Union Administration Board on April 8, 2004.

Becky Baker,

Secretary of the Board.

[FR Doc. 04–9526 Filed 4–27–04; 8:45 am]

BILLING CODE 4810–33–P; 6210–01–P; 6714–10–P; 6720–01–P; 7535–01–P

Federal Register

Wednesday,
April 28, 2004

Part VI

Department of Health and Human Services

Food and Drug Administration

Exocrine Pancreatic Insufficiency Drug Products; Draft Guidance for Submitting New Drug Applications; Notices

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003N–0205]

Exocrine Pancreatic Insufficiency Drug Products

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that all exocrine pancreatic insufficiency drug products are new drugs and is announcing the conditions for continued marketing of these drug products. Manufacturers who wish to continue to market exocrine pancreatic insufficiency drug products must submit new drug applications (NDAs); manufacturers who contend that a particular drug product is not subject to the new drug requirements of the Federal Food, Drug, and Cosmetic Act (the act) should submit a citizen petition. FDA has determined that prescription exocrine pancreatic insufficiency drug products are medically necessary and, accordingly, is allowing manufacturers 4 years to obtain approved applications.

DATES: This notice is effective April 28, 2004.

A citizen petition claiming that a particular drug product is not subject to the new drug requirements of the act should be submitted no later than June 28, 2004.

After April 28, 2008, any prescription exocrine pancreatic insufficiency drug product introduced or delivered for introduction into interstate commerce without an approved application, unless found by FDA not to be subject to the new drug requirements of the act in response to a citizen petition submitted for that product, will be subject to regulatory action.

ADDRESSES: All communications in response to this notice should be identified with Docket No. 2003N–0205 and directed to the appropriate office listed in section III of this document. References described in section V of this document are available for public examination in the Division of Dockets Management (HFA–305), Food and Drug Administration.

FOR FURTHER INFORMATION CONTACT: Mary E. Catchings, Center for Drug Evaluation and Research (HFD–7), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–594–2041.

SUPPLEMENTARY INFORMATION:

I. Background

This notice covers pancreatic enzyme preparations containing the ingredients pancreatin and pancrelipase. Both ingredients are extracted mainly from hog pancreas and contain principally amylase, protease, and lipase. Pancrelipase differs from pancreatin mainly in that it has a higher lipase concentration than does pancreatin.

Pancreatic extract drug products are indicated as replacement therapy to treat conditions associated with exocrine pancreatic insufficiency, including cystic fibrosis, chronic pancreatitis, pancreatic tumors, or pancreatectomy. Under normal circumstances, the pancreas secretes a sufficient amount of enzymes into the intestine to aid in the digestion process. When the pancreas is not functioning properly or is partially removed surgically, lesser amounts of pancreatic digestive enzymes (i.e., lipase for fat digestion, protease for protein digestion, and amylase for starch digestion) are released into the intestine. Because the pancreas has a large functional reserve capacity, malabsorption, due to insufficient digestion, does not occur until the pancreatic enzyme output level is reduced by more than 90 percent. When this level of reduction occurs, the pancreatic insufficiency can usually be detected by the increased fat content in the stools, and treatment with pancreatic enzymes taken by mouth may be necessary (56 FR 32282 at 32283, July 15, 1991).

Pancreatic extract drug products have been marketed in the United States for many years. Marketing of some of these products predates the 1938 passage of the act. Over the years, other pancreatic extract drug products have entered the market. Until recently, none of these drug products were marketed under approved NDAs.

As part of the OTC drug review, FDA evaluated the safety and effectiveness of drug products used to treat exocrine pancreatic insufficiency. In the **Federal Register** of December 21, 1979 (44 FR 75666), FDA published, under § 330.10(a)(6) (21 CFR 330.10(a)(6)), an advance notice of proposed rulemaking to establish a monograph for OTC exocrine pancreatic insufficiency drug products. The proposed rulemaking included the recommendations of the Advisory Review Panel on OTC Miscellaneous Internal Drug Products (the Panel), which was the advisory review panel responsible for evaluating data on the active ingredients in this drug class. Interested persons were invited to submit comments on the proposed rulemaking.

