
# Federal Register

9–13–04 Monday
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## DEPARTMENT OF AGRICULTURE

### Commodity Credit Corporation

### 7 CFR Part 1435

**RIN 0560–AH21**

### Sugar Program Definitions

**AGENCY:** Commodity Credit Corporation, USDA.

**ACTION:** Final rule.

**SUMMARY:** This rule amends the Sugar Program regulations of the Commodity Credit Corporation (CCC). Specifically, the definitions of "ability to market", "market" and "sugar" are revised. Also, the regulation is modified to describe the procedure used to reassign allocation deficits. These changes are intended to reduce the uncertainty and burden of sugar production forecasting.

**DATES:** Effective Date: This rule is effective September 13, 2004.

**FOR FURTHER INFORMATION CONTACT:** Barbara Fecso, Sugar Analyst, Dairy and Sweeteners Analysis Group, USDA, Farm Service Agency, 1400 Independence Ave SW., Washington DC 20250–0516. 202–720–6733. E-mail: *barbara.fecso@usda.gov*. Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.) should contact the USDA Target Center at (202) 720–2600 (voice and TDD).

**SUPPLEMENTARY INFORMATION:**

#### Discussion of Changes

CCC published regulations on August 26, 2002 (67 FR 54928), to implement the Sugar Program provisions of Title I of the Farm Security and Rural Investment Act of 2002 (the 2002 Act). That rule governed various activities affecting sugar beet and sugar cane producers and processors and the domestic market for sugar. In this rule, CCC is making two changes to Sugar Program regulations as a result of definitions that have had an unintended affect on program administration. The changes are as follows:

The definition of "ability to market" is being changed to discourage excess sugarcane acreage and reduce the uncertainty and burden of sugar production forecasting. "Ability to market" is used in conjunction with two other factors to determine each cane sugar state's marketing allotment and each sugarcane processor's allocation within a state. "Ability to market" was measured as the quantity of raw sugar produced during the applicable crop year. This definition disregards beginning stocks, which is part of a processor's ability to fulfill its allocation. This exclusion discourages cane processors from filling their allocation from stocks and encourages continued planting to maintain their allocation.

The accrual of large stocks that must be carried over into the next year due to the imposition of marketing allotments is increasing the likelihood of problems with the current definition of "ability to market". The problem created by excluding beginning stocks would be aggravated in cane disasters. A substantial loss in forecast cane sugar production would result in a considerable reduction in a processor's sugar marketing allocation, regardless of the processor's stock level.

The current definition of "ability to market" requires CCC to estimate crop year production for each state and processor using periodic processor surveys. State allotments and processor allocations are adjusted as these estimates change throughout the year. This process creates uncertainty for the sugarcane processors and a significant administrative burden for CCC and processors.

Hawaii and Puerto Rico already have a fixed allotment and their state allotment and processor definition of "ability to market" will not be changed. For the mainland states, the new definition for "ability to market" will be based on the states' and processors' 1999 through 2003 crop year production history. The mainland states' "ability to market" will be measured as the production from the highest production year for each state in the base period. This same measure of "ability to market" will be used to divide the Florida cane sugar marketing allotment among the state's processors. CCC will divide the Louisiana cane sugar marketing allotment among the state's processors using an average of (1) an Olympic average over the base period and (2) the 2003 crop. CCC will use the 2003-crop estimate of production that it used to develop the July World Agricultural Supply and Demand Estimates.

Since the other two factors are based on historical production, the cane states' allotments and processor allocations will now be based completely on historical data. Since allotments and allocations are not dependent on current production, the data collection burden on CCC and the processors, and the incentive to maintain sugarcane acreage is reduced. Allocations will balance with available sugar as processors sell over-allocation sugar to processors that need it, in accordance with the regulations, and as CCC reassigns unused allocation between processors and unused allotment between states.

The "ability to market" definition does not affect the reassignment process. The 2002 Act requires CCC to determine, from time to time, if a processor is unable (and conversely, able) to market its allocation. Consistent with the 2002 Act, CCC uses the best available data to make its determination and specifically lists then-current inventories of sugar, the estimated production of sugar and expected marketings, and other pertinent factors. CCC determines if a processor is unable to market its allocation by comparing a processor's sugar supply (with some exceptions) with its allocation. Specifically, CCC calculates a processor's available crop-year supply as its beginning stocks, plus production and purchased over-allocation sugar, less sales of over-allocation sugar, and desired ending stocks (generally zero). CCC recognizes that it should reduce supply by nonhuman use sales and exports but has not done so to date. Early reassignments require CCC to use estimates subject to error and allocation cannot be returned to a processor because too much was taken away. Thus, CCC will be more conservative in reducing a processor's allocation earlier in the year than later. At this time, CCC has no measure of its early conservatism but will work with the processors losing allocation to permit them a margin of

error beyond the formula results. This process worked satisfactorily in FY 2003.

The second change CCC is making is to clarify the definitions of market and marketing to include sales for non-domestic consumption, nonhuman consumption, and sales to another processor to enable that processor to fulfill its marketing allocation. The current definition for market and marketing excludes these sales. However, 7 CFR 1435.307 describes these types of sales as "marketings," but exempts them from being subject to the restriction of a processor's marketing allocations. CCC is developing procedures to ensure that sales for non-domestic consumption and nonhuman consumption, which also are not counted against a processor's sugar marketing allocation, are bona fide sales that do not affect the domestic food use market.

The new definition provides that the sale of sugar for non-domestic consumption, nonhuman consumption, or to another processor will be a sugar "marketing" regulated by 7 CFR 1435. This result is accomplished by deleting the sentence that excludes these sales from the "marketing" definition. The regulation retains the exemption for sales made before May 1, reported to CCC within 51 days.

The third change CCC is making is to clarify the definition of sugar to include in-process sugar, such as thick juice, in the current 7 CFR part 1435 definition, but implied elsewhere in the regulation language.

CCC modifies the reassignment provisions in § 1435.309 to explain more fully CCC's reassignment procedures. This rule also replaces the "by May 1" in section 1435.309(a) with language of the 2002 Act, "from time to time". May 1 is not an appropriate time to make reassignment determinations for all processors because CCC permits processors to buy or sell over-allocation sugar until May 1. The deadline "by April 15" is eliminated in section 1435.309(b) for the same reason.

### Notice and Comment

These changes will not be published with a request for public comment, and will be implemented with a final rule. Section 1601(c) of the Farm Security and Rural Investment Act of 2002 (2002 Act) provides that the regulations needed to administer Title I of the 2002 Act, including those involved here, may be promulgated without regard to the notice and comment provisions of 5 U.S.C. 553 or the Statement of Policy of the Secretary of Agriculture effective July 24, 1971, (36 FR 13804) relating to notices of proposed rulemaking and public participation in rulemaking. The rule will be effective upon publication in order to provide its benefit to producers as soon as possible.

### Executive Order 12866

This interim rule has been designated as "Not significant" under Executive Order 12866 and has not been reviewed by the Office of Management and Budget.

### Federal Assistance Programs

This final rule applies to the following Federal assistance programs, as found in the Catalog of Federal Domestic Assistance: 10.051—Commodity Loans and Loan Deficiency Payments.

### Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because CCC is not required by 5 U.S.C. 553 or other law to publish a notice of proposed rulemaking for the subject of this rule.

### Environmental Assessment

The environmental impacts of this rule have been considered under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and regulations of the Farm Service Agency (FSA) of the Department of Agriculture (USDA) for compliance with NEPA, 7 CFR part 799. An environmental evaluation was completed and the proposed action has been determined not to have the potential to significantly impact the quality of the human environment and no environmental assessment or environmental impact statement is necessary. A copy of the environmental evaluation is available for inspection and review upon request.

### Executive Order 12778

This rule has been reviewed under Executive Order 12778. This rule preempts State laws that are inconsistent with it and is not retroactive. Before judicial action may be brought concerning this rule, all administrative remedies must be exhausted.

### Executive Order 12372

This program is not subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. See the notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115 (June 24, 1983).

### Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) does not apply to this rule because CCC is not required by 5 U.S.C. 553 or any other law to publish a notice of proposed rulemaking for the subject of this rule. Further, this rule contains no unfunded mandates as defined in sections 202 and 205 of UMRA.

### Paperwork Reduction Act

Section 1601(c) of the 2002 Act provides that these regulations may be promulgated and the programs administered without regard to chapter 5 of title 44 of the United States Code (the Paperwork Reduction Act). Accordingly, these regulations and the forms and other information collection activities needed to administer the provisions authorized by these regulations are not subject to review by the Office of Management and Budget under the Paperwork Reduction Act.

### Government Paperwork Elimination Act

CCC is committed to compliance with the Government Paperwork Elimination Act, which requires Federal Government agencies to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. However, the information collections required by 7 CFR part 1435 rule are not yet fully implemented for the public to conduct business with FSA electronically. CCC Sugar Program forms are available on the agency's Internet web site. Forms may be completed and saved on a computer, but must be printed, signed and submitted to FSA in paper form.

### List of Subjects in 7 CFR Part 1435

Loan programs—agriculture, Price support programs, Reporting and record keeping requirements, and Sugar.

■ For the reasons set out in the preamble, 7 CFR part 1435 is amended as set forth below.

## PART 1435—SUGAR PROGRAM

■ 1. The authority for 7 CFR part 1435 continues to read as follows:

**Authority:** 7 U.S.C. 1359aa–1359jj and 7272 *et seq.*; 15 U.S.C. 714b and 714c.

## Subpart A—General Provisions

■ 2. In § 1435.2, revise the definitions of "ability to market," "market or marketing", and "sugar" to read as follows:

**§ 1435.2 Definitions.**

* * * * *

*Ability to market* means, for purposes of determining the State cane sugar allotments and sugarcane processor allocations for Hawaii and Puerto Rico, the estimated quantity of sugar, raw value, as CCC determines, that will be produced in the cane State or by the sugarcane processor, as appropriate, during the applicable crop year; for determining the remaining State cane sugar allotments, the highest single year of sugar production for the State during the 1999 through 2003 crop years; for determining the sugarcane processor allocations for mainland cane States other than Louisiana, the highest single year of sugar production for the processor during the 1999 through 2003 crop years; and, for determining the sugarcane processor allocations for Louisiana, the simple average of two amounts for each processor, including:

(1) The production of sugar for the processor, stated in short tons, raw value, during Crop Year 2003, as determined by CCC; and

(2) The simple average of 3 years of the processor's production of sugar, stated in short tons, raw value, from among the 1999 through 2003 crop years, excluding the year in which the production was the highest and the year in which the production was the lowest. With respect to the 2003 crop year, each processor's production shall be the same as determined under paragraph (1).

* * * * *

*Market or marketing* means the transfer of title associated with the sale or other disposition of sugar in United States commerce, including the forfeiture of sugar loan collateral under Subpart B, and for any integrated processor and refiner, the movement of raw cane sugar into the refining process.

* * * * *

*Sugar* means any grade or type of saccharine product derived, directly or indirectly, from sugarcane, sugar beets, sugarcane molasses or sugar beet molasses and consisting of, or containing, sucrose or invert sugar, including raw sugar, refined crystalline sugar, edible molasses, edible cane syrup, liquid sugar, and in-process sugar.

* * * * *

## Subpart D—Flexible Marketing Allotments for Sugar

■ 3. In § 1435.309 revise paragraphs (a), (b), and (c) to read as follows:

**§ 1435.309 Reassignment of deficits.**

(a) CCC will determine, from time to time, whether sugar beet or sugarcane processors will be unable to market their allocations.

(b) Sugar beet and sugar cane processors will report to CCC current inventories, estimated production, expected marketings, and any other pertinent factors CCC deems appropriate to determine a processor's ability to market their allocation.

(c) If CCC determines a sugarcane processor will be unable to market its fall allocation for the crop year in which an allotment is in effect, the deficit will be reassigned by June 1:

(1) First, to allocations of other sugarcane processors within that State based on each processor's initial allocation share of the State's allotment, but no processor may receive reassigned allocation such that its allocation exceeds its estimated total sugar supply.

(2) If the deficit cannot be eliminated after reassignment within the same State, be reassigned to the other cane States based on each State's initial share of the cane sugar allotment, but no State may receive reassigned State allotment such that its allocation exceeds its estimated total sugar supply, with the reassigned quantity to each State being allocated according to paragraph (c)(1) of this section.

* * * * *

Signed in Washington, DC, on September 1, 2004.

**James R. Little,**

*Executive Vice President, Commodity Credit Corporation.*

[FR Doc. 04–20587 Filed 9–10–04; 8:45 am]

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## FEDERAL TRADE COMMISSION

## 16 CFR Part 305

## Sample Labels

*CFR Correction*

In Title 16 of the Code of Federal Regulations, parts 0 to 999, revised as of January 1, 2004, part 305 is corrected by:

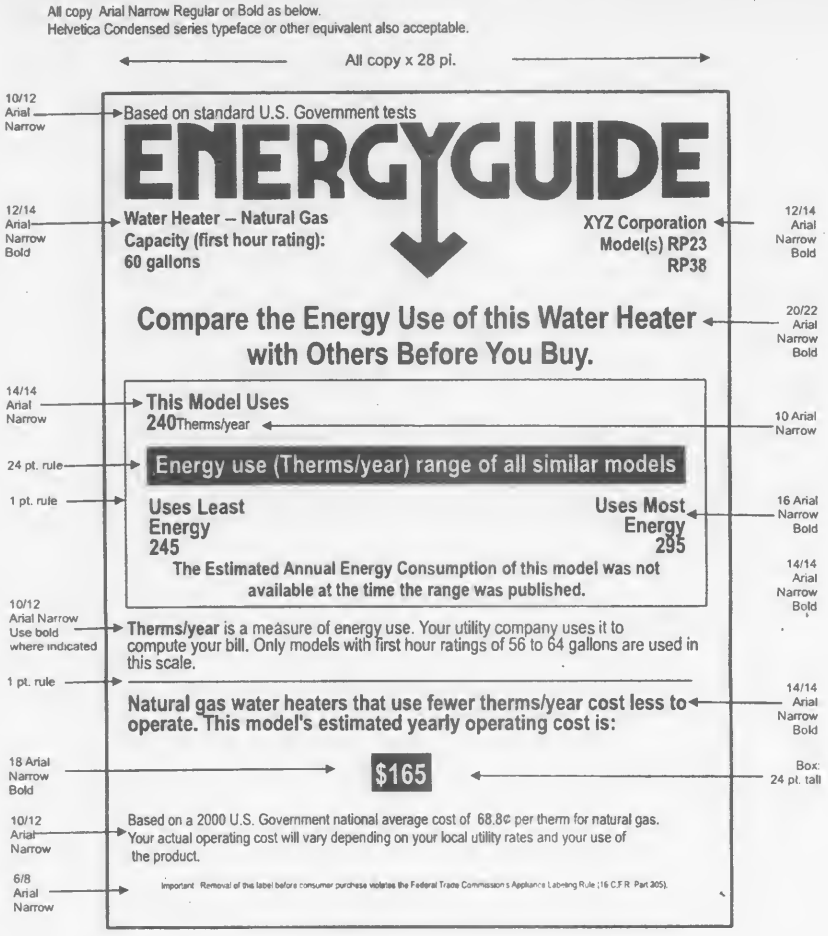
1. Replacing Sample Label 3 on page 311 with Sample Label 3 on page 306, and adding the following Prototype Label 3 in place of Sample Label 3 on page 306, and

2. Replacing Sample Label 4 on page 312 with Sample Label 4 on page 307, and adding the following Prototype Label 4 on page 307.

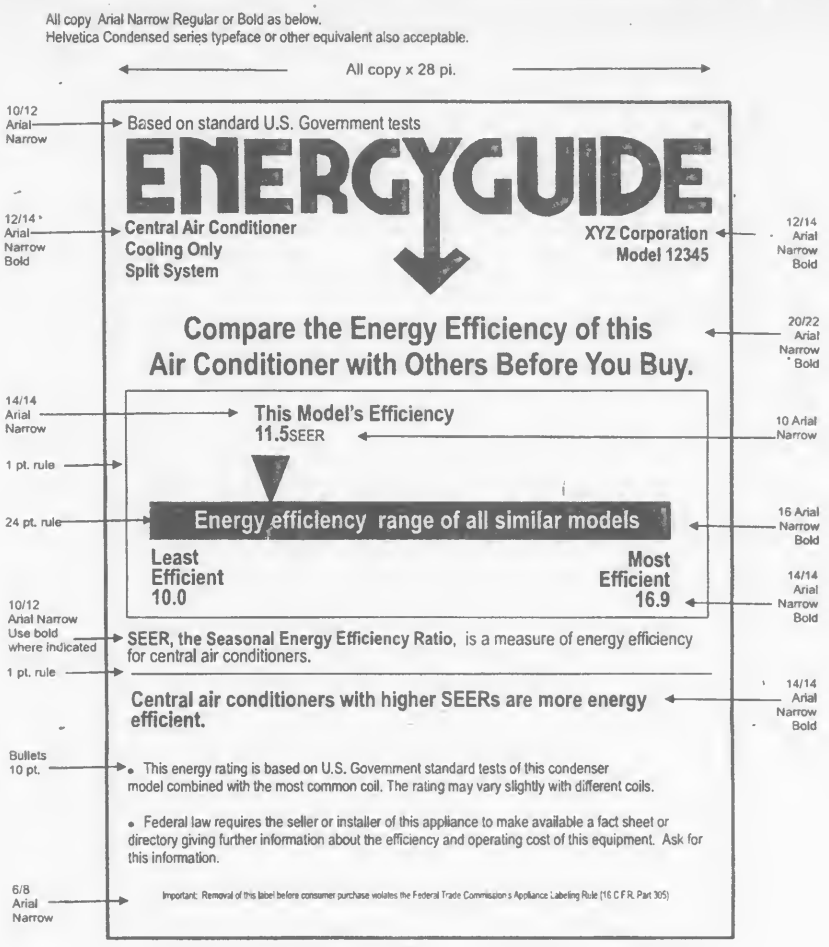
## PART 305—RULE CONCERNING DISCLOSURES REGARDING ENERGY CONSUMPTION AND WATER USE OF CERTAIN HOME APPLIANCES AND OTHER PRODUCTS REQUIRED UNDER THE ENERGY POLICY AND CONSERVATION ACT ("APPLIANCE LABELING RULE")

### APPENDIX l—SAMPLE LABELS

* * * * *




Prototype Label 3




Prototype Label 4

[FR Doc. 04–55518 Filed 9–10–04; 8:45 am]
BILLING CODE 1505–01–D

## SOCIAL SECURITY ADMINISTRATION

**20 CFR Part 422**

**[Regulations No. 22]**

**RIN 0960–AF87**

## Evidence Requirements for Assignment of Social Security Numbers (SSNs); Assignment of SSNs to Foreign Academic Students in F–1 Status

**AGENCY:** Social Security Administration (SSA).

**ACTION:** Final rules.

**SUMMARY:** We are revising our rules for assigning SSNs to foreign academic students in Department of Homeland Security (DHS, which has subsumed most of the various functions of the former Immigration and Naturalization Service or INS) classification status F–1 (referred to throughout this preamble as F–1 students). Specifically, we are requiring additional evidence for F–1 students who are applying for SSNs. Like all other applicants, an F–1 student must provide SSA with evidence of age, identity, immigration status, and work authorization. In addition, unless the F–1 student has an employment authorization document (EAD) from DHS or is authorized by the F–1 student's school for curricular practical training (CPT), the F–1 student must provide evidence that he or she has been authorized by the school to work and has secured employment or a promise of employment before we will assign an SSN. These rules will further enhance the integrity of SSA's enumeration processes for assigning SSNs by reducing the proliferation of SSNs used for purposes that are not related to work and thereby decreasing the potential for SSN fraud and misuse.

**DATES:** These regulations are effective October 13, 2004.

*Electronic Version:* The electronic file of this document is available on the date of publication in the **Federal Register** at *http://www.gpoaccess.gov/fr/index.html*. It is also available on the Internet site for SSA (*i.e.*, Social Security Online) at *http://policy.ssa.gov/pnpublic.nsf/LawsRegs*.

**FOR FURTHER INFORMATION CONTACT:** Robert J. Augustine, Social Insurance Specialist, Office of Regulations, 100 Altmeyer Building, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 965–0020, or TTY (410) 966–5609. For information on eligibility or filing for benefits, call our national toll-free numbers, 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet Web

site, Social Security Online, at *http://www.socialsecurity.gov*.

**SUPPLEMENTARY INFORMATION:**

**Background**

The Social Security Administration has been working to strengthen the process for assigning SSNs, our "enumeration" process. Concerns about national security, along with the growing problem of identity theft, have prompted us to identify additional areas where we can strengthen the integrity of the enumeration process. We have undertaken many initiatives but mention just a few here as background. As part of the SSN application process, we now verify the birth records submitted as evidence for U.S.-born citizens age one or older, and verify the immigration status of non-citizens with DHS. We have heightened the importance of our screening process for all evidentiary documents and recently promulgated new regulations lowering the age for mandatory in-person interviews.