In the **Federal Register** of November 8, 1985 (50 FR 46594), FDA published a notice of proposed rulemaking to establish a monograph for OTC exocrine pancreatic insufficiency drug products based on the Panel's recommendations and the agency's response to comments submitted following publication of the advance notice of proposed rulemaking (the November 1985 proposed rule). In the November 1985 proposed rule, the agency accepted the Panel's recommendation that exocrine pancreatic insufficiency drug products be available as OTC drug products and proposed the conditions under which these drug products would be generally recognized as safe and effective and not misbranded. Interested persons were invited to submit new data, written comments, objections, or requests for oral hearing on the proposed rulemaking.

Based on new information submitted in response to the tentative final monograph and other available information that came to its attention, the agency reconsidered the approach proposed in the November 1985 proposed rule. Mainly because of bioavailability problems associated with use of pancreatic extract drug products and other problems reported with the products manufactured as enteric-coated tablets and encapsulated enteric-coated microspheres, FDA concluded that an OTC drug monograph would not be sufficient to adequately regulate these drug products. FDA concluded that preclearance of each product to standardize enzyme bioactivity would be necessary. FDA also determined that continuous physician monitoring of patients is a collateral measure necessary to the safe and effective use of pancreatic enzyme drug products, requiring such products to be available by prescription only. Thus, in the **Federal Register** of July 15, 1991 (56 FR 32282), FDA proposed a rule (the July 1991 proposed rule) that would declare that OTC drug products used to treat exocrine pancreatic insufficiency are not generally recognized as safe and effective and are misbranded. Accordingly, FDA withdrew the November 8, 1985, proposed rule. In the preamble to the July 1991 proposed rule, FDA also stated that it considers all exocrine pancreatic insufficiency drug products, whether currently marketed on an OTC or a prescription basis, to be new drugs for which approved applications will be required for marketing. The final rule, which affected only OTC products, was published in the **Federal Register** of

April 24, 1995 (60 FR 20162) (the April 1995 final rule).

This notice reiterates the agency's determination that all pancreatic extract drug products are new drugs under section 201(p) of the act (21 U.S.C. 321(p)), requiring approved NDAs for marketing, and states the conditions for marketing the products.

II. Summary of Data Supporting New Drug Finding

In the July 1991 proposed rule and the April 1995 final rule, the agency discussed its review of the scientific data that provide the basis for the agency's decision to require approval of pancreatic extract drug products through the new drug approval process under section 505 of the act (21 U.S.C. 355).

Those data, including in vitro and in vivo studies, demonstrated variations in bioactivity among pancreatic extract drug products that were labeled as containing the same enzyme activity (Refs. 1 through 9). This notice discusses those data and the most recent data received by the agency.

An early study compared 16 commercially available pancreatic extract products (tablets, capsules, and enteric-coated tablets) in vitro. The study demonstrated a wide range of lipase activity (from 10 to 3,600 United States Pharmacopeia (U.S.P.) units of lipase activity per dosage unit) (Ref. 3). The study also evaluated the effectiveness of an enteric-coated tablet product with and without the enteric coating and observed greater effectiveness for the product lacking the enteric coating.

One in vitro study of various commercial pancreatic enzyme products demonstrated the variations in lipase activity and release rates among the products (Ref. 4). The study tested three main types of dosage forms, i.e., simple pancreatic enzyme preparations (uncoated tablets and powder-filled capsules), enteric-coated tablets, and encapsulated enteric-coated microspheres. The products were analyzed for amylase, lipase, and protease activity before being subjected to a simulated gastric fluid. The lipase activity of each product was then reanalyzed. The results showed that when subjected to a simulated gastric fluid, the simple dosage form products lost all of the original lipase activity. The enteric-coated tablet dosage form retained all of the original lipase activity under these conditions; the three encapsulated enteric-coated microsphere dosage form products retained 54.0, 90.7, and 99.9 percent, respectively, of their original lipase activity under these conditions. The study also investigated the release rate of the enzyme and the hydrogen-ion concentration (pH) level at which release begins. The enteric-coated tablets showed negligible release of enzymes in the pH range of 4.0 to 6.0. All of the enteric-coated microsphere products released their enzymes in the pH range of 5.5 to 6.0.