As part of our overall review of our enumeration processes for citizens and non-citizens alike, we considered our policy of assigning SSNs to F–1 students who do not have specific work authorization from DHS or from their schools. It might be helpful to look at how the Immigration and Nationality Act (INA) defines the F–1 nonimmigrant classification to better understand the context in which we made our regulations change.

The INA, in section 101(a)(15)(F)(i), 8 U.S.C. 1101(a)(15)(F)(i), describes an F–1 nonimmigrant as "an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States *temporarily and solely* for the purpose of pursuing such a course of study." (Italics added.) This definition provides the purpose of the F–1 student's stay in the U.S.—to study. Working in the U.S. is ancillary. In this respect, the F–1 classification is different from certain other nonimmigrant classifications that are based upon the type of work the nonimmigrant will be performing while in the U.S.

DHS regulations do provide, however, that F–1 students, while maintaining valid nonimmigrant student status, may work in the U.S. under certain circumstances. Under 8 CFR 214.2(f)(9)–(10), F–1 students may be authorized to work off-campus in optional practical training (OPT) and in an internship with a recognized international organization, or in cases of severe economic hardship. For these off-campus situations, they must apply to DHS for employment authorization. DHS then determines whether the applicant is eligible for employment authorization, and, if so, issues the applicant an EAD.

In the case of OPT, the employment must be directly related to the F–1 student's major area of study. If offered employment in an internship with a recognized international organization, the student must have a written certification from the international organization that the proposed employment is within the scope of the organization's sponsorship. In cases of extreme economic hardship, the student must present documentation as to why it is critical to be allowed to work off-campus (*i.e.*, loss of financial aid or on-campus employment without fault on the part of the student, substantial fluctuations in the value of currency or exchange rate, inordinate increases in tuition and/or living expenses, unexpected changes in the financial condition of the student's source of support, medical bills, or other substantial and unexpected expenses).

An F–1 student may also be eligible to participate in a CPT program that is an integral part of an established curriculum at the school where the student is enrolled. The work must be approved by the Designated School Official (DSO), who signs the student's Student and Exchange Visitor Information System (SEVIS) Form I–20, Certificate of Eligibility for Nonimmigrant Student Status, with the particulars of the employment, including whether the training is full time or part time, the name and location of the employer, and the start and end dates of the employment. For CPT, the student is neither required to submit a Form I–765 to DHS, nor required to present an EAD. *See* 8 CFR 214.2(f)(10)(i).

Under 8 CFR 214.2(f)(9)(i) and 274a.12(b)(6)(i), an F–1 student may also work "on campus" for a "specific employer incident to status" on the school's premises or at an off-campus location that is educationally affiliated with the school. F–1 students may perform such work without submitting a Form I–765 to DHS or having a DSO report on-campus employment or endorse the student's SEVIS Form I–20. However, 8 CFR 274a.12(b)(6)(i) does state, "Part-time on-campus employment is authorized by the school." DHS regulations are silent on how the school must authorize that on-campus employment because there is no DHS specific requirement as to how a school provides such authorization to F–1 students. It is clear that such work must not displace a U.S. resident and must be an integral part of the student's educational program. In addition, there are limitations on when the work may be performed (*e.g.*, not more than 30 days prior to the actual start of classes) and the maximum number of work hours.

When there is no EAD or school endorsement to document employment, SSA's experience indicates that many F–1 students are assigned SSNs when the students do not have jobs, are not intending to work, and, in some cases, where the school does not have on-campus employment available. Currently, for on-campus employment, where there is no EAD card or school annotation regarding employment on the SEVIS Form I–20, SSA accepts a letter from the DSO affirming that the student is enrolled in a full course of study and is therefore authorized to work on campus. However, our field experience shows that these letters are not always reliable. An October 2003 General Accounting Office (GAO) Report to the Chairman, Subcommittee on Social Security, Committee on Ways and Means, House of Representatives, entitled "Social Security Administration: Actions Taken to Strengthen Procedures for Issuing Social Security Numbers to Noncitizens but Some Weaknesses Remain" (GAO–04–12), cited an SSA Office of Inspector General (OIG) investigation that "uncovered a ring of 32 foreign students in four states who used forged work authorization letters to obtain SSNs. * * * However, an unknown number of other students associated with this ring had already obtained illegal SSNs with forged work authorization letters." Because of these types of investigations and numerous similar anecdotal field reports about significant anomalies between authorized work and actual work, we are revising our regulations for assigning SSNs to F–1 students. To ensure the authenticity of the student's work authorization from the school and to address student allegations about employment, we are requiring the F–1 student to provide evidence from the DSO of on-campus employment authorization and verification of employment or a promise of employment from the actual on-campus employer.

Assigning SSNs based on work that is authorized to be performed on campus, which we do not verify and which our experience and audits have shown to be often unsubstantiated—in effect assigning SSNs for non-work—runs counter to efforts SSA has initiated. These efforts also include those in response to Congressional inquiries and

OIG and GAO audits to strengthen enumeration integrity and decrease opportunities for potential SSN fraud and misuse. It also runs counter to SSA's recently promulgated regulation, "Evidence Requirements for Assignment of Social Security Numbers (SSNs): Assignment of SSNs for Nonwork Purposes," published in the **Federal Register** on September 25, 2003 (68 FR 55304), and effective October 27, 2003. This regulation, available online at *http://www.socialsecurity.gov/regulations/articles/rin0960_af05f.htm*, limits the number of valid non-work reasons for assigning an SSN to a non-citizen.

Because of these considerations, SSA is changing its regulations for SSN assignment to F–1 students for on-campus work. While we recognize that this change in our regulations will cause some inconvenience for F–1 students and schools, we believe that SSA's mission and the recommendations made by OIG, GAO and Congress to strengthen the enumeration process require that we make these revisions. We will provide assistance to schools and employers in implementing these regulatory changes as outlined below and will continue to work with educational associations and DHS as the process moves forward.

The Commissioner of the Social Security Administration has been given broad powers under law to carry out the provisions of the Social Security Act (the Act) and to establish procedures deemed necessary for that purpose. Section 205(a) of the Act states: "The Commissioner of Social Security shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this title, which are necessary or *appropriate* to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder." [Italics added]

Under section 205(c)(2)(A) of the Act, the Commissioner of Social Security is required to "establish and maintain records of the amounts of wages paid to * * * each individual and of the periods in which such wages were paid * * *." In addition, under section 205(c)(2)(B)(i)(I) of the Act, the Commissioner is required to assign Social Security numbers *to the maximum extent practicable* "to aliens at the time of their lawful admission to the United States either for permanent residence or under other authority of law permitting them to engage in employment in the United States and to other aliens at such time as their status is so changed as to make it lawful for them to engage in such employment." [Italics added] We consider the F–1 student to be in a status permitting on-campus work, which makes the student eligible for an SSN and a restricted Social Security card, when we have received evidence from the DSO that the school has authorized such work and the student has made arrangements to work for a specific employer.

Section 205(c)(2)(B)(ii) goes on to add that "The Commissioner of Social Security shall require of applicants for social security account numbers such evidence as may be necessary to establish the age, citizenship, or alien status, and true identity of such applicants, and to determine which (if any) social security account number has previously been assigned to such individual."

SSA's regulations at 20 CFR 422.107(a) implement the Act with respect to the evidence required to support an application for an SSN: "An applicant for an original social security number card must submit documentary evidence which the Commissioner of Social Security regards as *convincing* evidence of age, U.S. citizenship or alien status, and true identity." [Italics added] Additionally, they provide, "A social security number will not be assigned, or an original, duplicate, or corrected card issued, unless all the evidence requirements are met."

**Current SSA Rules**

Our regulations at 20 CFR 422.105 currently state that a nonimmigrant alien whose immigration Form I–94, Arrival/Departure Record, does not reflect a classification permitting work must submit a current document issued by U.S. immigration authority that verifies authorization to work has been granted.

Our regulations at 20 CFR 422.107(e) currently state that "When a person who is not a U.S. citizen applies for an original social security number or a duplicate or corrected social security number card, he or she is required to submit, as evidence of alien status, a current document issued by the [INS] in accordance with [its] regulations. The document must show that the applicant has been lawfully admitted to the United States, either for permanent residence or under authority of law permitting him or her to work in the United States, or that the applicant's alien status has changed so that it is lawful for him or her to work." If the applicant submits a valid unexpired immigration document(s) that shows current authorization to work, we will assign an SSN and issue a card that is valid for work.

Current SSA procedures require an F–1 student who needs an SSN for work to present evidence of age, identity, F–1 immigration status, and work authorization. This work authorization can either be from DHS in the form of an EAD document or from the F–1 student's school for on-campus employment or CPT. In the past, when an F–1 student applied for an SSN, we believed that the student had a job or imminent plans to secure a job. However, our recent experience has shown that some F–1 students, who do not have an EAD and are not authorized by their schools for on-campus curricular practical training, but who do have a letter from the DSO, apply for SSNs even when there is limited or no general on-campus employment available. Some F–1 students have informed us that they do not intend to work but need the SSNs to obtain goods or services in the community.

Because of these factors, we are requiring additional evidence for F–1 student SSN applicants. The purpose of the SSN is to keep track of an individual's earnings in the U.S. over his or her lifetime and to pay Social Security benefits. The assignment of SSNs for purposes other than that for which the SSN is intended can lead to potential misuse and/or fraud, which can impact society in the form of illegal employment in the U.S., fraudulent entitlement to Federal and State benefits and services, and other types of illegal activity such as bank and credit card fraud and identity theft. In order to strengthen the security of the enumeration process, we are requiring additional evidence from F–1 students before we will assign SSNs to them because they are allowed to work only in certain circumstances. We want to confirm that the student needs the SSN for such authorized work. If F–1 students are not planning to work in the kinds of jobs allowed by their F–1 status, then they would not have a legitimate need for the SSNs and the SSNs would not be assigned.

A number of published government audits and reports support this change. Three are cited here and are accessible online:

- SSA (OIG) study, "Using Social Security Numbers To Commit Fraud" (A–08–99–42002, May 1999) at *http://www.ssa.gov/oig/ADOBEPDF/A–08–99–42002.pdf*;
- GAO Report to the Chairman, Subcommittee on Social Security, Committee on Ways and Means, House

of Representatives, "Social Security Administration: Actions Taken to Strengthen Procedures for Issuing Social Security Numbers to Noncitizens but Some Weaknesses Remain" (GAO–04–12, October 2003) at *http://www.gao.gov*; and

- SSA's OIG report, "Management Advisory Report: The Social Security Administration's Procedures for Enumerating Foreign Students" (A–05–03–23056, December 17, 2003) at *http://www.ssa.gov/oig/office_of_audit/audit2004.htm.*

**Explanation of Additional Evidentiary Requirements**

*Section 422.105 Presumption of Authority of Nonimmigrant Alien To Accept Employment*

We are revising § 422.105 to state that, unless the F–1 student has an employment authorization document issued by DHS or a SEVIS Form I–20, Certificate of Eligibility for Nonimmigrant (F–1) Student Status, completed and signed by the school's DSO authorizing CPT on the employment page (page 3), the F–1 student applicant must provide additional documentation that confirms both that he or she has authorization from the school to engage in employment and has secured authorized employment. (In 2003, INS's benefit functions became part of the DHS.) This wording differs somewhat from that in the Notice of Proposed Rulemaking to clarify that this rule change only applies to F–1 students for on-campus work (these students have neither EADs nor authorization from their schools on Form I–20 for CPT). In discussions over the last year with DHS officials, they supported our plans to assign SSNs only to those F–1 students who have secured a job. The revision includes a cross-reference to § 422.107(e)(2), where the specific evidence requirements are explained.

*Section 422.107 Evidence Requirements*

We are revising paragraph (e) of § 422.107 of our regulations by redesignating paragraph (e) as paragraph (e)(1) and adding a new paragraph (e)(2) to specify that if an F–1 student does not have an employment authorization document and is not authorized for CPT as shown on the F–1 student's SEVIS Form I–20, Certificate of Eligibility for Nonimmigrant (F–1) Student Status, the F–1 student must provide documentation of both work authorization from the school and secured employment before we will assign an SSN to the student. First, the F–1 student will need to provide documentation from the school that he or she will be engaging in authorized employment. Under this change in our policy, we will not assign an SSN to the F–1 student unless the student provides a SEVIS Form I–20, and provides written confirmation from the DSO of (1) the nature of the employment the F–1 student is or will be engaged in and (2) the identification of the employer for whom the F–1 student is or will be working.

Second, we are also requiring that the F–1 student provide us with documentation that he or she is engaged in or has secured employment; *e.g.*, a statement from the F–1 student's employer. For purposes of these requirements, evidence of a formal job offer, a promise of a job, or evidence that the student is in fact engaged in that job will be considered "secured" employment.

By adding these additional evidentiary requirements, we believe there will be fewer opportunities for abuse of the enumeration process without having any adverse effects on F–1 students who need to work while they are in the U.S. The additional documentation we would require should be readily available.

In addition to the revisions discussed above, we are also making technical non-substantive revisions to §§ 422.103(b)(3) and (c)(3), 422.104(c), 422.105, 422.107(c), (d)(4), (d)(6), (e)(1) and (e)(2), and 422.110(b) that were not included in the NPRM. The revisions reflect that the Immigration and Naturalization Service has been reconstituted into the Department of Homeland Security.

**Public Comments**

On December 16, 2003, we published proposed rules in the **Federal Register** at 68 FR 69978 and provided a 60-day period for interested parties to comment. We received comments from 5 advocacy groups, 1 attorney representing international student interests, more than 70 colleges, universities and graduate schools, and 5 individuals. Because some of the comments received were quite detailed, we have condensed, summarized or paraphrased them in the discussion below. We have tried to present all views adequately and carefully address all of the issues raised by the commenters that are within the scope of the proposed rules.

*Purpose of This Regulation: Connection to the Prevention of Terrorism, Fraud and Misuse of the Social Security Number (SSN)*

*Comment:* A number of commenters suggested that SSA "withdraw" this regulation, questioning the purpose behind the rule and how its promulgation will prevent fraud, reduce misuse of the SSN, and/or deter terrorism. One questioned how this rule, had it been in effect in 2001, might have prevented the 9/11 terrorist attack and how it could prevent terrorist attacks in the future. Questions were raised about SSA's fraud prevention measures and some asked specifically how many international students commit SSN fraud, how this rule will reduce instances of SSN fraud and how international student fraud compares to overall SSN fraud. Comments were made that our rule "purports to solve a problem that does not exist" and criticized our using the May 1999, SSA OIG report, "Using Social Security Numbers To Commit Fraud" (A–08–99–42002), as part of the justification for this rule. This report was said to be too old to use as justification for a current regulation that would create "[s]erious policy changes with * * * far-reaching negative impact." Some commenters said the OIG report showed only that most of a small sample of international students who had SSNs did not have any earnings for the year studied; it did not indicate that the SSNs were used to work illegally in the U.S. Some mentioned that if F–1 students were to "misuse" their SSNs, it would be an issue for DHS, not SSA, to resolve. And, some commented that the rule provides no follow-up mechanism for SSA to determine whether the SSNs were actually used for work purposes.

*Response:* As we pointed out in the Proposed Rule language, in the past, when an F–1 student applied for an SSN, we believed that the student had a job or imminent plans to secure a job. However, our recent experience has shown that some F–1 students apply for SSNs even when there is limited or no employment available. Some schools and universities provide all their registered F–1 students with letters authorizing on-campus employment and refer them to SSA offices to apply for SSNs. Often, many of these students inform us that they do not intend to work but need the SSNs to obtain goods or services in the community.

We are revising our policy on the assignment of SSNs to F–1 students because our experience suggests that SSNs are assigned to some F–1 students who are not working and do not intend

to work. There are rare instances where an F–1 student might qualify for a non-work SSN. The only valid nonwork reasons for an SSN are: (1) A Federal statute or regulation requires an SSN to get the particular benefit or service to which a nonimmigrant has otherwise established entitlement; and (2) a State or local law requires a nonimmigrant who is legally in the U.S. to provide his/her SSN to get public assistance benefits to which he or she has otherwise established entitlement and for which all other requirements have been met. In all other cases, an F–1 student is not eligible for an SSN unless he or she will be working for a specific employer or in a specific type of employment, such as CPT, OPT or for a recognized international organization, or in cases of extreme economic hardship, as permitted by the F–1 classification. Assigning SSNs that are not needed for authorized work for a specific employer or in specific employment would put into circulation SSNs that may be used for fraudulent purposes or illegally for work not permitted while in the U.S. (*i.e.*, in work not permitted by their classification under immigration regulations at 8 CFR 274a.12).

With respect to how this rule relates to actual or potential terrorists, we note that SSA must do its part to strengthen the integrity of the SSN, lessen the fraudulent use of the SSN, and guard against providing SSNs inappropriately that could enable someone to integrate into American society who might intend to engage in criminal behavior or harm our country. The issuance of Federal documents to individuals who intend to do us harm enables those individuals to move more easily in our society. Therefore, in our discussions over the last year with DHS, it supported our plans to assign SSNs only to those F–1 students who have secured jobs.

Numerous studies support our concerns in this area and the need to revise policy. In addition to the reports cited in the Preamble, we reference the following OIG reports:

- "Congressional Response Report: SSN Misuse: A Challenge for the Social Security Administration," A–08–02–22030, October 3, 2001, *http://www.ssa.gov/oig/office_of_audit/audit2002.htm*;
- "Inspector General Statement on the Social Security Administration's Major Management Challenges," A–02–02–12054, December 7, 2001, *http://www.ssa.gov/oig/office_of_audit/audit2002.htm*; and
- "Management Advisory Report: Social Security Number Integrity: An Important Link in Homeland Security," A–08–02–22077, May 9, 2002, *http://www.ssa.gov/oig/office_of_audit/audit2002.htm*.

Additional audit reports may be found on SSA's Web site of the Inspector General at *http://www.ssa.gov/oig/office_of_audit/index.htm*.

The GAO also issued a report to the Chairman, Subcommittee on Social Security, Committee on Ways and Means, House of Representatives, in October 2003 entitled "Social Security Administration: Actions Taken to Strengthen Procedures for Issuing Social Security Numbers to Noncitizens but Some Weaknesses Remain" (GAO–04–12 accessible at *http://www.gao.gov*). In this report, based on its work from July 2002 through July 2003, GAO discussed SSA's verification of documents for foreign students seeking SSNs. GAO mentioned that SSA had stepped up its verification efforts for foreign students by requiring that they prove enrollment in a full course of study at a DHS-approved school before assigning SSNs to them. However, on page 7, it also advised the Committee that "SSA still does not require its field staff to verify this information or letters from the school stating the student is authorized to work—with the school," and "SSA also does not require that students actually have a job to qualify for an SSN, only that they have been authorized by their school to work on campus." On page 10 of the report, GAO supports its contention that "verification of foreign students * * * remains problematic" by citing a "recent" investigation by SSA's OIG, which we alluded to earlier in the preamble, regarding the ring of 32 foreign students in four states who presented to SSA forged work authorization letters along with their SSN applications. There were other students associated with this ring who had already obtained SSNs using the bogus letters.

In addition, the report cited a foreign student Web site that "advises" foreign students to "shop around" for an SSN by visiting more than one SSA office. The Web site also states, "If you are not authorized to work, ask your Foreign Student Advisor for help. Sometimes they can give you a letter to the SSA stating that you need a SSN for on-campus employment. Sometimes SSA clerks dont really read these letters, they just look at them." The GAO report included reports of schools, operating out of storefronts, that issued work authorization letters for students, claiming the students were working on campus. Another SSA office recounted to GAO reviewers experiences with schools selling work authorization letters to students who wished to get SSNs. These findings were pointed out in the report to the Committee as vulnerabilities for the integrity of SSA's enumeration system and as contributing to the proliferation of SSNs with the potential for misuse.

Most recently, SSA's OIG issued its final report on the enumeration of foreign students: "Management Advisory Report: The Social Security Administration's Procedures for Enumerating Foreign Students," A–05–03–23056, December 17, 2003, *http://www.ssa.gov/oig/office_of_audit/audit2004.htm*. The report pointed out problems that OIG sees in the enumeration of foreign students and stated that, while it recognized that increased security measures will impact on the time necessary to process SSN applications, it recommended that SSA employ more effective front-end controls over the enumeration of foreign students.

The OIG auditors corroborated our field experiences. In its examination of 15 educational institutions that enrolled 61,760 foreign students during the period November 2002 through October 2003 (during which time SSA was already requiring schools to provide evidence of school attendance and work authorization), OIG found that only 4 of the 15 (27 percent) stated that employment or an offer of employment was required to receive a work authorization letter from the school. The remaining 11 schools provided employment letters to all students based on their eligibility for employment. The OIG auditors cited a school that gave out the SS–5, Application for a Social Security Card, to every freshman during orientation as part of the normal registration process at that school. Also, one of the schools OIG examined, which has one of the highest percentages of foreign students among U.S. institutions, had just recently changed its policies to require that the student have a job offer prior to issuing a work authorization letter to SSA.