Variation in effectiveness among various dosage forms also has been observed. Several studies in patients with severe pancreatic insufficiency and with cystic fibrosis indicate that the encapsulated enteric-coated microsphere dosage form of pancreatic enzymes has improved effectiveness over other formulations in treating pancreatic insufficiency (Refs. 5 through 9).

A number of studies that compared the lipase activity and effectiveness of various products also showed variations among encapsulated enteric-coated microsphere products from different manufacturers (Refs. 1, 4, 7, and 9). For example, an in vivo study of 19 cystic fibrosis patients that compared 1 tablet form product and 3 encapsulated enteric-coated microsphere form products showed fewer gastrointestinal symptoms and increased fat absorption with 2 of the encapsulated enteric-coated microsphere products. The tablet and the third encapsulated enteric-coated microsphere product gave less satisfactory results, although the enzyme content of the latter was similar to the two more successful encapsulated enteric-coated microsphere products.

In its review, the agency reported that the wide range of enzyme activity, the variety of dosage forms, and the apparent uneven quality of the enteric coatings among pancreatic extract drug products have resulted in instances of underdosing and overdosing with pancreatic extracts. In one study reviewed by the agency, three patients whose pancreatic insufficiency had been controlled using one encapsulated enteric-coated microsphere dosage form experienced therapeutic failure when a similar product was substituted. The products were labeled as containing the same enzyme activity. Analyses of the products used in the study showed that most of the products contained greater lipase activity than labeled.

Review of the data identified other safety problems associated with the use of high doses of pancreatic extracts, for example, hyperuricosuria, hyperuricemia, obstipation, and intestinal obstruction. FDA has received several reports of intestinal stricture and blockage in cystic fibrosis patients using higher potency pancreatic enzymes in delayed release microtablets and microspheres (Refs. 10 through 17).

In February 2001, FDA received correspondence from the Cystic Fibrosis Foundation reporting apparent therapeutic failures associated with the use of pancreatic enzymes when "generic" versions of the drug products were substituted for "brand name" products. The adverse events reported included abdominal pain, intestinal obstruction, increased incidence of steatorrhea, increased episodes of rectal prolapse, and increased number of stools. In view of the information provided, however, no direct link between the 14 cases of insufficient therapeutic effect and the substitution of pancrelipase products reported here can be established. No information on adherence to dose and dose regimen has been provided. Also lacking are data on the clinical severity of cystic fibrosis in these patients, which is known to vary widely. Even with good compliance, some patients may not respond promptly or well to the suggested low starting doses of the pancreatic enzymes. Further, no information was provided to demonstrate that the patients with an inadequate therapeutic effect of the substituted "generic" version were administered equivalent units of the "brand name" product. Nonetheless, the substitution of pancrelipase appears to be somehow involved and raises additional concerns that should be addressed by FDA's requirement for new drug approval (Ref. 18).

Based on a review of all available data, including the studies and adverse reports referenced above, FDA concluded that the safe and effective use of pancreatic enzyme drug products requires that the products be marketed by prescription only and that the products be approved through the new drug approval process to standardize enzyme activity. FDA determined that bioactivity must be shown to correlate with the stated potency of each product, particularly for newer formulations that include microspheres and high-potency levels of pancreatic enzymes.

III. Office Contacts

All communications in response to this notice should be directed to the appropriate office as follows:

Applications under section 505 of the act: Central Document Room, Center for Drug Evaluation and Research, Food and Drug Administration, 5901–B Ammendale Rd., Beltsville, MD 20705–1266.

Citizen petitions (see § 10.30 (21 CFR 10.30)) contending that a particular drug product is not subject to the new drug

requirements of the act: Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Requests for an opinion on the applicability of this notice to a specific product: Division of New Drugs and Labeling Compliance (HFD–310), Center for Drug Evaluation and Research, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857.

Inquiries regarding procedures for obtaining approval of NDAs: Division of Gastrointestinal and Coagulation Drug Products (HFD–180), Center for Drug Evaluation and Research, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–7310.

Inquiries regarding procedures for obtaining approval of abbreviated new drug applications (ANDAs): Office of Generic Drugs (HFD–600), Center for Drug Evaluation and Research, Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855.