OIG recognized that work authorization and related work status of an F–1student are difficult to substantiate in the absence of any annotation on the I–20 or an EAD, and went on to recommend that SSA propose the regulatory requirement that evidence of actual employment be required for foreign students to be assigned SSNs. This requirement should help prevent the proliferation of SSNs used for non-work purposes and reduce the potential for fraud by confirming that each F–1 SSN applicant is attending school and is in good academic standing, that there is a legitimate job on campus for him or her,

and that each student has individualized, specific documentation to that effect.

This effort, as well as SSA's new verification procedures utilizing data from SEVIS to track foreign students and exchange visitors while they are in the U.S., may not prevent fraud and misuse, but both our enhanced enumeration processes and SEVIS work to make it less likely that fraud and misuse will occur.

With regard to the comments indicating that misuse of the SSN is solely a DHS issue, we point out here that SSA is responsible for investigating unauthorized uses of SSNs under the Act. Following the events of September 11, 2001, we increased management attention to possible enumeration weaknesses. We have developed major new initiatives that affect the assignment of SSNs to citizens and noncitizens alike. The examination of how and to whom we assign SSNs, which includes possible misuse of the SSN—unauthorized assignment or fraudulent application—is an issue of the utmost importance to us. As the Agency responsible for assigning SSNs, and maintaining the earnings records and other personal information for millions of SSN holders, SSA is responsible for investigating the misuse of SSNs.

*Legality of Regulation*

*Comment:* Several commenters questioned the legal basis for SSA's regulation with respect to F–1 students and on-campus work, saying that neither the Act nor SSA's regulations require actual employment as a precursor to obtaining an SSN.

*Response:* As already discussed in the Background section of the Preamble, we believe the Act supports a change in our regulations with respect to the type of evidence we require that is both appropriate and convincing to establish a work-related need for SSNs assigned to F–1 students. While F–1 students are allowed into the U.S. to study, DHS regulations also provide specific types of work in which F–1 students may engage. They are not allowed to work anywhere they wish in the general economy. As part of the application process for an SSN, SSA needs to know where an F–1 student will work in order to verify that the SSN will be used for legitimate and authorized purposes as allowed by the student's immigration classification.

For off-campus work, the F–1 student will have an EAD. If CPT is involved, the F–1 student will have the I–20 completed and signed by the DSO with specific employment information on the employment page (page 3). For on-campus work, DHS regulations require authorization by the school, although no specific endorsement by the school or DHS is necessary. *See* 8 CFR 274a.12(b)(6)(i). We are revising our regulations to state that we will need to see evidence of employment authorization, as well as evidence that a specific job has been secured, in order to establish a work-related need for the SSN.

The Act and regulations allow the Commissioner, as custodian of the SSN, to make rules and regulations that are necessary and appropriate to administer Social Security programs. Our rule is revising 20 CFR 422.105, "Presumption of authority of nonimmigrant alien to accept employment," and 20 CFR 422.107, "Evidence Requirements," to more clearly stipulate what is convincing evidence for F–1 students so as to assign them SSNs.

The additional documentation we are requiring will provide more definitive evidence than our current process of accepting DSO letters that confirm only that the student is enrolled in a full course of study and is work-authorized. SSA's OIG and others have found these procedures to be deficient. The new procedures will link the request for an SSN to an actual job that the student is allowed to hold, consistent with the F–1 status, and will help prevent the proliferation of SSNs for non-work purposes.

*F–1 Work on Campus "Incident to Status"*

*Comment:* Some commenters questioned SSA's understanding of DHS regulations as they pertain to our asking for additional documentation about the F–1 student's on-campus work, saying that such employment, under immigration regulations, is "incident to their status" or that it is a "benefit" or "entitlement" of their immigration status and, therefore, needs no formal documentation. One commenter said our proposed ruling "effectively negates" DHS regulations allowing F–1 students to work on campus.

*Response:* We have compared DHS regulations with our draft regulations and disagree that our regulations will negate an F–1 student's on-campus work possibilities. DHS establishes work eligibility for the various immigration categories. For F–1 on-campus work, DHS has delegated the authority to authorize work to the DSOs. *See* 8 CFR 274a.12(b)(6). DHS regulations at 8 CFR 214.2(f)(9) include a restriction on the number of hours that can be worked while school is in session and provide the specifics for what does and does not constitute "on-campus employment." For example, this regulation states that, "Employment with on-site commercial firms, such as a construction company building a school building, which do not provide direct student services is not deemed on-campus employment" and, "An F–1 student may engage in any on-campus employment authorized under this paragraph which will not displace United States residents."

Further, 8 CFR 274a.12(b) provides that an F–1 student is authorized to work with a "*specific employer* incident to status" (italics added), *i.e.*, if that employment is on campus or for purposes of CPT. 8 CFR 274a.12 (b)(6) adds another qualifier about such employment: the student must be in "valid nonimmigrant status." Also, CPT must be specifically authorized by the DSO before an F–1 student may engage in CPT. The types of off-campus work an F–1 student may perform are governed by other DHS regulations not directly germane to this discussion.

Thus, an F–1 student's ability to work on campus is dependent on meeting certain DHS criteria as stipulated in that Agency's regulations.

When an F–1 student files an application for an SSN, and if the student does not have an employment authorization document from DHS or an I–20 with employment information filled in by the DSO (as well as the signed approval of the DSO) on the employment page (page 3), it is not obvious to an SSA employee that the F–1 student can work. We have no way of knowing if the F–1 student is still in status, and therefore eligible and authorized to work (*i.e.*, is still a lawfully enrolled F–1 student at the school in a full course of study and/or otherwise maintaining valid nonimmigrant F–1 student status as stipulated in DHS regulations). For this reason, we require additional documentation to verify or otherwise validate that the F–1 student is still meeting those legal obligations. Thus, we are requiring evidence and verification of a job or job offer in order to ensure that we are assigning an SSN for a legitimate work-related purpose within the scope of the F–1 student's immigration classification.

We do not believe that this additional documentation is "effectively negating" DHS regulations. From our discussions with DHS officials, we understand that they support our plans to assign SSNs to those F–1 students who have secured jobs. We also know of schools and universities in the U.S. that already advise their students not to visit an SSA office until they have a job, job

prospects or even a written job offer or "contract" in hand.

*DHS Does Not Require an F–1 Student To Have a Job Before Providing the Student an EAD*

*Comment:* One commenter said that DHS does not require an F–1 student to have a job before applying for an EAD to work off-campus and questioned why SSA is requiring proof of a job before assigning an SSN.

*Response:* We have discussed this issue with DHS officials in light of the regulations at 8 CFR 214.2(f)(9) that provide the DHS requirements that must be met before F–1 students can work while in the U.S. The DHS regulation cited does not require that an F–1 student prove he or she has an off-campus job before DHS provides the student an EAD. However, it does require that the DSO, as part of the student's application for an EAD, provide adequate "documentation" to prove why the student legitimately needs to work off-campus, and that the student is meeting all other requirements for maintaining lawful nonimmigrant status as an F–1 student at the school. This additional documentation provides support for the off-campus work and helps DHS decide whether to provide an EAD to the student. For SSA, the EAD provides a link to actual work.

Also, for CPT, DHS regulations provide that the DSO must first provide specific employment information on the employment page (page 3) of the SEVIS Form I–20 before the student may begin such work. The DSO updates "the student's record in SEVIS as being authorized for curricular practical training that is directly related to the student's major area of study." The DSO also indicates "whether the training is full-time or part-time, the employer and location, and the employment start and end date." Finally, the DSO prints out a copy of the employment page indicating that curricular practical training has been approved, signs and dates it, and returns the SEVIS Form I–20 to the student, prior to the student beginning the CPT. Again, this documentation provides SSA field employees a link to actual work.

The only type of work an F–1 student may engage in that does not require some type of additional documentation under DHS regulations as described above is on-campus work pursuant to 8 CFR 214.2(f)(9(i) and 274a.12(b)(6)(i). Each year, SSA field employees interview numerous F–1 SSN applicants who do not have EADs or work documented on their SEVIS Form I–20s. These are the types of cases that SSA's OIG, in several audits referred to earlier in this document, has found to be most problematic. Because in these cases it is not clear to SSA employees that the F–1 student needs an SSN for work (in the absence of an EAD or specific employment information on the I–20), we are requiring additional documentation from the F–1 student to confirm that he or she needs an SSN in order to work for a specific employer in a type of work allowed by their F–1 classification.

*Requirement for DSO Work Information and Verification of That Information With Employer for On-Campus Work*

*Comment:* A number of commenters agreed with our position that it is important to verify an F–1 applicant's claim with respect to employment on campus. A few commenters suggested that one all-inclusive letter, in which the DSO provides information about the type of work the student is performing and verification of that work, suffice as proof of employment.

*Response:* We appreciate these comments, but the intent of the rule is to provide not only a statement from the school's DSO about the student's enrollment in a full course of study and work information, but also to confirm that information with the actual department or school office employing the student. In those cases where the DSO might also be the actual employer of the F–1 student, we would ask to have that employment confirmed with the human resources department or some other department that is responsible for payroll and wage reporting. If a student has already started a job, a pay slip or stub from the employer for work already performed would be acceptable proof of employment.

The reasons for needing to corroborate the work information that the DSO provides has already been cited above: SSA's experience with "DSO letters" that were fabricated by students, work allegations where there are very limited or no on-campus jobs, and the various OIG and GAO reports that confirm these experiences and recommend we require proof of employment from F–1 students for on-campus work. The verification from the actual employer (or HR/payroll department) is meant to support the DSO's statement about the student's work and confirm the need for the student to be assigned an SSN.

*Curricular and Optional Practical Training, and Off-Campus Employment*

*Comment:* We received several comments that questioned how this regulation would affect F–1 students who need to perform curricular or optional practical training (CPT and OPT) as part of their program, or who need to work in cases of severe economic hardship.

*Response:* This regulation only affects F–1 students who want to work or are already engaged in general on-campus work. This regulation is not meant to apply to any other type of work that an F–1 student may be authorized to perform while in this country, including work for CPT purposes. We agree, however, that the regulation language as drafted did not make that clear with respect to CPT. We have thus changed the language of the regulation in this final rule in 20 CFR 422.105, "Presumption of Authority of Nonimmigrant Alien to Engage in Employment," and 20 CFR 422.107, "Evidence Requirements," to make it clear that this rule applies only to F–1 students who do not have an EAD *and* are not authorized by the DSO for curricular practical training (CPT) as shown on the student's SEVIS Form I–20, Certificate of Eligibility for Nonimmigrant (F–1) Student Status. For CPT work, we will not require a DSO letter or separate employment verification because the DSO already provides work authorization and additional specific employment information on the student's I–20 employment page (page 3) as evidence of work. For OPT and other types of off-campus employment, we use the employment authorization document (EAD) that the student receives from DHS as proof of work authorization. These students do not need to provide proof of having a job, as we are requiring of F–1 students for general on-campus work, because they have provided sufficient information to obtain authorization to work off-campus so that we know they are seriously planning to work.

*Exceptions to Regulation for Graduate Assistantships and Fellowships*

*Comment:* Some commenters asked about the potential impact of this regulation on individuals who are attending school, particularly graduate school, and receiving a fellowship or assistantship in exchange for teaching or other services.

*Response:* The regulation as written does not prohibit the F–1 student from presenting his or her acceptance letter, which outlines the stipulations of the work portion of the fellowship or assistantship, as proof of employment. In such cases, we may not require any additional statement from the employer, but we will require the letter from the DSO that certifies the student is

attending school and has authorization to engage in on-campus employment.

*Scholarships*

*Comment:* Some have asked about the potential impact on individuals who are attending school via academic or athletic scholarships, or some other form of subsidy where the student receives finances that are not in exchange for employment, but must be reported as income to the Internal Revenue Service (IRS).

*Response:* Those students who are receiving scholarships, and who do not qualify for an SSN under these revised regulations, should contact the IRS to inquire about how to file for an Individual Taxpayer Identification Number (ITIN) for legitimate income tax reporting purposes. *See* information on ITINs at the IRS Web site at the following URLs: *http://www.irs.gov/newsroom/article/0,,id=112728,00.html* and *http://www.irs.gov/individuals/article/0,,id=96287,00.html.*

We understand from discussions with IRS that students must provide evidence that they are not eligible for an SSN (letter from SSA) and a copy of their scholarship acceptance letter when applying for an ITIN under this provision. We recommend that these students seek the guidance of legal counsel or a local IRS representative for exact information and filing requirements.

Form W–7, *Application for IRS Individual Taxpayer Identification Number,* and instructions on who is eligible for an ITIN, and how and when to submit the W–7 are accessible online at *http://www.irs.gov/pub/irs-pdf/fw7.pdf.*

*Hiring Issues/Lack of On-Campus Jobs*

*Comment:* Several individuals commented that if new international students do not have their SSNs in hand, they would be at a severe disadvantage when vying for jobs against those students who already have their numbers and/or against U.S. citizen students.

*Response:* Those students who are looking for work off-campus are not affected by this regulation and will need to abide by current SSA regulations that require EADs as evidence of work authority before we will assign SSNs to them.

As far as how this regulation change would affect an F–1 student "competing" for an on-campus job with a U.S. student, we do not believe this regulation will create an additional burden for the F–1 student for several reasons. First, it is important to remember that many jobs that fall under the DHS definition of "on-campus" are often jobs that also count as Federal work-study employment available to U.S. students as part of their "financial aid" package. As such, these are jobs for which, under Federal regulations, international students do not qualify. Second, F–1 students cannot be placed in a job if their being hired into the position would displace an eligible U.S. student or U.S. worker for that same position. As is clearly stated in 8 CFR 214.2(f)(9)(i), "An F–1 student may engage in any on-campus employment authorized under this paragraph which will not displace United States residents." Where direct competition for an on-campus job (which could include those jobs eligible as Federal work-study positions for a U.S. student) occurs between an international student and a U.S. student, DHS regulations require that the position go to the U.S. student.

As far as the concern about how this regulation, in general, might affect those F–1 students who do not yet have SSNs vying against other students who do, we anticipate that SSA's new verification procedures utilizing the data in SEVIS (*see* next section) will result in F–1 student applicants being assigned SSNs much more quickly than has been the case in the past. We believe that any disadvantages that might exist for F–1 students who do not yet have their SSNs, versus students who do, will be minimized once the school's employer community understands that F–1 student applicants for on-campus jobs should receive SSNs very quickly after providing evidence to SSA that they have job offers.

Also, F–1 students, once they apply for an SSN, can request that SSA issue them an "acknowledgment letter." This dated letter confirms that SSA has received an application for an SSN. It can be given to any SSN applicant whose evidence must be verified before final action can be taken to assign or deny an SSN application. An F–1 student can show this letter to an employer as proof that they have filed for an SSN.

*Delays in Receiving SSNs Until DHS Verifies Nonimmigrant Status*

*Comment:* A number of commenters noted the delays in processing SSN requests due to the time it takes for SSA to receive a response from DHS that verifies the student's nonimmigrant status. One commenter noted that, "SSN applications for non-immigrant applicants already take from 2 weeks to 8 months to be approved by the social security office" and that this regulation would cause even more delays. Some students are offered jobs that are of short duration, such as being asked to quickly translate documents, or are asked to help with orientation sessions when they first arrive on campus at the beginning of a new school year. Receiving an SSN timely seems even more critical in these situations.

*Response:* SSA has recently developed, in conjunction with DHS and the Department of State, an expedited way to verify the nonimmigrant status of F–1 and M–1 (vocational/nonacademic) students and J–1 exchange visitors. For these categories of nonimmigrants, if we cannot verify their status online using the Systematic Alien Verification for Entitlements system (SAVE), we request verification from the Los Angeles Immigration Status Verification Unit (LOS ISV) of DHS. LOS ISV will search SEVIS records. If the school has "registered" or the sponsor has "validated" that student in the SEVIS database upon the student's arrival in the U.S. and before we request verification of that status from LOS ISV, a positive verification response indicating the student is "active" in SEVIS can be sent to SSA within a few days. Once verification of the student's status is received, SSA will assign an SSN and issue an SSN card within two weeks. It is important to note that while this new SEVIS process speeds up the verification of student status, there is no information currently contained in SEVIS that verifies employment for on-campus work.

*Hiring and Starting Work Without an SSN*

*Comment:* Quite a few commenters asked how F–1 students could apply for jobs without first having an SSN. They told us that their schools and/or private on-campus employers do not hire anyone who does not already have an SSN. Many commenters said it is against the law to hire without an SSN, and that SSNs are required for payroll reporting and end-of-year wage reporting.

*Response:* A valid SSN is necessary for all employees so that employers can properly report their wages to SSA and the IRS as required by law. However, there is no provision in the Act that requires employers to mandate that employees have SSNs before they can be hired. Neither is there any provision in the Act that prohibits an employee from beginning work if he or she has not yet obtained an SSN. Furthermore, when the employer files the annual wage report, if the employee has applied for an SSN but has not yet received it, the employer can still file without the particular SSN by following the

procedures located on SSA's Web site at *http://www.socialsecurity.gov/employer1.htm. See* also the fact sheet entitled, "Employer Responsibilities When Hiring Foreign Workers," found at *http://www.socialsecurity.gov/employer/hiring.htm.* However, once the employee has received the number, he or she is required to inform the employer as soon as possible, and may be requested by the employer to show his or her Social Security card. The employer can then file a corrected wage report with SSA and the IRS following instructions that are available on both Agencies' Web sites, *http://www.socialsecurity.gov/employer/how.htm* and *http://www.irs.gov.*

We recognize this regulation may cause inconveniences for schools using certain payroll software systems. Schools with this problem may wish to discuss a work-around with their software vendor. Also, schools may contact one of SSA's Employer Services Liaison Officers (ESLOs), who specialize in payroll reporting issues. ESLOs for each State are listed on our Web site at: *http://www.ssa.gov/employer/wage_reporting_specialists.htm.*

It is SSA's hope that our new expedited method of verifying a student's nonimmigrant status with DHS using SEVIS will minimize the delays for F–1 students in obtaining SSNs. We are receiving positive feedback from our offices that this new verification process that began in January 2004 is greatly reducing verification times.

*Timing of the Payment of Wages*

*Comment:* Several of the commenters raised concerns that if an F–1 student begins work without an SSN, the employer may withhold that student's paycheck until the SSN is assigned and an SSN card is received in the mail.

*Response:* Employers are required to abide by Federal and State laws with respect to the payment of wages to employees who have completed the agreed-to amount of work. Also, different States have different payday requirements. A comprehensive list can be found on the Department of Labor's Web site at: *http://www.dol.gov/esa/programs/whd/state/payday.htm.* We would strongly recommend that employers and/or their payroll or HR departments check Federal and State labor laws and their own legal counsel before withholding payment of wages from their employees.

As previously mentioned, there is no provision in the Act that requires employers to mandate that employees have SSNs before they can be hired. Neither is there any provision in the Act that prohibits an employee from beginning work if he or she has not yet obtained an SSN.

Also, we expect that the decreased amount of time it takes to verify student nonimmigrant status using the new SEVIS verification process should increase the speed with which SSA can assign SSNs and students can pass along their SSNs to employers.

*Form I–9 Requirements*

*Comment:* Several commenters pointed out the F–1 student's need to use the SSN card as one of the proofs of employment eligibility on Form I–9, Employment Eligibility Verification, when they are applying for a job. They feared that if a student were required to receive a job offer before they could receive an SSN, they would not get the number in time to fill out the required I–9 form completely.

*Response:* The restricted Social Security card given to an F–1 student cannot be used for Form I–9 purposes. Form I–9 was developed for verifying that new employees are eligible to work in the U.S. Section 1 is completed and signed by the employee at the time employment begins and asks the employee to provide his or her name, address, date of birth, SSN and attest that he or she is authorized to work in the U.S. The employer then completes and signs Section 2 after examining certain employee documents, specified as List A, List B and List C documents, on the reverse side of the Form I–9. Any one document from List A establishes both identity and employment eligibility. Therefore, if an employee presents a List A document, he or she does not have to show the employer any other document. However, if the employee does not have a List A document, then he or she must establish identity by providing one document from List B and establish employment authorization by providing one document from List C.

While the SSN card is shown as a List C document, it only applies to "unrestricted" SSN cards—those issued to U.S. citizens, asylees, refugees, legal permanent resident aliens, and citizens of Compact of Free Association countries (Palau, Micronesia and the Marshall Islands)—all of whom are authorized by their status to work without restriction in the U.S. The SSN card issued to an F–1 student does not meet the List C requirement because an F–1 student who is assigned an SSN will always receive a "restricted" SSN card. A restricted SSN card bears one of two legends: "Not Valid For Employment" or "Valid Only With INS Authorization." (Effective for SSN cards issued March 27, 2004, and later, the printed legend reads "Valid Only With DHS Authorization.") The F–1 student generally receives the second type. This means that, for employment purposes, a restricted SSN card does not provide employment eligibility. (*See* DHS Web site on Form I–9 located at *http://uscis.gov/graphics/howdoi/faqeev.htm,* which discusses that a restricted SSN card with the legend "Valid Only With INS (or DHS) Authorization" does not satisfy the Form I–9 requirements.) Since all SSN cards given to F–1 students include this legend, although the number is valid for wage and tax reporting purposes, the card itself does not prove employment eligibility. SSA's regulation does not change that fact.