IV. Legal Status

Pancreatic enzyme drug products containing the ingredients pancreatin and pancrelipase are used as replacement therapy in conditions in which the exocrine secretions of the pancreas (principally, amylase, lipase, and protease) are either absent or deficient. The goal of therapy in pancreatic enzyme replacement is to control the consequences of exocrine pancreatic insufficiency, namely maldigestion and malabsorption of fats, protein, and carbohydrates and resulting nutritional deficiencies. Individualization of treatment is needed for optimal therapeutic effect (50 FR 46594 at 46597, November 8, 1985).

Various dosage forms of pancreatic enzyme drug products are currently marketed: Uncoated tablets, powders, capsules, enteric-coated tablets, and encapsulated enteric-coated microspheres. Significant variations in bioavailability have been shown both among the various dosage forms and among products from different manufacturers of the same dosage form. These variations in bioavailability can affect both safety and effectiveness of the products. Subpotent doses of pancreatic enzyme products may result in patients experiencing steatorrhea, malnutrition, and consequent nutritional deficiencies. High doses of these products have been associated with hyperuricosuria, hyperuricemia, and other severe complications such as colonic strictures and intestinal blockage in patients using high-potency dosage preparations.

Available data have shown that the formulation, dosage, and manufacturing process of pancreatic enzyme drug products have a critical effect on the safe and effective use of these drugs. The bioavailability of the enzymes present in these products depends on the process used to manufacture the drug products. Standardization of the enzyme bioactivity is necessary to avoid serious safety problems resulting from too little or too much supplementation.

FDA has approved an NDA for one pancreatic enzyme product (Cotazym, manufactured by Organon, Inc.). This product is not currently being marketed. No currently marketed pancreatic enzyme product has been shown to demonstrate consistent enzyme bioactivity that results in predictable safety and effectiveness. The approval of the NDA for Cotazym does not equate to general recognition of safety and effectiveness for pancreatic enzyme products as a class. Because bioactivity relates to product-specific formulation and manufacturing issues, each pancreatic enzyme product must be shown to be safe and effective based upon the specific characteristics of the drug product. Therefore, no currently marketed unapproved pancreatic enzyme drug product is generally recognized as safe and effective. Accordingly, pancreatic extract drug products used to treat exocrine pancreatic insufficiency are new drugs under section 201(p) of the act and are subject to the requirements of section 505 of the act. The submission of an NDA is necessary to provide FDA with information on the product's formulation, manufacture, quality control procedures, and the effectiveness of the marketed formulation to ensure, among other things, that a company has the ability to manufacture a consistently bioactive pancreatic enzyme formulation.

If a manufacturer of a pancreatic enzyme drug product contends that the particular drug product is not subject to the new drug requirements of the act, this claim should be submitted in the form of a citizen petition under § 10.30 and should be filed to Docket No. 2003N–0205 no later than June 28, 2004. Sixty days is the time allowed for such submissions in similar proceedings. (See § 314.200(c) and (e) (21 CFR 314.200(c) and (e)).) Under § 10.30(e)(2), the agency will provide a response to each petitioner within 180 days of receipt of the petition. A citizen petition that contends that a particular drug product is not subject to the new drug requirements of the act should contain the quality and quantity of data and information set forth in § 314.200(e). Note especially that a contention that a drug product is generally recognized as safe and effective within the meaning of section 201(p) of the act is to be supported by the same quantity and quality of scientific evidence that is required to obtain approval of an application for the product. (See § 314.200(e)(1).)

Conditions for Approval and Marketing

Manufacturers who wish to continue marketing pancreatin or pancrelipase drug products must submit applications as required by section 505 of the act and part 314 (21 CFR part 314). At this time, FDA expects to receive only NDAs, including section 505(b)(2) applications, for these products. For the reasons described below, the agency has determined that pancreatic extract drug products currently are not likely to be appropriate subjects for ANDAs.

For a pancrelipase or pancreatin product to be submitted as an ANDA, the proposed drug product would have to be shown to contain the same active ingredient(s) as an approved reference listed drug. Because of the complexity of pancreatic extract products, it is unlikely that currently available physiochemical and biological analytical tools would be able to demonstrate that the active ingredients in pancreatic extract products from two different manufacturers are the same. Therefore, the agency has concluded that manufacturers currently are unlikely to obtain approval of pancreatic extract products under section 505(j) of the act.