DHS regulations at 8 CFR 274.a.2, accessible at *http://uscis.gov/lpBin/lpext.dll/inserts/slb/slb-1/slb-9960/slb-27136/slb-27219?f=templates&fn=document-frame.htm#slb-8cfrsec274a2,* discuss verification of employment eligibility and the Form I–9 requirements. Further questions regarding on-campus employment and what documentation is needed to meet the Form I–9 requirements should be directed to the Department of Homeland Security. We have been advised by DHS that the Employer, Business, Investor and School Services (EBISS) helpdesk (1–800–357–2099), which is part of the United States Citizenship and Immigrations Service (USCIS) Customer Service Support Center, is the appropriate place to call for Form I–9 questions.

*Obtaining Legal Employment*

*Comment:* A couple of commenters suggested that this regulation would make it harder for an F–1 student to get an SSN and make it more tempting for a student to get a job illegally.

*Response:* We do not believe that this regulation will make it so difficult to get an SSN that F–1 students will resort to working illegally in the U.S. resulting in negative consequences in their legal status. SSA is working to strengthen the integrity of the SSN while balancing the need to ensure that those who do need SSNs for work are assigned numbers as expeditiously and securely as possible.

*Discrimination*

*Comment:* Some commenters questioned the "fairness" of this regulation on this particular alien category. One individual asked whether international students who were denied employment could file a lawsuit for discriminatory practices based on "national origin."

*Response:* We do not believe there is anything in the proposed regulation that discriminates against a particular ethnic or national group. Any international F–1 student who meets the evidentiary requirements we have set forth for on-campus employment will be granted an SSN, regardless of nationality or ethnic origin.

*Diversity*

*Comment:* A few individuals commented that the proposed regulation would have a negative impact on the diversity of the academic community and the surrounding community at large, particularly the business community, by imposing a roadblock which could ultimately discourage international students from attending schools in the U.S.

*Response:* It is certainly not the intention of SSA in the development of this regulation to discourage international students from enrolling in U.S. schools. We are making every effort to provide assistance to schools and F–1 students and will continue to examine ways to minimize any unforeseen impact this regulation change may have on students' work lives in the future.

*The Need for an SSN To Secure Goods and Services in the Community*

*Comment:* A frequently mentioned issue was the expressed concern about the impact that denial, or delayed receipt, of an SSN would have on a student's ability to assimilate into U.S. society. In particular, the lack of access to a driver's license was listed as a significant concern, especially in comments from individuals who represent community colleges and other institutions where the population, or at least a significant portion of it, needs to drive to the campus. Commenters also noted that many foreign students find they cannot lease an apartment, open a bank account or negotiate utility services without an SSN, which has come to be a required element to do business with many providers of goods and services in U.S. society. Some commenters requested that SSA "do something" to prohibit this business use of the SSN.

*Response:* While we recognize the many uses of the SSN by other Federal and State agencies, organizations and businesses in U.S. society, the primary purpose of an SSN is for SSA to track earnings over a worker's lifetime. SSA cannot control the types of information that private businesses request of their customers. We suggest that schools work with the local businesses in the community on alternatives to requiring SSNs from their foreign students in order to access services.

From our discussions with some credit-checking agencies, we have been informed that credit checks can be run using the name and date of birth information without an SSN. While the SSN is often requested on business forms and applications, the SSN is not always a required data element if the applicant does not have one, but is required if the applicant has been assigned an SSN.

With respect to needing an SSN to open a bank account or cash or deposit payroll checks, it is our understanding from talking to various banks that most banks will cash a payroll check for a non-customer if the check is from their bank. This should be helpful to many F–1 students whose employers' banks have branches in the employees' areas. Some banks charge for this service; others do not. There are other alternative business entities that cash checks for a fee.

Those students who need to open bank accounts, and who do not qualify for an SSN under these revised regulations, should contact the IRS to inquire about how to file for an Individual Taxpayer Identification Number (ITIN) for legitimate income tax reporting purposes. See information on ITINs at the IRS Web site at the following URLs: *http://www.irs.gov/newsroom/article/0,,id=112728,00.html* and *http://www.irs.gov/individuals/article/0,,id=96287,00.html.*

We understand from discussions with IRS that students who need to open bank accounts must provide evidence that they are not eligible for an SSN (letter from SSA) and a letter of intent to open an account from the financial institution when applying for an ITIN under this provision. We recommend that these students seek the guidance of legal counsel or a local IRS representative for exact information and filing requirements.

Form W–7, *Application for IRS Individual Taxpayer Identification Number,* and instructions on who is eligible for an ITIN, and how and when to submit the W–7 are accessible online at *http://www.irs.gov/pub/irs-pdf/fw7.pdf.*

As stated in Social Security regulation 20 CFR 422.104, the only circumstance in which SSA can assign an SSN to an alien for other than work purposes is when it is for a valid non-work reason. The only valid non-work reasons to assign an SSN to an alien are:

- To satisfy a Federal statute or regulation that requires the alien to have an SSN in order to receive a federally-funded benefit (such as Temporary Assistance to Needy Families) to which the alien has otherwise established entitlement; or
- To satisfy a State or local law that requires an alien who is legally in the U.S. to have an SSN in order to receive public assistance benefits (such as State-funded general assistance) to which the alien has otherwise established entitlement.

See also SSA's recently promulgated regulation "Evidence Requirements for Assignment of Social Security Numbers (SSNs): Assignment of SSNs for Nonwork Purposes," published in the **Federal Register** on September 25, 2003 (68 FR 55304), and effective October 27, 2003. In relation to this regulation, we have worked with States to amend their policies regarding the use of an SSN to obtain a driver's license. This regulation is available online at Social Security's Web page *http://www.socialsecurity.gov/regulations/articles/rin0960_af05f.htm.*

We do not consider the need of an SSN in order to apply to purchase or rent a house or apartment, obtain a driver's license, and apply for a bank account, to be valid non-work reasons to assign a nonimmigrant an SSN. An F–1 student who does not qualify for an SSN may qualify for an ITIN under certain limited circumstances that involve Federal tax reporting or filing requirements. An ITIN is issued by the IRS. See section on "Scholarships" for information on applying for an ITIN.

Currently, there are no statutory restrictions on the private sector's lawful use of the SSN. Action to limit the use of the SSN in the private sector would require Congressional action and is outside the scope of this regulation.

*Ways SSA Will Provide Assistance to the Public and SSA Employees*

*Comment:* Several commenters remarked on the extra burden this rule would place on school administrations and F–1 students. Some believe that this regulation will have an adverse economic effect on the community by reducing foreign student attendance at approved schools. One commenter questioned how SSA intends to adequately communicate this revision of policy to our own employees to ensure that it is carried out correctly and equitably. Some questioned how the regulation will be implemented operationally; *i.e.*, what specific types of documents and information will DSOs and employers be expected to provide?

*Response:* SSA recognizes that this regulation will: (1) Cause some inconvenience; (2) need to be communicated widely and explained in detail to the academic community; and (3) need to be well-understood and

applied equitably and respectfully by SSA field employees.

To lessen the inconvenience and to help schools and F–1 students comply with this rule, we will do the following:

- Provide a "sample" DSO letter format that schools can download from our Web site and/or obtain from local SSA field offices that can be used to document student attendance and work information;
- Provide a "sample" employer letter format that employers can download from SSA's Web site and/or obtain from local SSA field offices that can be used in certifying an F–1's on-campus work relationship (if the student does not have a pay stub or pay slip);
- Provide appropriate assistance to F–1 students in SSA field offices, as well as through the toll-free 800 assistance number (1–800–772–1213), if they are having difficulty securing the needed documentation.

As public information tools, we will develop informational handouts and fact sheets—available online and in SSA field offices—including an explanation of the new evidence requirements. Some other public information materials may be developed as needed.

SSA currently has available online at *http://www.ssa.gov/employer/hiring.htm* an informational fact sheet for employers, "Employer Responsibilities When Hiring Foreign Workers," that provides SSA and IRS Web sites, links to employer reporting responsibilities, and how to report if the employee has not yet received his or her SSN.

And, SSA will continue to work with schools and advocacy groups on F–1 student issues as they arise.

For our own employees, we will:

- Issue new national instructions that implement the provisions of the revised regulations;
- Provide appropriate training on how the new procedures are to be implemented; and
- Advise our field and regional offices to provide feedback on how the process is working.

*Excessive Paperwork*

*Comment:* Several commenters raised the issue of the increased amount of paperwork a school's administration would have to create and process to comply with the proposed regulation. Their concern is that the already strained resources of school administrations will be stretched even further if they are required to provide additional documentation to prove that a student already has employment or an employment commitment before obtaining an SSN.

*Response:* While we recognize there will be an increased demand on school administrators, the primary concern of SSA must be to ensure the integrity of SSNs by not assigning SSNs for other than work or valid non-work purposes. We certainly sympathize with the plight of administrators and that is why SSA will provide assistance to the schools as described above.

**Regulatory Procedures**

*Executive Order 12866, as Amended by Executive Order 13258*

The Office of Management and Budget (OMB) has reviewed these final rules in accordance with Executive Order 12866, as amended by Executive Order 13258. We have also determined that these rules meet the plain language requirement of Executive Order 12866, as amended by Executive Order 13258.

*Regulatory Flexibility Act*

We certify that these final rules will not have a significant economic impact on a substantial number of small entities because they affect only individuals. Thus, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

*Federalism*

We have reviewed these final rules under the threshold criteria of Executive Order 13132 and have determined that they 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. There may be some minimal impact on those States whose academic institutions have not developed an alternative method in their recordkeeping systems for identifying F–1 students not eligible for SSNs. There may also be some minimal impact on States whose academic institutions may be an F–1 student's employer.

*Paperwork Reduction Act*

The Paperwork Reduction Act (PRA) of 1995 says that no persons are required to respond to a collection of information unless it displays a valid Office of Management and Budget (OMB) control number. In accordance with the PRA, SSA is providing notice that OMB has approved the information collection requirements contained in §§ 422.105(a) & (b) and 422.107(e)(2) of these final rules. The OMB Control Number for these collections is 0960–0684, expiring 01/31/2007.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security—Disability Insurance; 96.002 Social Security—Retirement Insurance; 96.004, Social Security—Survivors Insurance.)

**List of Subjects in 20 CFR Part 422**

Administrative practice and procedure, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Social Security.

Dated: June 7, 2004.

**Jo Anne B. Barnhart,**

*Commissioner of Social Security.*

■ For the reasons set forth in the preamble, we are amending part 422, subpart B, chapter III of title 20, Code of Federal Regulations as follows:

## PART 422—ORGANIZATION AND PROCEDURES

### Subpart B—[Amended]

■ 1. The authority citation for subpart B of part 422 continues to read as follows:

**Authority:** Secs. 205, 232, 702(a)(5), 1131, and 1143 of the Social Security Act (42 U.S.C. 405, 432, 902(a)(5), 1320b–1, and 1320b–13).

■ 2. Section 422.105 is revised to read as follows:

**§ 422.105 Presumption of authority of nonimmigrant alien to engage in employment.**

(a) *General rule.* Except as provided in paragraph (b) of this section, if you are a nonimmigrant alien, we will presume that you have permission to engage in employment if you present a Form I–94 issued by the Department of Homeland Security that reflects a classification permitting work. (*See* 8 CFR 274a.12 for Form I–94 classifications.) If you have not been issued a Form I–94, or if your Form I–94 does not reflect a classification permitting work, you must submit a current document authorized by the Department of Homeland Security that verifies authorization to work has been granted *e.g.*, an employment authorization document, to enable SSA to issue an SSN card that is valid for work. (*See* 8 CFR 274a.12(c)(3).)

(b) *Exception to presumption for foreign academic students in immigration classification F–1.* If you are an F–1 student and do not have a separate DHS employment authorization document as described in paragraph (a) of this section *and* you are not authorized for curricular practical training (CPT) as shown on your Student and Exchange Visitor Information System (SEVIS) Form I–20, Certificate of Eligibility for Nonimmigrant (F–1) Student Status, we will not presume you have authority to

engage in employment without additional evidence. Before we will assign an SSN to you that is valid for work, you must give us proof (as explained in § 422.107(e)(2)) that:

(1) You have authorization from your school to engage in employment, and

(2) You are engaging in, or have secured, employment.

■ 3. Section 422.107 is amended by redesignating paragraph (e) as paragraph (e)(1), adding a heading for paragraph (e)(1), and adding a new paragraph (e)(2) to read as follows:

**§ 422.107 Evidence requirements.**

* * * * *

(e) *Evidence of alien status*—(1) *General evidence rules.* * * *

(2) *Additional evidence rules for F–1 students*—(i) *Evidence from your designated school official.* If you are an F–1 student and do not have a separate DHS employment authorization document as described in § 422.105(a) *and* you are not authorized for curricular practical training (CPT) as shown on your SEVIS Form I–20, Certificate of Eligibility for Nonimmigrant (F–1) Student Status, you must give us documentation from your designated school official that you are authorized to engage in employment. You must submit your SEVIS Form I–20, Certificate of Eligibility for Nonimmigrant (F–1) Student Status. You must also submit documentation from your designated school official that includes:

(A) The nature of the employment you are or will be engaged in, and

(B) The identification of the employer for whom you are or will be working.

(ii) *Evidence of your employment.* You must also provide us with documentation that you are engaging in, or have secured, employment; *e.g.*, a statement from your employer.

**§§ 422.103, 422.107, and 422.110 [Amended]**

■ 4. In addition to the amendments set forth above, remove the terms "Immigration and Naturalization Service (INS)," "Immigration and Naturalization Service," and "INS" and, in their place, add the term "Department of Homeland Security" in the following places:

a. Section 422.103(b)(3), and (c)(3);

b. Section 422.107(d)(4), and (d)(6); and

c. Section 422.110(b).

[FR Doc. 04–20614 Filed 9–10–04; 8:45 am]

BILLING CODE 4191–02–P

## DEPARTMENT OF THE INTERIOR

### Minerals Management Service

### 30 CFR Part 204

**RIN 1010–AC30**

## Accounting and Auditing Relief for Marginal Properties

**AGENCY:** Minerals Management Service (MMS), Interior.

**ACTION:** Final rule.

**SUMMARY:** MMS is promulgating new regulations to implement certain provisions in the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996. These regulations explain how lessees and their designees can obtain accounting and auditing relief for production from Federal oil and gas leases and units and communitization agreements that qualify as marginal properties.

**DATES:** Effective September 13, 2004.

**FOR FURTHER INFORMATION CONTACT:** Sharron L. Gebhardt, Lead Regulatory Specialist, Chief of Staff Office, Minerals Revenue Management, MMS, telephone (303) 231–3211, fax (303) 231–3781, or e-mail *sharron.gebhardt@mms.gov.*

The principal authors of this rule are Sarah L. Inderbitzin of the Office of the Solicitor and Mary A. Williams of Minerals Revenue Management, MMS, Department of the Interior (Department).

**SUPPLEMENTARY INFORMATION:**

### I. Background

On August 13, 1996, the President signed into law the Federal Oil and Gas Royalty Simplification and Fairness Act (RSFA).[1] RSFA amends the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA).[2] Section 7 of RSFA allows MMS and the State concerned (defined under RSFA as "a State which receives a portion of royalties or other payments under the mineral leasing laws from [a Federal onshore or OCS oil and gas lease]")[3] to provide royalty prepayment and regulatory relief for production from marginal properties for Federal onshore and Outer Continental Shelf (OCS) oil and gas leases.[4] The stated purpose of granting relief to production from marginal properties under RSFA is to promote production, reduce administrative costs, and increase net receipts to the United States and the States.[5] Specifically, paragraph (c) of the new 30 U.S.C. 1726 enacted by RSFA section 7 directed the Secretary of the Interior (and States that had received a delegation of audit authority) to "provide accounting, reporting, and auditing relief that will encourage lessees to continue to produce and develop" marginal properties, "*[p]rovided* that such relief will only be available to lessees in a State that concurs." If royalty payments from a lease are not shared with a State under applicable law, then the Secretary alone determines whether to provide relief.

In response to the RSFA section 7 amendments, MMS conducted three workshops to receive input from a wide variety of constituent groups to develop a proposed rule. The workshops were held at MMS offices in Denver, Colorado, on October 31, 1996; January 23, 1997; and November 5, 1997. Representatives from several Federal and State government organizations participated along with industry organizations representing both small and large Federal oil and gas lessees. The input received during these workshops was instrumental in developing the proposed rule that was published in the **Federal Register** on January 21, 1999 (64 FR 3360). The proposed rule addressed only accounting and auditing relief. It did not propose prepayment relief. The final rule also does not include any provisions authorizing prepayment relief. That subpart is reserved for possible later rulemaking.

Public comments received in response to the proposed rule were sharply contradictory. The comments fell into two general categories:

1. The States believed that MMS was offering too much relief to industry; and

2. Industry believed that the rule was too complicated and did not offer enough relief.

Because of the contradictory opinions, the Associate Director for Minerals Revenue Management asked the Department's Royalty Policy Committee (RPC) to form a subcommittee to review the marginal property issue and make recommendations to the Department on how MMS should proceed. The RPC appointed a subcommittee with members from several industry associations and the major States affected by the relief provisions. MMS employees and a representative of the Office of the Solicitor served as technical advisors to the subcommittee.

The RPC subcommittee prepared a report and submitted it to the RPC on

[1] Pub. L. 104–185, as corrected by Pub. L. 104–200.

[2] 30 U.S.C. 1701 *et seq.*

[3] 30 U.S.C. 1702(31).

[4] 30 U.S.C. 1726.

[5] 30 U.S.C. 1726(a).

March 27, 2001. The RPC accepted the subcommittee's recommendations. On August 2, 2001, the Acting MMS Director—on behalf of the Secretary—approved the report and advised MMS to proceed with a supplementary proposed rule incorporating the subcommittee's recommendations. The MMS published a supplementary proposed rule on March 31, 2003 (68 FR 15390), that included the RPC subcommittee's recommendations with one exception described in the response to comments in the next two sections.

**II. Comments on the 1999 Proposed Rule**

MMS received comments on the initial proposed rule published on January 21, 1999 (64 FR 3360), from the following nine entities:

- 3 States;
- 1 State and Indian audit organization;
- 2 oil and gas producers;
- 2 industry associations; and
- 1 law firm [hereinafter the "law firm"] representing 1 industry association and 11 oil and gas companies.

These comments are analyzed and discussed below:

*Definition of Base Period*

*1999 Proposed Rule.* In § 204.2, MMS proposed to define the base period as the 12-month period from October 1 through September 30 immediately preceding the calendar year in which the lessee takes or requests marginal property relief.

*Public Comments.* One State commented that the base period should track as closely as possible to the beginning of the applicable calendar year in which the lessee takes marginal property relief. One producer requested that the base period be moved from October 1 through September 30 to September 1 through August 31 because the proposed period did not allow sufficient time for producers to report. One industry association also requested that the base period be moved back to give industry more time for calculations.

*RPC Subcommittee Recommendation.* The subcommittee members discussed the need to change the proposed base period. Producer groups indicated that the base period needed to be moved back at least 1 or 2 months. However, one State representative said that the base period needed to be as close to the calendar year as possible, but the State could accept moving it back to September 1 through August 31. The subcommittee ultimately recommended changing the base period to July 1 through June 30. The subcommittee agreed that it was necessary to move the base period back in order for MMS to publish a **Federal Register** notice before the first of the calendar year listing which States were participating in the marginal property relief options. The subcommittee decided that the following schedule should meet the needs of all parties (industry, States, and MMS):

August 15 Operators submit production reports for June production.

October 1 MMS furnishes States a report of marginal properties for July–June base period.

November 1 States notify MMS if they wish to opt in or out of marginal property accounting and auditing relief (if a State fails to notify MMS, it is deemed to have opted out).

December 1 MMS publishes a **Federal Register** notice listing which States are opting in or out.

January 31 Payor notifications are due on the marginal properties that they will begin reporting annually.

February 28 Payor's annual royalty report and payment are due on marginal properties for which relief was taken for the previous calendar year (unless an estimated payment is on file, in which case the royalty report and payment are due on March 31).

*MMS Response.* We agree with the RPC subcommittee recommendation to change the period to July 1 through June 30.

*Definition of "Producing Wells"*

*1999 Proposed Rule.* In § 204.2, MMS proposed to define producing wells as only those producing oil or gas that contribute to the sum of the barrels of oil equivalent (BOE) used in the calculation of a marginal property under § 204.4. The definition excludes injection or water wells.