Manufacturers interested in submitting ANDAs for pancreatic extract products are strongly advised to contact the Office of Generic Drugs (HFD–600) (see section III of this document) to discuss the feasibility of such an application.

FDA discussed the requirements for approval of a full NDA in the July 1991 proposed rule (56 FR 32282 at 32283). An NDA must include adequate and well-controlled clinical studies of the product's effectiveness, i.e., evidence of human bioactivity in normal volunteers or patients to demonstrate that the enzymes are active in vivo on ingested fats, proteins, and carbohydrates. The bioactivity must be shown to correlate with the stated potency of each product. The studies need to comply with the requirements of part 314. An application must also include information on the drug product's formulation, manufacture, and quality control procedures to ensure that the applicant has the ability to manufacture a consistently bioactive formulation. Elsewhere in this issue of the **Federal**

Register, FDA is announcing the availability of a draft guidance for industry entitled "Exocrine Pancreatic Insufficiency Drug Products—Submitting NDAs." This draft guidance, when finalized, will aid sponsors of exocrine insufficiency drug products in submitting NDAs for the drug products.

Inquiries regarding procedures for obtaining approval of NDAs should be directed to the Division of Gastrointestinal and Coagulation Drug Products (HFD–180) (see section III of this document).

Pancreatic enzyme products are medically necessary because they are used to treat exocrine pancreatic insufficiency, a condition in which symptoms are due to deficient secretion of pancreatic enzymes (i.e., lipase, protease, amylase) essential for normal digestion and absorption. Exocrine pancreatic insufficiency associated with cystic fibrosis, chronic pancreatitis, and other pancreatic diseases causes maldigestion and malabsorption of fats, protein, and carbohydrates, and poor absorption of fat-soluble vitamins, iron, folic acid, and other micronutrients. These nutritional deficiencies lead to steatorrhea, diarrhea, and malnutrition in cystic fibrosis and chronic pancreatitis, and also growth retardation in children, adolescents, and adults with cystic fibrosis. The severity of the conditions varies from patient to patient as does the dosage requirement of pancreatic enzyme replacement therapy needed to relieve the symptoms of pancreatic insufficiency. The dosage, including the relative amounts of enzymes (lipase for fat digestion, protease for protein digestion, and amylase for starch digestion), should be individualized for each patient and adjusted when clinically indicated. In recommended doses, pancreatic extracts are virtually free of adverse effects.

There are safety issues associated with the continued marketing of unapproved pancreatic enzyme products. As discussed previously in this document, there are safety problems associated with high doses of pancreatic extracts. The most common adverse effects are gastrointestinal in nature, specifically diarrhea, nausea, stomach cramps, or pain. Excessive doses of pancreatic extracts have been associated with hyperuricosuria, hyperuricemia, obstipation, and intestinal obstruction. It appears that these side effects have been addressed to some extent in the labeling for a number of the currently marketed products. Continuous physician monitoring is also recommended to help minimize these problems. Cases of intestinal stricture and obstruction have been observed in one adult and one child without cystic fibrosis treated for prolonged periods with high concentrations of pancreatic enzymes. Intestinal stricture and obstruction have also been observed in children with cystic fibrosis treated with various concentrations of pancreatic enzymes or with pancreatic enzyme preparations containing high lipase concentrations. Whether there is a relationship between the use of these products and intestinal stricture needs further investigation.

Despite the risks associated with use of unapproved pancreatic enzyme products, no alternative drug is relied upon by the medical community to treat the lack of lipase, protease, and amylase caused by exocrine pancreatic insufficiency. Pancreatic enzyme supplements are a daily requirement for patients with exocrine pancreatic insufficiency and are needed for survival for many of these patients, e.g., cystic fibrosis patients.

To meet the needs of patients requiring pancreatic enzyme replacement therapy, pancreatic extract drug products in varying dosage forms, enzyme content, and activity are currently being marketed. According to FDA records, there are 23 manufacturers and 26 repackers/private label distributors marketing 38 formulations. Pancreatic enzyme products, including some of the currently marketed products, have been marketed for years. Only one product, Cotazym, sponsored by Organon, Inc., is the subject of an approved NDA and that product is not currently being marketed. However, there is a need for a range of products to remain available for patient use. The dosage requirements of patients vary, and the appropriate daily dose of pancreatic enzyme supplements must be individualized and adjusted when clinically indicated. Furthermore, physicians have identified and stabilized their patients on currently available products with different ratios of lipase, protease, and amylase that meet the patients' needs. Thus, to meet the dosing requirements and to maintain compliance with treatment, pancreatic supplements are needed with varied concentrations of lipase, protease, and amylase.

Accordingly, FDA will permit currently marketed pancreatic enzyme products to be marketed without approved applications until April 28, 2008, to give manufacturers time to conduct the required studies and to prepare and submit applications, and to allow time for review of and action on these applications. This provision for continuation of marketing, which applies only to pancreatic enzyme products marketed on or before the publication of this document, is consistent with the order in *Hoffmann-LaRoche, Inc.* v. *Weinberger*, 425 F. Supp. 890 (D.D.C. 1975), as amended, reprinted in the **Federal Register** of September 22, 1975 (40 FR 43531), and March 2, 1976 (41 FR 9001), because pancreatic enzyme products are medically necessary drug products.

After April 28, 2008, any pancreatic enzyme drug product that is introduced or delivered for introduction into interstate commerce without an approved application will be subject to regulatory action, unless there has been a finding by FDA, under a citizen petition submitted for that product as described above, that the product is not subject to the new drug requirements of the act.

This notice is issued under the Federal Food, Drug, and Cosmetic Act (secs. 502, 505 (21 U.S.C. 352, 355)) and under authority delegated to the Associate Commissioner for Policy and Planning (21 CFR 5.20).

V. References

The following references have been placed on display in the Division of Dockets Management (see the **ADDRESSES** section of this document) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Hendeles, L. et al., "Treatment Failure After Substitution of Generic Pancrelipase Capsules: Correlation with In Vitro Lipase Activity," *Journal of the American Medical Association*, 263:2459–2461, 1990.

2. Regan, P. T. et al., "Comparative Effects of Antacids, Cimetidine and Enteric Coating on the Therapeutic Response to Oral Enzymes in Severe Pancreatic Insufficiency," *New England Journal of Medicine*, 297:854–858, 1977.

3. Graham, D. Y., "Enzyme Replacement Therapy of Exocrine Pancreatic Insufficiency in Man: Relation Between In Vitro Enzyme Activities and In Vivo Potency in Commercial Pancreatic Extracts," *New England Journal of Medicine*, 296:1314–1317, 1977.

4. Fatmi, A. A. and J. A. Johnson, "An In Vitro Comparative Evaluation of Pancreatic Enzyme Preparations," *Drug Development and Industrial Pharmacy*, 14:1429–1438, 1988.

5. Graham, D. Y., "An Enteric-Coated Pancreatic Enzyme Preparation that Works," *Digestive Diseases and Sciences*, 24:906–909, 1979.

6. Mischler, E. H. et al., "Comparison of Effectiveness of Pancreatic Enzyme Preparations in Cystic Fibrosis," *American Journal of Diseases of Children*, 136:1060–1063, 1982.

7. Littlewood, J. M. et al., "In Vivo and In Vitro Studies of Microsphere Pancreatic Supplements," *Journal of Pediatric Gastroenterology and Nutrition*, 7 (Supplement 1):S22–S29, 1988.

8. Dutta, S. K., V. S. Hubbard, and M. Appler, "Critical Examination of Therapeutic Efficacy of a pH-Sensitive Enteric-Coated Pancreatic Enzyme Preparation in Treatment of Exocrine Pancreatic Insufficiency Secondary to Cystic Fibrosis," *Digestive Diseases and Sciences*, 33:1237–1244, 1988.

9. Beverley, D. W. et al., "Comparison of Four Pancreatic Extracts in Cystic Fibrosis," *Archives of Disease in Childhood*, 62:564–568, 1987.

10. Cystic Fibrosis Foundation Results of a Survey of 114 Cystic Fibrosis Care Centers in the United States, Patient Registry 1992 Annual Data Report, Bethesda, MD, October 1993, in OTC Vol. 17BFR, Docket No. 79N–0379, Division of Dockets Management.