*MMS Response.* MMS is clarifying the definition of "producing wells" in the final rule to further specify which wells will be included in calculating a marginal property. We are adding a sentence to clarify that wells with multiple zones commingled downhole are considered as a single well. Counting each commingled zone as a separate completion overstates the number of producing well days in determining the average daily well production for a property.

*Definition of "Property"*

Although the proposed rule did not contain a definition of "property," we added a definition to the final rule for clarification. The rule uses the term "property," and not all properties will qualify as marginal properties. Therefore, we are defining property as a lease, a portion of a lease, or an agreement that may be a marginal property if it meets the qualifications of this subpart. Section 204.4 explains what criteria a property must meet to qualify as a marginal property.

*Definition of "Marginal Property"*

*1999 Proposed Rule.* In § 204.4, MMS proposed to define a "marginal property" as a property having average daily well production of less than 15 BOE per well per day during the base period.

*Public Comments.* The law firm and the two industry associations suggested that MMS establish separate production levels for different situations, particularly offshore and onshore properties. One State was concerned that using all producing wells in the calculation could result in classifying properties with high-producing wells as marginal. The same State also objected to MMS delegating to itself the determination of what marginal production is because RSFA stated that MMS and the States should determine the definition jointly.

*RPC Subcommittee Recommendation.* The subcommittee members discussed the comment that separate qualification rates should be established for offshore and onshore properties. MMS representatives advised the subcommittee that industry had previously formed an operational group to establish a rate for offshore, but the group could not agree and the idea was dropped. Subcommittee members also discussed whether the States could set their own individual qualification rates. The subcommittee members decided this was not acceptable because of the administrative burden associated with tracking and auditing different rates for different States. One State representative was concerned that some States might want to offer some relief but not at an average daily production of less than 15 BOE. The RPC subcommittee did not recommend any changes in the definition of "marginal property."

*MMS Response.* In the final rule MMS retains the definition of "marginal property" contained in the 1999 proposed rule with minor modifications to clarify how a lease qualifies as marginal. We moved the information regarding Indian leases not being eligible for relief to § 204.1, and added to the first sentence of § 204.200 that you may obtain accounting and auditing relief for "Federal onshore or OCS

lease" production from a marginal property.

Also, as explained in the proposed rule, under § 204.4(a)(1), if your lease is not in an agreement, then your entire lease is a property that must qualify as a marginal property under paragraph (b) of this section. In other words, these are stand-alone Federal leases, and the entire lease would have to qualify under § 204.4.

Under § 204.4(a)(2), if all or a portion of your lease is in one agreement, then the entire agreement must qualify as a marginal property under paragraph (b) of this section. For example, even if other leases in the agreement are not Federal leases, you must use the production attributable to those leases, as well as your lease, in order to make the calculation under paragraphs (b) and (c) of this section to determine whether the agreement meets the production level limits under paragraph (b). If the agreement does qualify, then the production attributable to your lease is eligible for relief under this part. If there are other Federal leases in the agreement, then production attributable to those leases also could qualify for relief, but the lessees or designees of those leases will need to apply individually.

Under § 204.4(a)(3), if all or a portion of your lease is in more than one agreement, then each agreement must qualify separately as a marginal property under paragraph (b) of this section. In addition, for each agreement that qualifies, only the production attributable to your lease or to the part of your lease in that agreement would be eligible for relief under this part. For example, if 50 percent of your lease is included in agreement "A," and 50 percent of your lease is included in agreement "B," then agreement "A" must qualify as marginal in order for the production attributable to your lease included in agreement "A" to be eligible for relief. Likewise, in order for the production attributable to the 50 percent of your lease included in agreement "B" to be eligible for relief, agreement "B" must qualify as marginal. Any production from your lease that is not committed to an agreement also may be eligible for separate relief under paragraph (4) of this section.

Under § 204.4(a)(4), if only a portion of your lease is in an agreement and you have production from the stand-alone portion of the Federal lease that is not in the agreement, then the stand-alone portion must qualify separately as a marginal property under paragraph (b) of this section. For example, if 50 percent of your lease is included in an agreement and 50 percent is not, the 50 percent that is not included in the agreement must qualify separately as marginal property under paragraph (b) of this section. This would be the case even if the 50 percent that is included in the agreement did not qualify as a marginal property.

In this final rule, we deleted the word "entire" from paragraph (a)(1) because it is unnecessary since there is only one lease. In addition, in paragraph (a)(3), we revised the rule to add language like paragraph (a)(2) making it clear that any production from your lease that is not in the agreement may be separately eligible for relief under section (a)(4).

We also modified paragraph (c) by removing "on or attributable to" in the first sentence to clarify that the entire property (whether a stand-alone lease, or agreement) must qualify as marginal, not just the production attributable to your lease, or portion of your lease. We also added language in the first sentence to state that you must divide the sum of all BOE for all producing wells on the property "during the base period" to clarify the calculation. In addition, to clarify that the "property" (whether a stand-alone lease, or agreement) must qualify as marginal, not just the production attributable to your lease which may be only a part of the relevant property (*e.g.*, an agreement), we replaced "your property" with "the property." Also, throughout the final rule, we have replaced "marginal property" with "marginal property production" when required to distinguish between the "marginal property" that the calculation in this section applies to and your "marginal property production" for which you are seeking relief.

MMS agrees with the subcommittee's conclusion that using different State production levels to define "marginal property" would be too administratively onerous for use. Such an approach also would result in a Federal law having different meanings in different States, which would raise serious legal concerns.

Although using all producing wells in the calculation to determine whether a property is marginal may result in some leases or units with high-producing wells being classified as marginal properties, we believe it would be too administratively burdensome to allow relief for individual wells, rather than by lease or unit or communitization agreement (hereinafter referred to as "agreement" in this context) as the rule provides. Moreover, MMS believes that, because a State may opt out on providing relief if it does not concur with the definition of "marginal property," the final rule allows the Secretary (acting through MMS) and the State to "jointly determine, on a case-by-case basis, the amount of what marginal production from a lease or leases or well or wells, or parts thereof" may obtain royalty accounting and auditing relief, as the statute provides (30 U.S.C. 1726(a)). Several State representatives on the subcommittee ultimately recommended using the production level in the proposed rule.

*Statutory Requirements for Relief*

*1999 Proposed Rule.* In § 204.5, MMS reiterated the RSFA statutory requirements that any relief granted for marginal properties must promote production, reduce administrative costs, and increase net receipts to the Federal Government and the States.

*Public Comments.* One State asserted that the proposed rule was contrary to law because it was unlikely to promote production or increase net receipts and there is no way to determine whether or not the relief will increase net receipts. The State also expressed concern about the loss of the time value of royalty receipts if we allow delayed reporting.

*RPC Subcommittee Recommendation.* The subcommittee discussed numerous times the difficulty in finding possible relief options that would meet all three RSFA objectives. The subcommittee recommended that two relief options be retained—cumulative reporting and "other" relief.

*MMS Response.* We understand the State's concerns but do not agree that the relief offered will not promote production or increase net receipts. Because use of the annual reporting option is limited in § 204.202 to properties producing 1,000 BOE or less annually, we believe there will be little loss, if any, of time value of the royalties. Moreover, we believe the administrative savings to the lessee will promote production, and the administrative savings to MMS and the States will more than offset any possible loss of interest. A member of MMS's reengineering team informed the subcommittee that each different relief option would require modifications to MMS's compliance programs and thus add cost. In the final rule, we limit our relief options to those recommended by the subcommittee to avoid being cost prohibitive.

However, in order to partially address the State's concerns and to be consistent with RSFA's language, we modified § 204.5(b) to make it clear that MMS, with a State s concurrence, may decide to discontinue any relief granted, at any time. In addition, we made it clear that MMS s decision to discontinue relief is not appealable within the Department.

Thus, MMS will consult with the States about whether to discontinue relief, but MMS will issue the decision to discontinue relief.

Section 204.5(b)(1) also explains that, if MMS terminates your cumulative reports and payments relief under this section, your relief continues until the end of the calendar year in which you received the notice. For other types of relief, MMS's notice will tell you when your relief terminates.

*State Liability for Denials of Requests for Relief*

*1999 Proposed Rule.* In § 204.6, MMS proposed that, if MMS denied a request for relief based on a State's denial, then the decision was final for the Department and could not be appealed administratively.

*Public Comments.* One State expressed the opinion that MMS's interpretation of RSFA was incorrect and left the States open to litigation in Federal court. Another State indicated that the proposed rule did not clearly acknowledge that nothing in RSFA serves to waive a State's immunity from suit.

*RPC Subcommittee Recommendation.* All of the State representatives on the subcommittee expressed concern over the language in the proposed rule that said if a decision not to grant relief is based on a State's denial, the decision would not be subject to administrative appeal. This would put any challenge to a decision not to grant relief directly into Federal District Court. The States were not willing to accept that risk. Based on this discussion, the subcommittee sent a request to seven State agencies asking their opinion on the comments raised by State representatives on the subcommittee. Only one agency responded, stating that it agreed with the other States' concerns. Consequently, the subcommittee recommended that each State be given the ability to determine, before each calendar year, whether it will allow either the notification-based relief option or the request-based relief option, or both. If a State decides to allow the request-based relief option, the State would thereby agree to let MMS make the final decision on the relief request. That decision could then be appealed administratively within the Department.

*MMS Response.* We agree with the subcommittee's recommendation. We also think that modifying § 204.207(b) in the final rule to read as follows will eliminate the States' concerns:

> If there is a State concerned for your marginal property that has determined in advance under § 204.208 that it will allow either or both of the relief options under this subpart, MMS will decide whether to approve, deny, or modify your relief request after consulting with the State concerned.

In addition, in § 204.206(a), we codified the RPC subcommittee's recommendation that the State be consulted. Thus, the approval process under the final rule is like the current process for issuance of orders where the State has performed the audit. Although the State would be consulted regarding whether to grant, deny, or modify relief, MMS would ultimately issue the decision and the State would not be subject to suit in Federal District Court. Moreover, any State that does not wish to allow accounting and reporting relief may opt out.

*Who May Request Relief?*

*1999 Proposed Rule.* In § 204.201, MMS proposed that a lessee or the lessee's designee for a Federal property could obtain relief if the property qualifies as marginal. Further, the lessee or lessee's designee could request relief only for the lessee's fractional interest in the property.

*Public Comments.* One industry association liked the fact that not all lessees in a property have to seek relief in order for an individual lessee to take relief on the lessee's portion. One State commented that RSFA did not allow designees to apply for relief in place of the lessee.

*RPC Subcommittee Recommendation.* The subcommittee suggested retaining the original proposed language concerning designees.

*MMS Response.* We agree with the State that RSFA does not specifically state that designees may seek relief on behalf of lessees. However, it also does not specifically preclude such action. Indeed, 30 U.S.C. 1726(c) merely authorizes the Secretary and delegated States to provide relief "to encourage lessees to continue to produce and develop properties" and that relief will only be "available to lessees in a State that concurs" with granting that relief. The statute is silent about who may request relief. Therefore, because the statute is silent and designees are acting as the lessee's agent, we believe it is reasonable and consistent with RSFA to authorize designees to request relief under this rulemaking.

The RPC subcommittee also recommended that we not require all lessees or designees for a property to apply for relief. Therefore, in the final rule, we added language in § 204.201(a)(3) to specifically state that you may obtain relief even if the other lessees and designees for your property do not request relief.

*Cumulative Reporting and Payment Relief*

*1999 Proposed Rule.* In § 204.203, MMS proposed to allow lessees to report quarterly, semiannually, or annually depending upon the volume of royalty BOE produced on the property.

*Public Comments.* One State objected to allowing payments less often than monthly because that is what is required by lease terms. The law firm commented that cumulative reporting should not be less often than annually. One industry association suggested that the thresholds for the lessee to be allowed to submit cumulative reports should be higher. The other industry association was concerned that lessees could not perform the complicated calculations to determine the level of relief and suggested MMS establish a consistent production level for eligibility for relief. The industry association also stated that the calculations to determine cumulative royalty reporting relief were too narrow and too burdensome, and all marginal properties should get the same relief. The association also suggested that MMS eliminate the requirement to report allowances separately on marginal properties and explain how estimates would work with reporting less often than monthly. One State was concerned that MMS would have to develop a separate database to track reporting dates and royalty rates by lessee.

*RPC Subcommittee Recommendation.* A representative of the MMS financial reengineering team was invited to a subcommittee meeting on cumulative reporting. The reengineering team representative stated that MMS would have to make some modifications to its financial system in order to process reporting on a periodic, cumulative basis. The representative explained that each reporting frequency would require funding for system modifications; thus, we would probably have to limit the available relief options to avoid being cost prohibitive. Consequently, the subcommittee recommended that only annual cumulative reporting be retained as a notification-based relief option and that this option be limited to marginal properties producing 1,000 BOE or less annually.

*MMS Response:* We agree with the subcommittee's recommendations. Moreover, with respect to one State's concern regarding the lease instrument's requirement that lessees pay monthly, the Government may, by rule, modify an obligation under the lease terms if doing so does not change the lessee's position to its detriment.

In addition, to clarify the requirements of this section (redesignated from § 204.203 to § 204.202 in this final rule), without changing the substance of the proposed rule, we reorganized this section of the final rule and added language to make clear when you must submit reports and payments, and how you must fill out your Report of Sales and Royalty Remittance, Form MMS–2014.

Further, as originally proposed § 204.202(g) addressed situations where * * * you dispose of a *marginal property* for which you have taken relief * * * (emphasis added). However, as discussed above, the lease for which you took relief may or may not be the entire marginal property. For example, your lease may be in an agreement, and the agreement is the "marginal property." If the agreement does qualify and you take relief for your lease production, but later dispose of your lease, you have not disposed of the "marginal property," only your "ownership interest" in the marginal property. Therefore, we have revised the rule in § 204.202(e) to state "[I]f you dispose of *your ownership interest in* a marginal property for which you have taken relief. * * *"

Finally, in § 204.202(e)(2) (proposed 204.202(g)(2)), we added language to codify the existing principle that late payment interest is owed if you do not report and pay timely after disposing of your ownership interest in a marginal property as required under this paragraph.

*Complex Calculations*

*1999 Proposed Rule.* In §§ 204.203, 204.204, and 204.205, the level of relief in each reporting option was based on various levels of marginal production. The calculations required lessees to multiply the BOE attributable to a marginal property by the applicable lease royalty rate.

*Public Comments.* One State commented that it believed MMS did not provide any rationale for the volume cut-offs for relief. Another State commented that it was unclear how MMS derived production levels for the levels of relief.

*RPC Subcommittee Recommendation.* Discussion in the subcommittee centered on the complexity of the calculations required to determine whether a marginal property qualified for a particular form of accounting relief. The proposed rule included five different production levels for the five different forms or levels of accounting relief. The subcommittee ultimately decided to recommend volume limits based on total BOE rather than royalty BOE. The subcommittee also reduced the number of volume levels from five to one. This simplified the calculations significantly.

*MMS Response.* We agree with the subcommittee's recommendations.

*Net Adjustment Reporting*

*1999 Proposed Rule.* In § 204.204, MMS proposed to allow net adjustment reporting as one of the notification-based relief options. In this reporting scenario, lessees could adjust a previously reported royalty line in a one-line net entry on the Form MMS–2014, rather than using MMS's traditional two-line adjustment process.

*Public Comments.* One State objected to allowing net adjustments. One industry association stated that net adjustment reporting should be allowed for all leases under MMS's reengineered system. The law firm, however, commented that net adjustments would not be "relief" for marginal properties if it is allowed for all reporters in the reengineered system.

*RPC Subcommittee Recommendation.* The subcommittee members discussed the problems MMS's financial reengineering team had encountered in trying to implement net adjustment reporting. Because of very specific requirements in FOGRMA for certain data elements to be displayed on the Explanation of Payments (EOP) sent to States and tribes, the reengineering team and MMS's industry partners found net adjustment reporting unworkable. However, MMS continues to look for acceptable net adjustment reporting options for reengineering purposes. Based on MMS's continuing efforts to offer net adjustment reporting for all reporters, the subcommittee recommended that the net adjustment reporting relief option be dropped.

*MMS Response.* We agree with the subcommittee's recommendation.

*"Rolled-Up" Reporting Relief Option*

*1999 Proposed Rule.* In § 204.205, MMS proposed to allow "rolled-up" reporting as one of the notification-based relief options. In this reporting scenario, lessees could report all selling arrangements for a revenue source under a single selling arrangement on the Form MMS–2014.

*Public Comments.* The law firm stated that "rolled-up" reporting was not significant relief. One of the industry associations agreed that, if all product codes could not be rolled up, this was not significant relief.

*RPC Subcommittee Recommendation.* The subcommittee recommended that the "rolled-up" reporting relief option be dropped. This recommendation was, again, associated with the problem of accommodating required EOP information and the fact that selling arrangements were dropped from the revised Form MMS–2014 effective October 1, 2001.

*MMS Response.* We agree with the subcommittee's recommendation.

*Alternative Valuation Relief Option*

*1999 Proposed Rule.* In § 204.206, MMS proposed to allow lessees to request approval to report and pay royalties using a valuation method other than that required under 30 CFR part 206.

*Public Comments.* In comments to the 1999 proposed rule and the 2003 supplementary proposed rule, one State and one industry association did not think alternative valuation relief was necessary because lessees already have that option under current valuation regulations. The law firm was troubled by the provision that the proposed valuation method should "approximate 30 CFR part 206." The law firm stated that, with all the litigation currently in progress, it would be difficult for someone to determine what that value should be. Another State commented that the proposed rule invited litigation because there was no way for a State or MMS to determine whether an alternative valuation method would "approximate" royalties in the future. The State further added that alternative valuation relief was not accounting, reporting, or auditing relief but really royalty relief.

*RPC Subcommittee Recommendation.* The subcommittee recommended dropping this option.

*MMS Response.* We agree with removal of this option because alternative valuation is still an option a lessee may request under "other relief" in § 204.203 of this final rule.

However, MMS believes the comments to the 1999 proposed rule and the 2003 supplementary proposed rule merit further response. First, the current rules under 30 CFR part 206.107(a)(6) do offer "alternative valuation relief." However, the fact that lessees may request alternative valuation relief under § 206.107(a)(6) does not preclude MMS from offering valuation relief as an option under this subpart. Second, there does not seem to be any real difficulty to ensure that royalties due under an alternative method approximate royalties due under 30 CFR part 206. Either the requested alternative method comes up with nearly the same royalties that would be due under 30 CFR part 206, or it does not. To that end, the 1999 proposed rule required that "any

alternative valuation method * * * [m]ust be readily determinable and certain. * * *" If MMS and the State concerned cannot determine that royalties due under the requested method approximate royalties due under 30 CFR part 206, then MMS can deny the request. In fact, in the 1999 proposed rule, MMS assumed that any request "would propose a simplified valuation method because it would reduce administrative costs."

Finally, "alternative valuation relief" does not equal "royalty relief." As MMS explained in the 1999 proposed rule and the 2003 supplementary proposed rule, the "alternate valuation relief option" would allow lessees and designees to "request and report and pay royalties using a valuation method other than that required under 30 CFR part 206." The "royalty relief" the Department offers under different rules is not an alternative valuation method, but rather a "royalty rate reduction." Accordingly, alternative valuation does not equal royalty relief—the savings under alternative valuation relief are administrative, whereas the savings under royalty relief are decreased royalties paid.

*1999 Proposed Rule.* In § 204.211, MMS proposed how it would review requests for alternative relief. MMS did not propose timeframes within which it would review requests.

*RPC Subcommittee Recommendation.* The subcommittee recommended that MMS have 120 days to review alternative relief requests. The subcommittee recommended that, if MMS did not complete the review within the prescribed 120 days, requests would be deemed "approved."

*MMS Response.* In the March 31, 2003, supplementary proposed rule, MMS described its concerns about deeming a request "approved" based solely on the length of time elapsed after receipt of the request without any Department review. We explained that one alternative was to deem the request denied if MMS does not approve or disapprove a lessee's request within 120 days after MMS receives the request. Because denial of a request may be appealed, this alternative would give the Department the opportunity to review the request and make an informed decision. The other option was to have no timing requirements by not including any provision at all.

Because of these concerns, we specifically requested comments on:

- Whether there should be a time limit on MMS approval after it receives a request for reporting, accounting, and auditing relief;
- Whether the request should be deemed approved or denied after some time period, and what that period should be; and
- Any other alternative approaches.

MMS did not receive any comments in response to these questions. In this final rule, MMS decided to have no time requirement for reviewing requests for alternative relief under § 204.206.

*Audit Relief Option*

*1999 Proposed Rule.* In § 204.207, MMS proposed to allow audit relief such as audits of limited scope, audits coordinated with other State or Federal agencies, or audits by independent public accountants.

*Public Comments.* One State objected to any limit on the scope of audits. The State further added that independent auditors do not review whether royalties are paid correctly. Another State asserted that it did not think audit relief was warranted and would not participate in it. The third State wanted to remove the audit relief option related to "coordinated royalty and severance tax audits" because it compromised the State's right to audit.