11. Smyth, R. L. et al., "Strictures of Ascending Colon in Cystic Fibrosis and High-Strength Pancreatic Enzymes," *Lancet*, 343:85–86, 1994.

12. Oades, P. J. et al., "Letter to the Editor," *Lancet*, 343:109, 1994.

13. Campbell, C. A., J. Forrest, and C. Musgrove, "Letter to the Editor," *Lancet*, 343:109, 1994.

14. Briars, G. L. et al., "Letter to the Editor," *Lancet*, 343:600, 1994.

15. Mahony, M. J. and M. Corcoran, "Letter to the Editor," *Lancet*, 343:599–600, 1994.

16. Knabe, N. et al., "Letter to the Editor," *Lancet*, 343:1230, 1994.

17. Taylor, C. J., "Colonic Strictures in Cystic Fibrosis," *Lancet*, 343:615–616, 1994.

18. Letter dated February 14, 2001, from P. W. Campbell, III, Cystic Fibrosis Foundation, to L. Talarico, FDA.

Dated: April 5, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–9652 Filed 4–27–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003D–0206]

Draft Guidance for Industry on Exocrine Pancreatic Insufficiency Drug Products—Submitting New Drug Applications; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry entitled "Exocrine Pancreatic Insufficiency Drug Products—Submitting NDAs." Elsewhere in this issue of the **Federal Register**, FDA is announcing that all exocrine pancreatic insufficiency drug products are new drugs requiring approved new drug applications (NDAs) for marketing. This draft guidance is intended to aid sponsors of exocrine insufficiency drug products in submitting NDAs for the drug products.

DATES: Submit written or electronic comments on the draft guidance by June 28, 2004. General comments on agency guidance documents are welcome at any time.

ADDRESSES: Submit written requests for single copies of the draft guidance to the Division of Drug Information (HFD–240), Center for Drug Evaluation and Research, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857. Send one self-addressed adhesive label to assist that office in processing your requests. Submit written comments on the draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Monika Houstoun, Center for Drug Evaluation and Research (HFD–180), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–7310.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled "Exocrine Pancreatic Insufficiency Drug Products—Submitting NDAs." Elsewhere in this issue of the **Federal Register**, FDA is announcing that all exocrine pancreatic insufficiency drug products are new drugs. The document states that manufacturers who wish to continue to market these products must submit applications as required by section 505 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 355) and 21 CFR part 314. The document states that FDA is prepared to accept NDAs for these products, including applications submitted under section 505(b)(2) of the act. This draft guidance is intended to assist manufacturers of exocrine pancreatic insufficiency drug products in preparing and submitting documentation to meet NDA requirements for the drug products.

This level 1 draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the agency's current thinking on issues concerning applications, including applications under section 505(b)(2) of the act, for exocrine pancreatic insufficiency drug products. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments on the draft guidance. Submit a single copy of electronic comments to *http://www.fda.gov/dockets/ecomments* or two paper copies of any written comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The draft guidance and received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

III. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/cder/guidance/index.htm* or *http://www.fda.gov/ohrms/dockets/default.htm*.

Dated: April 15, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–9653 Filed 4–27–04; 8:45 am]

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The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

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COMMERCE DEPARTMENT

National Oceanic and Atmospheric Administration

Fishery conservation and management:

Northeastern United States fisheries—

Summer flounder, scup and black sea bass; published 3-29-04

ENVIRONMENTAL PROTECTION AGENCY

Pesticides; emergency exemptions, etc,:

Citronellol; published 4-28-04

Pesticides; emergency exemptions, etc.:

Geraniol; published 4-28-04

Pesticides; tolerances in food, animal feeds, and raw agricultural commodities:

Antimicrobial formulations; published 4-28-04

LABOR DEPARTMENT

Labor-Management Standards Office

Federal contractors and subcontractors:

Employee rights concerning union dues or fees payment; published 3-29-04

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Airworthiness directives:

AeroSpace Technologies of Australia Pty Ltd.; published 3-31-04

Dornier; published 3-24-04

TRANSPORTATION DEPARTMENT

Surface Transportation Board

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Licensing and related services; 2002 update; published 3-29-04