The law firm stated that audit relief was inconsequential because under the current strategy, marginal properties are seldom audited. One industry association agreed that audit relief was not of significant benefit because the States and MMS already practice coordinated audits. The other industry association, however, strongly supported audit relief.

*RPC Subcommittee Recommendation.* The subcommittee recommended dropping this option.

*MMS Response.* We agree with removal of this option because audit relief is still an option a lessee may request under "other" relief in § 204.203 of the final rule.

However, the comments to the 1999 proposed rule merit further response. First, in the 1999 proposed rule MMS gave three examples of potential audit relief: (1) audits of limited scope, (2) coordinated royalty and severance tax audits, and (3) reliance by MMS on independent certified audits. Interestingly, both Wyoming and South Dakota allow voluntary environmental audits where the lessees perform self-evaluations and are then immune from prosecution under certain conditions if they report violations. MMS's example in the 1999 proposed rule of possibly accepting a company's "affirmative statement in the audit report of the company's independent certified auditors that they have reviewed the company's royalty accounting practices with respect to marginal properties and found them to be in compliance with Federal lease terms, laws, and regulations" is similar. Although MMS did not propose to allow immunity to lessees who perform their own audits, there is no question that such audit relief would provide relief to lessees who would not have to spend the time and money to respond to MMS or State audit requests. It would also meet RSFA's goals to "reduce administrative costs, and increase net receipts to the United States and the States * * *" by saving MMS and States audit time on properties that produce nominal royalties.

With respect to comments that audit relief could interfere with MMS's or States' right to audit, we believe that § 204.204(a) negates this concern. This section explicitly states that MMS would not approve a request for accounting and auditing relief if the request "(a) Prohibits MMS or the State from conducting any form of audit." As MMS explained in the 1999 proposed rule, MMS developed an audit strategy to assure compliance with laws, regulations, and lease terms. To administer this strategy, MMS and the States must audit a sample of leases consisting of a wide range of conditions. Therefore, MMS proposed to deny any relief requested under this subpart that prevents it or a State from conducting an audit of a marginal property. Thus, fears of diminished capacity to audit due to audit relief granted seem largely unwarranted.

*Other Relief Option*

*1999 Proposed Rule.* In § 204.208, MMS proposed to allow a lessee to request any type of accounting and auditing relief that was appropriate for a specific marginal property provided that it was not specifically prohibited.

*Public Comments.* One State opposed the other relief option because the burden to evaluate the request was too great for a meaningless level of cost savings.

*RPC Subcommittee Recommendation.* The subcommittee members discussed all three approval-based relief options contained in the 1999 proposed rule. Because of sensitive issues in the original proposal, the subcommittee decided to recommend an approval-based relief option called "other" relief.

Other relief would apply to all marginal properties and could be anything within MMS authority that the lessee or his/her designee thinks would be marginal property relief. The lessee or designee would need to submit a proposal to MMS for approval. After consultation with the State or States concerned, MMS would decide whether

to grant the requested relief. Examples of what might be considered are audit relief or an alternative valuation method as discussed above under "Alternative Valuation Relief Option".

*MMS Response.* We agree with the subcommittee's recommendation. Further, we disagree with one State's comment that such an option is too great a burden relative to any savings. Any relief requested must meet the statutory requirements in RSFA to promote production, increase net receipts, and reduce administrative costs. The other relief option is now addressed in § 204.203 of this final rule.

*Disallowed Relief Options*

*1999 Proposed Rule.* In § 204.209, MMS listed relief items that MMS would not approve if requested by lessees.

*Public Comments.* One State wanted to add three items to the types of relief that MMS would not approve. The items were any relief request that (1) decreases royalty income below true market value, (2) increases allowances, or (3) reduces royalty-bearing volumes.

*RPC Subcommittee Recommendation.* The subcommittee recommended retaining the list of disallowed items with no changes.

*MMS Response.* We agree with the subcommittee. The relief options not allowed are now addressed in § 204.204 of this final rule. We believe § 204.203(a)(1) in the final rule, which provides that any alternative valuation methodology must approximate royalties payable under 30 CFR part 206, addresses the State's concern.

*Notification-Based Relief*

*1999 Proposed Rule.* In § 204.210(a), MMS described the information a lessee must submit to MMS before taking any notification-based relief.

*Public Comment.* One industry association supported notification-based relief rather than request-based relief. The other industry association did not want any required notification for taking relief in §§ 204.203, 204.204, and 204.205.

Two States opposed the automatic relief options. One of those States indicated that all relief should be gained through an approval process. One industry association liked the provision that would allow lessees to file a single notification for multiple marginal properties.

*RPC Subcommittee Recommendation.* The subcommittee recommended only one type of notification-based relief—cumulative annual reporting.

*MMS Response.* We agree with the subcommittee recommendation to allow only notification-based relief for annual reporting. The notification-based relief option is now at § 204.202 of this final rule.

*Approval Process*

*1999 Proposed Rule.* In §§ 204.212 and 204.213, MMS described the approval process for request-based relief.

*Public Comments.* All three States thought that the approval process placed too much administrative burden on the States. One State objected to MMS telling the States what the scope, timing, or process should be for its review of a request. The same State noted that MMS cannot tell a State who in the State will make determinations on relief or how long they have to make the determinations. One industry association suggested that authority to approve alternative valuation should be delegated to someone below the Assistant Secretary for Land and Minerals Management (AS/LM). The other industry association wanted approval authority for all properties to be with the AS/LM. The law firm, one State, and one industry association commented that they did not agree with the fact that the regulation required States to do things within specified time periods, but not MMS. One State did not agree with the provision that, if the State did not notify MMS of its decision within 30 days, then the State is deemed to agree with MMS's determination. One industry association was concerned that States might be given more than 30 days to review and decide relief options. The same industry association supported publication of States' decisions to allow or disallow certain types of relief and wanted MMS and the States to develop criteria for analyzing relief requests.

*RPC Subcommittee Recommendation.* The subcommittee recommended that MMS consult with the State concerned about a request for relief rather than requiring a decision from the State in a specific period of time.

*MMS Response.* The State's concerns regarding timing are no longer an issue because the final rule requires consultation with the State concerned, rather than specific timing requirements. See discussion on § 204.207(b) under the topic "State Liability" above for denials of requests for relief.

*Length of Relief*

*1999 Proposed Rule.* In § 204.217, MMS proposed that any approved relief would remain in effect for as long as the property qualified as marginal.

*Public Comments.* One State opposed continuous relief throughout the life of a lease and thought the marginal properties should be monitored periodically. One industry association supported relief for the life of the lease.

*RPC Subcommittee Recommendation.* The subcommittee did not recommend any changes in § 204.217.

*MMS Response.* We agree that properties should have relief for the life of the lease only if they continue to qualify as marginal. Moreover, nothing in the final rule precludes MMS from monitoring and auditing leases for compliance with other MMS regulations and lease terms. Section 204.217 is redesignated as § 204.209 in this final rule.

*Relationship to Other Incentive Programs*

*1999 Proposed Rule.* In § 204.218, MMS proposed that a lessee could obtain accounting and auditing relief for a marginal property even if the property benefited from other Federal or State production incentive programs.

*Public Comments.* One State commented that lessees should be required to disclose other types of relief they are receiving. One industry association supported the provision allowing lessees to get marginal property relief even if they benefit from other incentive programs.

*RPC Subcommittee Recommendation.* The subcommittee did not recommend any changes in this provision.

*MMS Response.* We agree that lessees should get marginal property accounting and auditing relief even if they benefit from other relief programs. Nothing in RSFA precludes obtaining marginal property relief if a lessee obtains other relief. Section 204.218 is now redesignated as § 204.213 in this final rule.

*Fees*

*1999 Proposed Rule.* In § 204.210(b), MMS listed the information that lessees must submit in their requests for accounting and auditing relief and the requirement to submit a $50 fee with each request.

*Public Comments.* One State indicated that the items to be included in the written request for relief were inadequate. Two States said the $50 fee is too low compared to the cost incurred by States and MMS to process requests. The commenters suggested the fees should be shared with the States. Both industry associations opposed the fee. One commented that small independent producers could not afford the fee and objected to the fee because MMS would not refund it for any reason.

*RPC Subcommittee Recommendation.* The subcommittee recommended

elimination of the fee for request-based relief.

*MMS Response.* Information lessees must submit in their requests for accounting and auditing relief is now addressed in § 204.205 of this final rule. After further legal review, we have decided that it is reasonable not to recover a processing fee for requests or notices under the final rule. MMS recovers its costs under the Independent Offices Appropriations Act of 1952 (IOAA),[6] for Federal offshore leases, and the Federal Land Policy and Management Act of 1976 (FLPMA),[7] for Federal onshore leases. Thus, as part of the March 31, 2003, supplementary proposed rulemaking, we analyzed the proposed marginal property relief's cost recovery fees for reasonableness according to the factors in FLPMA § 304(b).[8] In that supplementary proposed rulemaking, we examined the "reasonableness factors" which FLPMA requires to be considered: (a) Actual costs (exclusive of management overhead); (b) the monetary value of the rights or privileges sought by the applicant; (c) the efficiency to the Government processing involved; (d) that portion of the cost incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant; (e) the public service provided; and (f) other factors relevant to determining the reasonableness of the costs.

For marginal property relief taken or requested under §§ 204.202 and 204.203, the method used to evaluate the factors under the March 31, 2003, supplementary proposed rulemaking was twofold. First, we estimated actual costs and evaluated each of the remaining FLPMA reasonableness factors (b) through (f) individually to decide whether the factor might reasonably lead to an adjustment in actual costs. If so, that factor was then weighed against the remaining factors to determine whether another factor might reasonably increase, decrease, or eliminate any contemplated reduction. On the basis of that twofold analysis, although MMS's total estimated actual costs were $2,370 to process an average request, MMS determined that a fee of $50 to process relief requests was reasonable.

MMS determined a reduced fee was reasonable primarily based on its evaluation of FLPMA factor (f) "other factors." MMS's primary consideration under this factor was RSFA's purpose with respect to marginal properties. Congress enacted RSFA to "promote production," [9] by "encourag[ing] lessees to continue to produce and develop marginal properties." [10] Congress stated that "certain regulatory * * * obligations should be waived if it can be demonstrated such a waiver could aid in maintaining production that might otherwise be abandoned." [11] However, RSFA also mandated that any relief should "reduce administrative costs, and increase net receipts to the United States and the States." [12] Congress stated that granting relief for marginal properties should "result in additional receipts from oil and gas production that would otherwise be abandoned, and would * * * increase oil and gas production on Federal lands by creating economic efficiencies to make Federal leases more competitive with private leases." [13] Thus, as part of its FLPMA reasonableness analysis, MMS considered (1) whether the benefit from the increase in royalties to be gained from continued production from marginal properties and the decreased administrative burden to MMS from granting such relief merited a reduction in fee charges; and (2) whether recovering the fee would defeat the Congressional intent to provide relief by discouraging companies from requesting relief.

MMS has reexamined the analysis under factor (f) in the March 31, 2003, supplementary proposed rule to determine whether those factors warrant elimination of the proposed fee. We think they do. We agree that the administrative savings to industry if they are granted relief will not be significant enough for them to pay a fee to request relief. Moreover, we agree that the companies that most need the relief are small independents who would be discouraged from applying for relief by even the previously proposed nominal fee of $50. Because the purpose of RSFA is to grant relief to producers so they will continue to produce, we think it is counterproductive to include a fee that will discourage many of the smaller marginal producers from requesting relief. Thus, in the final rule we do not require payment of a processing fee for relief requests.

*Properties Approved as Part of a Nonqualifying Agreement*

Section 204.210 explains that if the Bureau of Land Management (BLM) or MMS's Offshore Minerals Management (OMM) retroactively approves the inclusion of a marginal property that qualified for relief as part of an agreement that does not qualify for relief under this subpart, the property qualification ceases as of December 31 of the calendar year that the BLM or OMM approval became effective. In that case, MMS will not retroactively rescind your relief. Since production is allocated to your property under the nonqualifying agreement, you must report and pay based on that allocation. In the proposed rule, we stated in paragraph (c) that if this occurs, you must adjust your royalty payments. To clarify what we meant by paragraph (c) we changed it in the final rule to read that:

> (c) For the calendar year in which you receive the BLM or OMM approval, and for any previous period affected by the approval, the volumes on which you report and pay royalty for your lease must be amended to reflect all volumes produced on or allocated to your lease under the nonqualifying agreement as modified by BLM or OMM. Report and pay royalties for your production using the procedures in § 204.202(b).

For example, assume that you have a stand-alone lease for which you are taking cumulative reports and payments relief beginning January 2005, and your lease retroactively becomes part of a nonqualifying agreement in June 2005 retroactive to January 2005. In that case, your marginal property relief will terminate as of December 31, 2005, with your annual report for calendar year 2005. On your calendar year 2005 annual report, you must report and pay royalties for January 2005 through December 2005 based on the volumes produced on or allocated to your lease under the agreement.

*Minimum Royalty*

MMS added § 204.214 to clarify that minimum royalty is still due on marginal properties by the date prescribed in your lease and in the amount prescribed therein. Since the annual report and payment under marginal property relief may occur after minimum royalty is due, if the amount of minimum royalty you paid is less than your production royalty obligation, then you would owe additional royalties for the difference. If the minimum royalty you paid exceeds your production royalty obligation, then you would not be entitled to a credit because you must pay at least the minimum royalty amount on your lease each year.

[6] 31 U.S.C. 9701 *et seq.*

[7] 43 U.S.C. 1701.

[8] 64 FR 3366–69.

[9] RSFA section 7(a).

[10] S. Rep. 260, 104th Cong., 2d Sess. 20 (1996); H.R. 667, 104th Cong., 2d Sess. 20 (1996).

[11] H.R. 667, 104th Cong., 2d Sess. 20 (1996).

[12] RSFA section 7(a).

[13] *Id.* at 20–21.

### III. Comments on the 2003 Supplementary Proposed Rule

MMS received one comment on the supplementary proposed rule published on March 31, 2003 (68 FR 15390), from a law firm on behalf of one State. This comment is analyzed and discussed below:

*Public Comment.* The commenter asserted that subsidies and relief have not promoted oil and gas production, increased royalty receipts, or reduced administrative costs. The commenter does not believe reduced administrative costs will be offset by increased royalties. Moreover, the commenter indicated that the State will exercise its option to opt out of marginal property relief. The commenter also expressed concern about several underlying assumptions of the rule and the State's ability to protect school funds from other Federal efforts to reduce lessee obligations.

*MMS Response.* We have considered the commenter's concerns but do not agree that the relief offered will not promote production, increase royalty receipts, and reduce administrative costs. And, as indicated by the commenter, the State may exercise its option to opt out of marginal property relief.

### IV. Procedural Matters

*1. Summary Cost Data*

We have summarized below the estimated costs and royalty impacts of this rule to all potentially affected groups: industry, State and local governments, and the Federal Government. Indian tribes and individual Indian mineral owners are not affected by this rule. The cost and royalty impact information in Item 1 of this section, Procedural Matters, is used as the basis for Department certifications in Items 2 through 14 below.

A. Industry

(1) *Notification-based relief—Costs of submitting notifications.* Approximately 3,000 Federal oil and gas properties produce 1,000 or less BOE annually. In the first year after this rule becomes effective, we estimate that lessees of 1,000 of these properties will submit notifications that they will take cumulative reporting and payment relief. We do not anticipate that all lessees of qualifying properties will submit notifications because not all States will allow reporting and payment relief, and large corporations may find that modifying their computer systems to report and pay on a few leases annually rather than monthly will not be cost effective.

We further estimate that a lessee will require 2 hours to determine if a property qualifies for cumulative reporting and payment relief and then to prepare and submit the notification to MMS. Consequently, the total estimated burden for all notifications in the first year is 2,000 hours (1,000 properties × 2 hours). Using an estimated $50 per hour cost, the total cost for all lessees to submit these notifications is $100,000 (2,000 burden hours × $50).

Because the reporting and payment relief for a qualified property is for the life of the property as long as the property produces less than 1,000 BOE per year, a notification need be filed only one time. However, we estimate that MMS will receive notifications for approximately 100 newly qualifying properties in each subsequent year. The total estimated burden for each subsequent year is 200 hours (100 properties × 2 hours) for a total cost of $10,000 (200 burden hours × $50).

(2) *Notification-based relief—Cost savings of reporting fewer lines.* We estimate that an average of 1,000 properties (500 leases and 500 agreements) will involve cumulative reporting and payment relief annually. This means that royalties on these properties will be reported and paid annually rather than monthly. We further estimate that lessees will submit 5,500 fewer lines for leases (1 line per month × 11 months × 500 leases) and 16,500 fewer lines for agreements (3 lines per month × 11 months × 500 agreements) on Form MMS–2014 each year for a total of 22,000 fewer lines per year. Because the time to submit the Form MMS–2014 averages 3 minutes per line, we estimate that lessees will save 1,100 burden hours (22,000 lines × 3 minutes ÷ 60 minutes) or a total of $55,000 (1,100 burden hours × $50) in the first year this rule is effective and for each year thereafter.

(3) *Request-based relief—Cost of requesting approval for other accounting and auditing relief.* MMS expects approximately 10 requests per year for other accounting and auditing relief. We estimate each request will require 4 hours for a lessee to prepare and submit. This estimate also includes providing information originally omitted from the request and lessee approval of MMS modifications, if any. The total estimated burden is 40 hours (10 requests × 4 hours). The estimated cost to lessees to request other relief is approximately $2,000 per year (40 burden hours × $50).

(4) *Request-based relief—Costs or royalty impacts of taking request-based relief.* We are unable to quantify the costs or royalty impacts of the request-based relief category at this time because we do not know what types of relief industry will request or how many MMS will approve.

(5) *Both types of relief—Cost of notifying MMS that relief has ceased.* When a property ceases to qualify for previously granted relief, the lessee or designee is required to notify MMS. MMS expects that 24 properties will cease to qualify for relief each year and that each notification will require 0.25 hours to prepare and submit. The total estimated burden is 6 hours (24 properties × 0.25). The estimated cost to lessees for these notifications is approximately $300 (6 burden hours × $50).

*Small Business Issues.* Approximately 2,500 companies report and pay royalties to MMS. We estimate that over 97 percent of these companies are small businesses as defined by the U.S. Small Business Administration because they have 500 or fewer employees. We anticipate that most of the relief granted under this rule will benefit small companies. Typically, as properties near the end of their productive life, larger companies with higher overhead, sell their marginal properties to small companies who can operate them more profitably. We expect most small companies will avail themselves of the cumulative reporting and payment relief option. Generally, larger companies may not use this option because of the expense of modifying their large, complex computer systems to report a few leases on an annual rather than a monthly basis. However, we expect that most request-based relief will be sought by larger companies having more sophisticated and complex accounting considerations. If any company, large or small, chooses not to take the accounting and auditing relief offered in this rule, it will incur no additional expense or burden.

*B. State and Local Governments*

This rule will not impose any additional burden on local governments. MMS estimates that States impacted by this rule would incur costs and royalty impacts as calculated below:

(1) *Notification-based relief—Costs of determining State participation.* Burden hours for review and development of a blanket State policy on accounting and auditing relief are estimated to be 40 hours at the beginning of each year. Only four States have sufficient numbers of marginal properties to require an in-depth analysis of the economic impact of offering accounting and auditing relief. Consequently, we

estimate the total annual burden to establish blanket policies for all States to be approximately 160 hours (4 primary States × 40 hours) or a total cost of $8,000 (160 burden hours × $50).

(2) *Request-based relief—Costs of consulting with MMS on other accounting and auditing relief.* Consultation with MMS on individual requests for other accounting and auditing relief is estimated to be 4 hours per property. As noted previously, MMS expects approximately 10 requests for individual accounting and auditing relief each year for a total burden of 40 hours for all States (10 requests × 4 hours per request) or a total cost of $2,000 (40 burden hours × $50).

(3) *Notification-based relief—Royalty impacts of prolonging the life of marginal wells.* As discussed in Item A, we estimate that after the first year, cumulative reporting will save industry approximately $45,000 annually ($55,000 − $10,000). We expect the reduced cost of operations will prolong the life of marginal wells. If the reporting relief encourages industry to continue to produce oil and gas from marginal properties, States will benefit in the additional receipts. The States generally would receive 50 percent of the royalties collected on additional production. The States also would benefit from continued employment and economic activity resulting from production that would otherwise be abandoned. We cannot determine the length and dollar impact of this additional well life at this time. However, if a State chooses to participate in this reporting relief, we expect the net royalty impact to the State will be positive.

(4) *Notification-based relief—Royalty impact of lost time value of money.* Because payments would be made annually rather than monthly, States will lose the time value of money on sales made in the 11 months before the royalty payment is due. Generally, States receive 50 percent of the royalties collected for onshore leases.

For example, New Mexico has the largest number of properties qualifying for cumulative reporting and payment relief—approximately 1,280. Using a value of $30 per barrel of oil and $5 per Mcf of gas and a 7 percent interest rate, we estimate that, if all 1,280 qualifying properties take cumulative reporting and payment relief, New Mexico would lose a maximum of $27,000 annually in the time value of money. The calculation for New Mexico marginal properties producing 1,000 BOE per year or less is as follows:

| Action | Gas (Mcf) | Oil (bbl) | Total |
|---|---|---|---|
| Total qualifying volume | 1,741,829 | 154,101 | |
| Multiplied by estimated unit value | × $5.00 | × $30.00 | |
| Total estimated value | $8,709,145 | $4,623,030 | $13,332,175 |
| Multiplied by royalty rate[1] | | | × .125 |
| Total royalty due for year | | | $1,666,521.88 |
| Divided by 12 months[2] | | | ÷12 |
| Average royalty due per month | | | $138,876.82 |
| Multiplied by estimated interest rate | | | × .07 |
| Interest on 1 mo. royalty for 1 yr. | | | $9,721.38 |
| Multiplied by 66/12[3] | | | × 66/12 |
| Interest (time value) lost for yr.[4] | | | $53,467.58 |

[1] The royalty rate for Federal onshore leases is most often 12½ percent. However, many of these marginal properties may also qualify for lower royalty rates under the stripper oil royalty rate reduction program (30 CFR 216.57). Consequently, the royalty value in this calculation could be less.

[2] To simplify this calculation, we divided the total royalty due for the year by 12 months on the assumption that the royalties would be evenly produced throughout the year.

[3] This factor reflects that different amounts of interest would accrue for each production month, beginning with 11/12 of 7 percent for the first month; 10/12 of 7 percent for the second month; 9/12 of 7 percent for the third month, etc. for a total of 66/12.

[4] The New Mexico State share is 50 percent; the Federal share is 50 percent. We rounded each share to $27,000.

As noted above, we calculated the time value of money lost for qualifying properties in New Mexico to be approximately $53,500 annually (the New Mexico share is $27,000 and the Federal Government's share is $27,000). Because New Mexico has 43 percent of all marginal properties producing 1,000 BOE or less per year, we extrapolated the total loss for qualifying properties in all States to be $124,419 annually ($53,500 ÷ 0.43 = $124,419). The share of the lost time value of money for all States would be $62,209 and the Federal Government's share would be $62,209.

*C. Federal Government*

(1) *Notification-based relief—Cost savings of processing fewer lines.* As noted in Item A(2) above, lessees will report—and MMS will process—approximately 22,000 fewer lines under the cumulative reporting and payment relief option. We estimate that MMS will save approximately $10,340 per year (22,000 lines × $0.47 processing cost per line). We determined the cost per line using cost data from OMB Control Number 1010–0140 ($1,167,900 to MMS to process lines received from industry on the Form MMS–2014 divided by 2,484,000 expected lines per year).

(2) *Notification-based relief—Costs to process notifications.* In the first year, MMS expects to receive 1,000 notifications from lessees who wish to report annually on their marginal properties. We estimate that recording each notification in MMS's automated records will require 5 minutes per notice. Total time to record the notifications is approximately 83 hours (1,000 notices × 5 minutes ÷ 60 minutes). Using an average cost of $50 per hour, the total cost to the Government is estimated to be $4,150 (83 hours × $50).

In the second year and each year thereafter, MMS expects to receive only 100 notifications. Total time to record the notifications is approximately 8 hours (100 notices × 5 minutes ÷ 60 minutes) or a total cost of $400 (8 hours × $50).

(3) *Request-based relief—Costs to evaluate requests for other relief.* As noted in Item A(3) above, MMS expects to receive 10 individual accounting and auditing relief requests from lessees annually. We estimate that each request will require 40 hours to analyze. The total estimated cost is 400 hours. The total cost is $20,000 (400 hours × $50).

(4) *Notification-based relief—Royalty impact of prolonging the life of marginal wells.* As discussed in Item A above, we estimate that after the first year, cumulative reporting will save industry approximately $45,000 annually ($55,000 − $10,000). We believe this reduced cost of operations will prolong

the life of marginal wells. We cannot determine the length and dollar impact of this additional well life at this time. The Federal Government would generally receive 50 percent of the royalties collected on additional production. We expect the net royalty impact to the Federal Government will be positive.

(5) *Notification-based relief—Royalty impact of lost time value of money.* The Federal Government will lose the time value of money on sales made in the 11 months before the royalty payment is due. Generally, the Federal Government receives 50 percent of the royalties collected for onshore leases. We think the royalty interest lost to the Federal Government for the time value of money would be the same as for all States or $62,209 annually (see Item B(4) above for the calculation).

*D. Summary of Costs and Royalty Impacts*

| Description | Cost +/− | |
|---|---|---|
| | First year | Subsequent years |
| A. Industry: | | |
| (1) Notification-based relief—Costs of submitting notifications | $−100,000 | $−10,000 |
| (2) Notification-based relief—Cost savings of reporting fewer lines | 55,000 | 55,000 |
| (3) Request-based relief—Cost of requesting approval for other accounting and auditing relief | −2,000 | −2,000 |
| (4) Request-based relief—Costs or royalty impacts of taking request-based relief | [1] | [1] |
| (5) Both types of relief—Cost of notifying MMS that relief has ceased | −300 | −300 |
| Net impact to Industry | −47,300 | 42,700 |
| B. State and Local Governments: | | |
| (1) Notification-based relief—Costs of determining State participation | −8,000 | −8,000 |
| (2) Request-based relief—Costs of consulting with MMS on other accounting and auditing relief | −2,000 | −2,000 |
| (3) Notification-based relief—Royalty impacts of prolonging the life of marginal wells | [1] | [1] |
| (4) Notification-based relief—Royalty impact of lost time value of money | −62,209 | −62,209 |
| Net impact to State and Local Governments | −72,209 | −72,209 |
| C. Federal Government: | | |
| (1) Notification-based relief—Cost savings of processing fewer lines | 10,340 | 10,340 |
| (2) Notification-based relief—Costs to process notifications | −4,150 | −400 |
| (3) Request-based relief—Costs to evaluate requests | −20,000 | −20,000 |
| (4) Notification-based relief—Royalty impact of prolonging the life of marginal wells | [1] | [1] |
| (5) Notification-based relief—Royalty impact of lost time value of money | −62,209 | 62,209 |
| Net impact to Federal Government | −76,019 | −72,269 |

[1] Unknown.

2. Regulatory Planning and Review (Executive Order 12866)

This document is not a significant rule and is not subject to formal review by the Office of Management and Budget (OMB) under Executive Order 12866.

a. This rule will not have an effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments, or communities.

b. This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

c. This rule will not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of the recipients.

d. This rule does not raise novel legal or policy issues.

3. Administrative Procedure Act (APA)

The MMS has determined that it will waive the 30-day delay of effectiveness provisions of the APA 5 U.S.C. 553(d), in this rulemaking. Section 553(d) of the APA permits waiver of the 30 day delayed effective date requirement for final rules for, *inter alia*, good cause or where a rule relieves a restriction. MMS finds that good cause exists because the 30-day delay will result in postponement of the relief for industry until 2006. Alternative Accounting and Auditing Requirements are mandated by Sec. 7(c) of RSFA. The final rule establishes schedules and timeframes for annual reporting relief. If the rule is not effective prior to October 1, 2004, the first deadline, the relief as outlined in the rule will not begin until calendar year 2006. The October 1, 2004, deadline is when MMS would furnish the States a report of marginal properties for the July 2003–June 2004 base period so that the States can decide whether to allow marginal property relief in 2005.

Accordingly the rule must be effective before October 1, 2004, or relief for industry will be postponed until February 2006. Therefore, MMS finds that there is good cause to make the final rule effective immediately upon publication in the **Federal Register.**

4. Regulatory Flexibility Act

The Department certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Approximately 2,500 companies report and pay royalties to MMS. We estimate that over 97 percent of these companies are small businesses as defined by the U.S. Small Business Administration because they have 500 or fewer employees. We anticipate that most of the relief granted under this rule will benefit small companies. Typically, as properties near the end of their productive life, larger companies with higher overhead sell their marginal properties to small companies who can operate them more profitably.

We expect most small companies will avail themselves of the notification-based cumulative reporting and payment relief option. Generally, larger companies may not use this option because of the expense of modifying their large, complex computer systems to report a few leases on an annual rather than a monthly basis. However, we expect that most larger companies, having more sophisticated and complex accounting considerations, will choose the request-based relief option. If any company, large or small, chooses not to take the accounting and auditing relief offered in this rule, it will incur no additional expense or burden.

*Your comments are important.* The Small Business and Agricultural

Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small businesses about Federal agency enforcement actions. The Ombudsman will annually evaluate the enforcement activities and rate each agency's responsiveness to small business. If you wish to comment on the enforcement actions in this rule, call 1–888–734–3247. You may comment to the Small Business Administration without fear of retaliation. Disciplinary action for retaliation by an MMS employee may include suspension or termination from employment with the Department.

5. Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Will not have an annual effect on the economy of $100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises.

6. Unfunded Mandates Reform Act

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule will not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

7. Governmental Actions and Interference With Constitutionally Protected Property Rights (Takings), Executive Order 12630

In accordance with Executive Order 12630, this rule does not have significant takings implications. This rule does not impose conditions or limitations on the use of any private property; consequently, a takings implication assessment is not required.

8. Federalism, Executive Order 13132

In accordance with Executive Order 13132, this rule does not have any significant Federalism implications. This rule does not substantially or directly affect the relationship between Federal and State governments. This rule does not impose any additional burden on local governments. MMS will consult with the State concerned on any notification or request-based relief. Only four States have sufficient numbers of marginal properties that will require a yearly analysis of the economic impact of offering accounting and auditing relief. Any consultation with a concerned State on request-based relief is expected to be minimal as MMS anticipates receiving only about 10 requests annually. Although consultation with the State concerned on whether to allow relief on Federal marginal properties in their State does impose some costs, the amount is not significant and States can opt out of allowing any relief, eliminating the cost.

9. Civil Justice Reform, Executive Order 12988

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule will not unduly burden the judicial system and does meet the requirements of sections 3(a) and 3(b)(2) of the Order.

10. Paperwork Reduction Act of 1995

The OMB has approved a new collection of information contained in this rule, entitled "30 CFR Part 204, Alternatives for Marginal Properties," under 44 U.S.C. 3501 *et seq.* The OMB-assigned control number is 1010–0155, and OMB approval of this collection expires May 31, 2006. When we renew the ICR in 2006, we will change the title to "30 CFR 204, Subpart A—General Provisions and Subpart C—Auditing and Accounting Relief" to clarify the regulatory language we are covering under 30 CFR 204, Subparts A and C.

The estimated total burden hours currently approved under ICR 1010–0155 is 2,206. The information collection applies only to §§ 204.202(b), 204.203(b), 204.205(a) and (b), 204.206(a) and (b), 204.208(c) and (d), and 204.209(b) of this rule. OMB Control number 1010–0140 covers the burden hours for §§ 204.202(b), (d), and (e), 204.210(c) and (d), and 204.214(b). We received comments from industry, but there were no changes in the burden hours from the proposed rule to the final rule. We will use this information to determine and monitor the eligibility of the lessee or designee for accounting and auditing relief for Federal marginal properties. A response is required to obtain a benefit.

This information collection does not contain confidential information. However, trade secrets and proprietary information are protected if submitted. Storage of such information and access to it are controlled by strict security measures. None of the information requested is considered sensitive.

Submit your comments on the accuracy of this burden estimate or suggestions on reducing the burden to Sharron L. Gebhardt, Lead Regulatory Specialist, Chief of Staff Office, Minerals Revenue Management, MMS, P.O. Box 25165, MS 302B2, Denver, Colorado 80225. If you use an overnight courier service, the MMS courier address is Building 85, Room A–614, Denver Federal Center, Denver, Colorado 80225. You may also e-mail your comments to us at *mrm.comments@mms.gov*. Include the title of the information collection and the OMB Control number in the Attention line of your comment. Also, include your name and return address. Submit electronic comments as an ASCII file avoiding the use of special characters and any form of encryption. If you do not receive a confirmation that we have received your e-mail, contact Ms. Gebhardt at (303) 231–3211. 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.

11. National Environmental Policy Act (NEPA)

This rule deals with financial matters and has no direct effect on MMS's decisions on environmental activities. Pursuant to the Departmental Manual (DM), 516 DM 2.3A(2), § 1.10 of 516 DM 2, Appendix 1 excludes from documentation in an environmental assessment or impact statement "policies, directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature; or the environmental effects of which are too broad, speculative or conjectural to lend themselves to meaningful analysis and will be subject later to the NEPA process, either collectively or case-by-case." Section 1.3 of the same appendix clarifies that royalties and audits are considered to be routine financial transactions that are subject to categorical exclusion from the NEPA process.

12. 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) and DOI DM 512 DM 2, we have evaluated potential effects on federally recognized Indian tribes. This rule does not apply to Indian leases.

13. Effects on the Nation's Energy Supply, Executive Order 13211

This rule is not a significant rule and is not subject to formal review by the OMB under Executive Order 12866. The primary purpose of this rule is to provide accounting and auditing relief to certain lessees of Federal oil and gas properties, largely in the form of reduced records submittal requirements. This rule does not have a significant effect on energy supply, distribution, or use because, although it should promote some additional production on a subset of Federal oil and gas leases, the additional production would not be significant in comparison to total production from Federal oil and gas leases.

14. Consultation and Coordination With Indian Tribal Governments, Executive Order 13175

In accordance with Executive Order 13175, this rule does not have tribal implications that impose substantial direct compliance costs on Indian tribal governments.

**List of Subjects in 30 CFR Part 204**

Continental shelf, Government contracts, Mineral royalties, Natural gas, Petroleum, Public lands—mineral resources, Reporting and recordkeeping requirements.

Dated: August 26, 2004.

**Rebecca W. Watson,**

*Assistant Secretary for Land and Minerals Management.*

■ For reasons set out in the preamble, 30 CFR part 204 is added as follows:

## PART 204—ALTERNATIVES FOR MARGINAL PROPERTIES

**Subpart A—General Provisions**



**Subpart B—Prepayment of Royalty [Reserved]**

**Subpart C—Accounting and Auditing Relief**



**Authority:** 30 U.S.C. 1701 *et seq.*

### Subpart A—General Provisions

#### § 204.1 What is the purpose of this part?

This part explains how you as a lessee or designee of a Federal onshore or Outer Continental Shelf (OCS) oil and gas lease may obtain prepayment or accounting and auditing relief for production from certain marginal properties. This part does not apply to production from Indian leases, even if the Indian lease is within an agreement that qualifies as a marginal property.

#### § 204.2 What definitions apply to this part?

*Agreement* means a federally approved communitization agreement or unit participating area.

*Barrels of oil equivalent (BOE)* means the combined equivalent production of oil and gas stated in barrels of oil. Each barrel of oil production is equal to one BOE. Also, each 6,000 cubic feet of gas production is equal to one BOE.

*Base period* means the 12-month period from July 1 through June 30 immediately preceding the calendar year for which you take or request marginal property relief. For example, if you request relief for calendar year 2006, your base period is July 1, 2004, through June 30, 2005.

*Combined equivalent production* means the total of all oil and gas production for the marginal property, stated in BOE.

*Designee* means the person designated by a lessee under 30 CFR 218.52 to make all or part of the royalty or other payments due on a lease on the lessee's behalf.

*Producing wells* means only those producing oil or gas wells that contribute to the sum of BOE used in the calculation under § 204.4(c). Producing wells do not include injection or water wells. Wells with multiple zones commingled downhole are considered as a single well.

*Property* means a lease, a portion of a lease, or an agreement that may be a marginal property if it meets the qualification requirements of § 204.4.

*State concerned (State)* means the State that receives a statutorily prescribed portion of the royalties from a Federal onshore or OCS lease.

#### § 204.3 What alternatives are available for marginal properties?

If you have production from a marginal property, MMS and the State may allow you the following options:

(a) *Prepay royalty.* MMS and the State may allow you to make a lump-sum advance payment of royalties instead of monthly royalty payments for the remainder of the lease term. See Subpart B for prepayment of royalty requirements.

(b) *Take accounting and auditing relief.* MMS and the State may allow various accounting and auditing relief options to encourage you to continue to produce and develop your marginal property. See Subpart C for accounting and auditing relief requirements.

#### § 204.4 What is a marginal property under this part?

(a) To qualify as a marginal property eligible for royalty prepayment or accounting and auditing relief under this part, the property must meet the following requirements:

| If your lease is . . . | Then . . . | And . . . |
|---|---|---|
| (1) Not in an agreement | The lease must qualify as a marginal property under paragraph (b) of this section. | |

| If your lease is . . . | Then . . . | And . . . |
|---|---|---|
| (2) Entirely or partly committed to one agreement. | The entire agreement must qualify as a marginal property under paragraph (b) of this section. | Agreement production allocable to your lease may be eligible for relief under this part. Any production from your lease that is not committed to the agreement also may be eligible for separate relief under paragraph (a)(4) of this table. |
| (3) Entirely or partly committed to more than one agreement. | Each agreement must qualify separately as a marginal property under paragraph (b) of this section. | For any agreement that does qualify, that agreement's production allocable to your lease may be eligible for relief under this part. Any production from your lease that is not committed to an agreement also may be eligible for separate relief under paragraph (a)(4) of this table. |
| (4) Partly committed to an agreement and you have production from the part of the lease that is not committed to the agreement. | The part of the lease that is not committed to the agreement must qualify separately as a marginal property under paragraph (b) of this section. | |

(b) To qualify as a marginal property for a calendar year, the combined equivalent production of the property during the base period must equal an average daily well production of less than 15 barrels of oil equivalent (BOE) per well per day calculated under paragraph (c) of this section.

(c) To determine the average daily well production for a property, divide the sum of the BOE for all producing wells on the property during the base period by the sum of the number of days that each of those wells actually produced during the base period. If the property is an agreement, your calculation under this paragraph must include all wells included in the agreement, even if they are not on a Federal onshore or OCS lease.

**§ 204.5 What statutory requirements must I meet to obtain royalty prepayment or accounting and auditing relief?**

(a) MMS and the State may allow royalty prepayment or accounting and auditing relief for your marginal property production if MMS and the State jointly determine that the prepayment or accounting and auditing relief is in the best interests of the Federal Government and the State to:

(1) Promote production;

(2) Reduce the administrative costs of MMS and the State; and

(3) Increase net receipts to the Federal Government and the State.

(b) At any time, if MMS and the State determine that either prepayment or accounting and auditing relief no longer meets the criteria in paragraph (a) of this section, MMS, with the State's concurrence, may discontinue any prepayment or accounting and auditing relief options granted for production from any marginal property.

(1) MMS will provide you written notice of the decision to discontinue relief.

(i) If you took the cumulative reports and payments relief option under § 204.202, your relief will terminate at the end of the calendar year in which you received the notice.

(ii) If you were approved for prepayment relief under subpart B of this part or other relief under § 204.203, MMS's notice will tell you when your relief terminates.

(2) MMS's decision to discontinue relief is not subject to administrative appeal.

**§ 204.6 May I appeal if MMS denies my request for prepayment or other relief?**

If MMS denies your request for prepayment relief under Subpart B of this part or other relief under § 204.203, you may appeal under 30 CFR part 290.

## Subpart B—Prepayment of Royalty [Reserved]

## Subpart C—Accounting and Auditing Relief

**§ 204.200 What is the purpose of this subpart?**

This subpart explains how you as a lessee or designee may obtain accounting and auditing relief for your Federal onshore or OCS lease production from a marginal property. The two types of accounting and auditing relief that you can receive under this subpart are cumulative reports and payment relief (explained in § 204.202) and other accounting and auditing relief appropriate for your property (explained in § 204.203).

**§ 204.201 Who may obtain accounting and auditing relief?**

(a) You may obtain accounting and auditing relief under this subpart:

(1) If you are a lessee or a designee for a Federal lease with production from a property that qualifies as a marginal property under § 204.4;

(2) If you meet any additional requirements for specific types of relief under this subpart; and

(3) Only for the fractional interest in production from the marginal property for which you report and pay royalty. You may obtain relief even if the other lessees or designees for your lease or agreement do not request relief.

(b) You may not obtain one or both of the relief options specified in this subpart on any portion of production from a marginal property if:

(1) The marginal property covers multiple States; and

(2) One of the States determines under § 204.208 that it will not allow the relief option you seek.

**§ 204.202 What is the cumulative royalty reports and payments relief option?**

(a) The cumulative royalty reports and payments relief option allows you to submit one royalty report and payment annually for production during a calendar year. You are eligible for this option only if the total volume produced from the marginal property (not just your share of the production) is 1,000 BOE or less during the base period.