VETERANS AFFAIRS DEPARTMENT

State cemetery grants; published 3-29-04

COMMENTS DUE NEXT WEEK

AGRICULTURE DEPARTMENT

Agricultural Marketing Service

Milk marketing orders:

Northeast and other marketing areas; comments due by 5-3-04; published 3-2-04 [FR 04-04724]

AGRICULTURE DEPARTMENT

Animal and Plant Health Inspection Service

Interstate transportation of animals and animal products (quarantine):

Brucellosis in cattle—

State and area classifications; comments due by 5-3-04; published 3-2-04 [FR 04-04599]

Plant-related quarantine, domestic:

Asian longhorned beetle; comments due by 5-7-04; published 3-8-04 [FR 04-05128]

Plant-related quarantine, foreign:

Karnal bunt; wheat importation; comments due by 5-3-04; published 3-3-04 [FR 04-04723]

AGRICULTURE DEPARTMENT

Farm Service Agency

Special programs:

Direct Farm Loam Programs; regulatory streamlining; comments due by 5-4-04; published 4-19-04 [FR 04-08772]

AGRICULTURE DEPARTMENT

Food Safety and Inspection Service

Meat and poultry inspection:

Bovine spongiform encephalopathy policies—

Preliminary regulatory impact analysis for interim regulations; availability and comment request; comments due by 5-7-04; published 4-7-04 [FR 04-07925]

AGRICULTURE DEPARTMENT

Rural Utilities Service

Electric loans:

Electric System Emergency Restoration Plan; comments due by 5-3-04; published 3-19-04 [FR 04-06167]

AGRICULTURE DEPARTMENT

Religious organizations; participation in USDA programs; equal treatment for faith-based organizations; comments due by 5-4-04; published 3-5-04 [FR 04-05092]

AMERICAN BATTLE MONUMENTS COMMISSION

Employee responsibilities and conduct; removal of superseded regulations and addition of residual cross references; comments due by 5-5-04; published 4-6-04 [FR 04-07675]

COMMERCE DEPARTMENT

National Oceanic and Atmospheric Administration

Endangered and threatened species:

Sea turtle conservation requirements—

Shrimp trawling requirements; Atlantic Ocean and Gulf of Mexico; turtle excluder devices; comments due by 5-3-04; published 4-16-04 [FR 04-08698]

COURT SERVICES AND OFFENDER SUPERVISION AGENCY FOR THE DISTRICT OF COLUMBIA

Semi-annual agenda; Open for comments until further notice; published 12-22-03 [FR 03-25121]

DEFENSE DEPARTMENT

Federal Acquisition Regulation (FAR):

Hazardous material safety data; comments due by 5-3-04; published 3-3-04 [FR 04-04749]

ENERGY DEPARTMENT

Federal Energy Regulatory Commission

Electric rate and corporate regulation filings:

Virginia Electric & Power Co. et al.; Open for comments until further notice; published 10-1-03 [FR 03-24818]

ENVIRONMENTAL PROTECTION AGENCY

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Pulp and paper industry; comments due by 5-6-04; published 4-15-04 [FR 04-08582]

Air programs; approval and promulgation; State plans for designated facilities and pollutants:

Washington; comments due by 5-3-04; published 4-2-04 [FR 04-07470]

Air quality implementation plans; approval and promulgation; various States; air quality planning purposes; designation of areas:

Pennsylvania; comments due by 5-3-04; published 4-2-04 [FR 04-07471]

Air quality implementation plans; approval and promulgation; various States:

Florida; comments due by 5-6-04; published 4-6-04 [FR 04-07646]

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New York; comments due by 5-7-04; published 4-7-04 [FR 04-07862]

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National priorities list update; comments due by 5-7-04; published 3-8-04 [FR 04-05109]

Water supply:

National primary drinking water regulations—

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "PLUS" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal_register/public_laws/public_laws.html.*

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S. 2057/P.L. 108–220

To require the Secretary of Defense to reimburse members of the United States Armed Forces for certain transportation expenses incurred by the members in connection with leave under the Central Command Rest and Recuperation Leave Program before the program was expanded to include domestic travel. (Apr. 22, 2004; 118 Stat. 618)

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108th Congress

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