(b) To use the cumulative royalty reports and payments relief option, you must do all of the following:

(1) Notify MMS in writing by January 31 of the calendar year for which you begin taking your relief. See § 204.205(a) for what your notification must contain;

(2) Submit your royalty report and payment in accordance with 30 CFR 218.51(g) by the end of February of the year following the calendar year for which you reported annually, unless you have an estimated payment on file. If you have an estimated payment on file, you must submit your royalty report and payment by the end of March of the year following the calendar year for which you reported annually;

(3) Use the sales month prior to the month that you submit your annual report and payment under paragraph (b)(2) of this section on your Report of Sales and Royalty Remittance, Form MMS–2014, for the entire previous calendar year's production for which you are paying annually. (For example, for a report in February use January as your sales month, and for a report in March use February as your sales month, to report production for the entire previous calendar year for which you are paying annually);

(4) Report one line of cumulative royalty information on Form MMS–2014 for the calendar year, the same as if it were a monthly report; and

(5) Report allowances on Form MMS–2014 on the same annual basis as the royalties for your marginal property production.

(c) If you do not pay your royalty by the date due in paragraph (b) of this section, you will owe late payment interest determined under 30 CFR 218.54 from the date your payment was due under this section until the date MMS receives it.

(d) If you take relief you are not qualified for, you may be liable for civil penalties. Also you must:

(1) Pay MMS late payment interest determined under 30 CFR 218.54 from the date your payment was due until the date MMS receives it; and

(2) Amend your Form MMS–2014 to reflect the required monthly reporting.

(e) If you dispose of your ownership interest in a marginal property for which you have taken relief under this section (or if you are a designee who reports and pays royalty for a lessee who has disposed of its ownership interest), you must:

(1) Report and pay royalties for the portion of the calendar year for which you had an ownership interest; and

(2) Make the report and payment by the end of the month after you dispose of the ownership interest in the marginal property. If you do not report and pay timely, you will owe interest determined under 30 CFR 218.54 from the date the payment was due under this section.

**§ 204.203 What is the other relief option?**

(a) Under this relief option, you may request any type of accounting and auditing relief that is appropriate for production from your marginal property, provided it is not prohibited under § 204.204 and meets the statutory requirements of § 204.5. Examples of relief options you could request are:

(1) To report and pay royalties using a valuation method other than that required under 30 CFR part 206 that approximates royalties payable under that part 206; and

(2) To reduce your royalty audit burden. However, MMS will not consider any request that eliminates MMS's or the States' right to audit.

(b) You must request approval from MMS under § 204.205(b), and receive approval under § 204.206 before taking relief under this option.

**§ 204.204 What accounting and auditing relief will MMS not allow?**

MMS will not approve your request for accounting and auditing relief under this subpart if your request:

(a) Prohibits MMS or the State from conducting any form of audit;

(b) Permanently relieves you from making future royalty reports or payments;

(c) Provides for less frequent royalty reports and payments than annually;

(d) Provides for you to submit royalty reports and payments at separate times;

(e) Impairs MMS's ability to properly or efficiently account for or distribute royalties;

(f) Requests relief for a lease under which the Federal Government takes its royalties in kind;

(g) Alters production reporting requirements;

(h) Alters lease operation or safety requirements;

(i) Conflicts with rent, minimum royalty, or lease requirements; or

(j) Requests relief for production from a marginal property located in whole or in part in a State that has determined that it will not allow such relief under § 204.208.

**§ 204.205 How do I obtain accounting and auditing relief?**

(a) To take cumulative reports and payments relief under § 204.202, you must notify MMS in writing by January 31 of the calendar year for which you begin taking your relief.

(1) Your notification must contain:

(i) Your company name, MMS-assigned payor code, address, phone number, and contact name; and

(ii) The specific MMS lease number and agreement number, if applicable.

(2) You may file a single notification for multiple marginal properties.

(b) To obtain other relief under § 204.203, you must file a written request for relief with MMS.

(1) Your request must contain:

(i) Your company name, MMS-assigned payor code, address, phone number, and contact name;

(ii) The MMS lease number and agreement number, if applicable; and

(iii) A complete and detailed description of the specific accounting or auditing relief you seek.

(2) You may file a single request for multiple marginal properties if you are requesting the same relief for all properties.

**§ 204.206 What will MMS do when it receives my request for other relief?**

When MMS receives your request for other relief under § 204.205(b), it will notify you in writing as follows:

(a) If your request for relief is complete, MMS may either approve, deny, or modify your request in writing after consultation with any State required under § 204.207(b).

(1) If MMS approves your request for relief, MMS will notify you of the effective date of your accounting or auditing relief and other specifics of the relief approved.

(2) If MMS denies your relief request, MMS will notify you of the reasons for denial and your appeal rights under § 204.6.

(3) If MMS modifies your relief request, MMS will notify you of the modifications.

(i) You have 60 days from your receipt of MMS's notice to either accept or reject any modification(s) in writing.

(ii) If you reject the modification(s) or fail to respond to MMS's notice, MMS will deny your relief request. MMS will notify you in writing of the reasons for denial and your appeal rights under § 204.6.

(b) If your request for relief is not complete, MMS will notify you in writing that your request is incomplete and identify any missing information.

(1) You must submit the missing information within 60 days of your receipt of MMS's notice that your request is incomplete.

(2) After you submit all required information, MMS may approve, deny, or modify your request for relief under paragraph (a) of this section.

(3) If you do not submit all required information within 60 days of your receipt of MMS's notice that your request is incomplete, MMS will deny your relief request. MMS will notify you in writing of the reasons for denial and your appeal rights under § 204.6.

(4) You may submit a new request for relief under this subpart at any time after MMS returns your incomplete request.

**§ 204.207 Who will approve, deny, or modify my request for accounting and auditing relief?**

(a) If there is not a State concerned for your marginal property, only MMS will decide whether to approve, deny, or modify your relief request.

(b) If there is a State concerned for your marginal property that has

determined in advance under § 204.208 that it will allow either or both of the relief options under this subpart, MMS will decide whether to approve, deny, or modify your relief request after consulting with the State concerned.

**§ 204.208 May a State decide that it will or will not allow one or both of the relief options under this subpart?**

(a) A State may decide in advance that it will or will not allow one or both of the relief options specified in this subpart for a particular calendar year. If a State decides that it will not consent to one or both of the relief options, MMS will not grant that type of marginal property relief.

(b) To help States decide whether to allow one or both of the relief options specified in this subpart, for each calendar year MMS will send States a Report of Marginal Properties by October 1 preceding the calendar year.

(c) If a State decides under paragraph (a) of this section that it will or will not allow one or both of the relief options in this subpart during the next calendar year, within 30 days of the State's receipt of the Report of Marginal Properties under paragraph (b) of this section, the State must:

(1) Notify the Associate Director for Minerals Revenue Management, MMS, in writing, of its intent to allow or not allow one or both of the relief options under this subpart; and

(2) Specify in its notice of intent to MMS which relief option(s) it will allow or not allow.

(d) If a State decides in advance under paragraph (a) of this section that it will not allow one or both of the relief options specified in this subpart, it may decide for subsequent calendar years that it will allow one or both of the relief options in this subpart. If it so decides, within 30 days of the State's receipt of the Report of Marginal Properties under paragraph (b) of this section, the State must:

(1) Notify the Associate Director for Minerals Revenue Management, MMS, in writing, of its intent to allow one or both of the relief options allowed under this subpart during the next calendar year; and

(2) Specify in its notice of intent to MMS which relief option(s) it will allow.

(e) If a State does not notify MMS under paragraph (c) or (d) of this section, the State will be deemed to have decided not to allow either of the relief options under this subpart for the next calendar year.

(f) MMS will publish a notice of the State s intent to allow or not allow certain relief options under this section in the **Federal Register** no later than 30 days before the beginning of the applicable calendar year.

**§ 204.209 What if a property ceases to qualify for relief obtained under this subpart?**

(a) A marginal property must qualify for relief under this subpart for each calendar year based on production during the base period for that calendar year. The notice or request you provided to MMS under § 204.205 for the first calendar year that the property qualified for relief remains effective for successive calendar years if the property continues to qualify.

(b) If a property is no longer eligible for relief for any reason during a calendar year other than the reason under § 204.210 or paragraph (c) of this section, the relief for the property terminates as of December 31 of that calendar year. You must notify MMS in writing by December 31 that the relief for the property has terminated.

(c) If you dispose of your interest in a marginal property during the calendar year, your relief terminates as of the end of the sales month in which you disposed of the property. Report and pay royalties for your production using the procedures in § 204.202(e).

**§ 204.210 What if a property is approved as part of a nonqualifying agreement?**

If the Bureau of Land Management (BLM) or MMS's Offshore Minerals Management (OMM) retroactively approves a marginal property that qualified for relief for inclusion as part of an agreement that does not qualify for relief under this subpart, the property no longer qualifies for relief under this subpart then:

(a) MMS will not retroactively rescind the marginal property relief for production from your property under § 204.211;

(b) Your marginal property relief terminates as of December 31 of the calendar year that you receive the BLM or OMM approval of your marginal property as part of a nonqualifying agreement; and

(c) For the calendar year in which you receive the BLM or OMM approval, and for any previous period affected by the approval, the volumes on which you report and pay royalty for your lease must be amended to reflect all volumes produced on or allocated to your lease under the nonqualifying agreement as modified by BLM or OMM. Report and pay royalties for your production using the procedures in § 204.202(b).

(d) If you owe additional royalties based on the retroactive agreement approval and do not pay your royalty by the date due in § 204.202(b), you will owe late payment interest determined under 30 CFR 218.54 from the date your payment was due under § 204.202 (b)(2) until the date MMS receives it.

**§ 204.211 When may MMS rescind relief for a property?**

(a) MMS may retroactively rescind the relief for your property if MMS determines that your property was not eligible for the relief obtained under this subpart because:

(1) You did not submit a notice or request for relief under § 204.205;

(2) You submitted erroneous information in the notice or request for relief you provided to MMS under § 204.205 or in your royalty or production reports; or

(3) Your property is no longer eligible for relief because production increased, but you failed to provide the notice required under § 204.209(b).

(b) MMS may rescind relief for your property if MMS decides to take royalty in kind.

**§ 204.212 What if I took relief for which I was ineligible?**

If you took relief under this subpart for a period for which you were not eligible, you:

(a) May owe additional royalties and late payment interest determined under 30 CFR 218.54 from the date your additional payments were due until the date MMS receives them; and

(b) May be subject to civil penalties.

**§ 204.213 May I obtain relief for a property that benefits from other Federal or State incentive programs?**

You may obtain accounting and auditing relief for production from a marginal property under this subpart even if the property benefits from other Federal or State production incentive programs.

**§ 204.214 Is minimum royalty due on a property for which I took relief?**

(a) If you took cumulative royalty reports and payment relief on a property under this subpart, minimum royalty is still due for that property by the date prescribed in your lease and in the amount prescribed therein.

(b) If you pay minimum royalty on production from a marginal property during a calendar year for which you are taking cumulative royalty reports and payment relief, and:

(1) The annual payment you owe under this subpart is greater than the minimum royalty you paid, you must pay the difference between the minimum royalty you paid and your annual payment due under this subpart; or

(2) The annual payment you owe under this subpart is less than the minimum royalty you paid, you are not entitled to a credit because you must pay at least the minimum royalty amount on your lease each year.

**§ 204.215 Are the information collection requirements in this subpart approved by the Office of Management and Budget?**

OMB has approved the information collection requirements contained in this subpart under 44 U.S.C. 3501 *et seq.*, and assigned OMB control number 1010–0155. See 30 CFR part 210 for details concerning your estimated reporting burden and how you may comment on the accuracy of the burden estimate.

[FR Doc. 04–20560 Filed 9–10–04; 8:45 am]

BILLING CODE 4310–MR–P

## DEPARTMENT OF AGRICULTURE

### Forest Service

### 36 CFR Part 292

**RIN 0596–AC00**

## Sawtooth National Recreation Area—Private Lands; Increasing Residential Outbuilding Size

**AGENCY:** Forest Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Department is adopting, as final, regulations that revise the building standard for residential outbuildings within the Sawtooth National Recreation Area in Idaho. This final rule provides that not more than two outbuildings could be constructed with each residence for an aggregrate square foot area of the outbuildings not to exceed 850 square feet from the current 400-square-foot standard, and limits such outbuildings to one story. This regulation also allows residents to construct two-car garages and increase indoor storage areas to protect personal property and equipment, thereby reducing the need for unprotected and unsightly outdoor storage.

**DATES:** *Effective Date:* This final rule is effective October 13, 2004.

**FOR FURTHER INFORMATION CONTACT:** Jonathan Stephens, Recreation, and Heritage Resources Staff, Forest Service, USDA, (202) 205–1701; or Ed Waldapfel, Public Affairs Officer, Sawtooth National Forest (208) 737–3219.

**SUPPLEMENTARY INFORMATION:** The Sawtooth National Recreation Area (SNRA) in Idaho on the Sawtooth National Forest was created when Congress passed Public Law 92–400 in 1972 to assure the preservation and protection of the natural, scenic, historic, pastoral, and fish and wildife values and the enhancement of recreational values. The act directed the Secretary of Agriculture to develop regulations setting standards for the use, subdivision, and development of privately owned property within the boundaries of the recreation area. The current regulations at Title 36 of the Code of Federal Regulations, part 292, subpart C (36 CFR part 292, subpart C), were adopted in 1974 (39 FR 11544) and were amended in 1976 and 1989 (41 FR 29379, 54 FR 3368). Section 292.16(e)(2)(ii) sets out a residential building standard providing that each residence on private land within the SNRA may have not more than two outbuildings at an aggregate area not to exceed 400 square feet.

The act establishing the SNRA recognizes that the Secretary may from time to time amend these regulations. The SNRA regulations at section 292.14(b) require that any amendment to the regulations shall include publication of a notice of a proposed rulemaking in the **Federal Register** to provide interested persons the opportunity to comment before adoption of a final rule. The Forest Service promulgated a proposed rule and requested public comment on Apri 22, 2004 (69 FR 21796).

The Forest Service proposed to increase the residential building standard for the two allowable outbuildings to 850 square feet and to limit such outbuildings to one story. The agency previously received numerous comments from the public indicating that the current residential outbuilding size standard is inadequate and supporting the need to increase this size standard. These comments were received in response to the environmental assessment prepared in 2000 for proposed revision of the Sawtooth National Forest land and resource management plan.

This increase in the standard for the maximum square footage of the two allowable residential outbuildings allows the private landowners to construct two-car garages and increase indoor storage areas to protect personal property and equipment, thereby reducing the need for unprotected and unsightly outdoor storage.

### Summary of Public Comments and the Department's Responses

*General Comments:* The proposed rule was published in the **Federal Register** on April 22, 2004, for a 60-day public comment period (69 FR 21796). In addition, to the **Federal Register** notice, a news release was distributed to 39 local and regional media outlets, organizations and elected officials. A personal postcard was mailed to more than 450 private landowners within the Sawtooth National Recreation Area. The Forest Service received 9 comments on the proposed rule. Comments were received by the following: 5 individuals, 2 organizations, 1 agency and 1 business. In general, all respondents were supportive of the proposed rule. Respondents recognized the need for a limited increase in the size of outbuildings within the Sawtooth National Recreation Area.

*Response:* The Department does not intend to make any revisions to the proposed rule. Therefore, the rule, as proposed, is being adopted as final.

*Comment on Enforcement of Outbuilding Standards:* One respondent expressed concern that the current regulation for outbuildings was not adequately enforced over the last 20 years.

*Response:* The Forest Service is responsible for enforcement of the new regulation. The Forest Service remains committed to enforce the new regulation to protect the scenic integrity of the Sawtooth NRA.

*Comment on working with local counties:* One respondent stated that there is a need to work with the local counties for enforcement of the new regulation.

*Response:* The Forest Service recognizes the need to work with the local communities in enforcement of the new regulation. The Forest Service will be working with the local county assessors office to inform landowners about the new regulations.

*Comment on outdoor storage for equipment:* One respondent expressed concern about strorage of outdoor recreation equipment. The respondent is concerned that the new regulation will not address some additional outdoor storage needs.

*Response:* The Department believes that this new regulation will address the respondent's concern about storage of outdoor recreation equipment by providing additional space for private landowners.

*Comment on property with current scenic easements:* One respondent expressed concern about whether or not property owners with existing scenic easements will be covered under the new regulation.

*Response:* The Department believes that language used in the property owners existing scenic easement will deterimine whether or not these property owners with existing scenic

easements are covered by this regulation.

**Regulatory Certifications**

*Regulatory Impact*

This final rule has been reviewed under USDA procedures and Executive Order 12866 on Regulatory Planning and Review. The Office of Management and Budget (OMB) has determined that this is not a significant rule. This final rule would not have an annual effect of $100 million or more on the economy, nor adversely affect productivity, competition, jobs, the environment, public health or safety, nor State or local Governments. This final rule would not interfere with an action taken or planned by another agency, nor raise new legal or policy issues. Finally, this rule would not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients of such programs. Accordingly, this final rule is not subject to OMB review under Executive Order 12866.

*Proper Consideration of Small Entities*

This final rule has been considered in light of Executive Order 13272 regarding proper consideration of small entities and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which amended the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). It has been determined that this final rule would not have a significant economic impact on a substantial number of small entities as defined by SBREFA. This final rule imposes minimal additional requirements on the affected public, which includes the owners of private property and residences within the Sawtooth National Recreational Area. The increase of the allowable outbuilding size to 850 square feet is responsive to comments already received from the affected public stating that the current allowable square footage under the existing rule is inadequate. These comments were received in response to an environmental assessment prepared in 2000 for the proposed amendment of the Sawtooth National Forest land and resource management plan. The changes are necessary to protect the public interest, are not administratively burdensome or costly to meet, and are well within the capability of small entities to perform.

*Environmental Impact*

Section 31.1b of Forest Service Handbook 1909.15 (57 FR 43180; September 18, 1992) excludes from documentation in an environmental assessment or impact statement "rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions' that do not significantly affect the quality of the human environment. This final rule provides additional storage for residential outbuildings on private lands within the Sawtooth National Recreation Area. The agency's assessment is that this final rule falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement. Furthermore, public comments indicating that the current 400-square-foot limit is inadequate were previously received in response to an environmental assessment prepared in 2000 for the proposed amendment of the Sawtooth National Forest land and resource management plan.

*No Takings Implications*

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and it has been determined that the final rule does not pose the risk of a taking of private property.

*Federalism*

The agency has considered this final rule under the requirements of Executive Order 13132, Federalism, and has concluded that the final rule conforms with the federalism principles set out in this Executive order; would not impose any compliance costs on the States; and would not have substantial direct effects on the States or the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, the agency has determined that no further assessment of federalism implications is necessary.

*Consultation and Coordination With Indian Tribal Governments*

This final rule, which is applicable only to private lands within the Sawtooth National Recreation Area, does not have tribal implications as defined by Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, and therefore advance consultation with tribes is not required.

*Energy Effects*

This final rule has been reviewed under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. It has been determined that this final rule does not constitute a significant energy action as defined in the Executive order.

*Controlling Paperwork Burdens on the Public*

This final rule does not contain any additional record keeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or not already approved for use and, therefore, imposes no additional paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

*Unfunded Mandates Reform*

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995, which the President signed into law on March 22, 1995, the Department has assessed the effects of this final rule on State, local, and tribal governments and the private sector. This final rule does not compel the expenditure of $100 million or more by any State, local, or tribal government or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

*Civil Justice Reform*

This final rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. After adoption of this rule as final, (1) all State and local laws and regulations that conflict with this rule or that would impede full implementation of this rule would be preempted, (2) no retroactive effect would be given to this rule; and (3) this final rule would not require the use of administrative proceedings before parties could file suit in court challenging its provisions.

**List of Subjects in 36 CFR Part 292**

Mineral resources, Recreation and recreation areas.

■ Therefore, for the reasons set forth in the preamble, the USDA Forest Service amends 36 CFR part 292, subpart C as follows:

## PART 292—NATIONAL RECREATION AREAS

### Subpart C—Sawtooth National Recreation Area—Private Lands

■ 1. The authority citation for subpart C continues to read as follows:

**Authority:** Sec. 4(a), Act of Aug. 22, 1972 (86 Stat. 613).

■ 2. Amend § 292.16 by revising paragraph (e)(2)(ii) to read as follows:

**§ 292.16 Standards.**

* * * * *

(e) * * *

(2) * * *

(ii) Not more than two outbuildings with each residence. Aggregate square foot area of outbuildings not to exceed 850 square feet and to be limited to one story not more than 22 feet in height.

* * * * *

Dated: September 7, 2004.

**David P. Tenny,**

*Deputy Under Secretary, Natural Resources and Environment.*

[FR Doc. 04–20592 Filed 9–10–04; 8:45 am]

**BILLING CODE 3410–11–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

### 44 CFR Parts 201 and 206

**RIN 1660–AA17**

### Hazard Mitigation Planning and Hazard Mitigation Grant Program

**AGENCY:** Federal Emergency Management Agency (FEMA), Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Interim rule.

**SUMMARY:** This rule provides State and Indian tribal governments with a mechanism to request an extension to the date by which they must develop State Mitigation Plans as a condition of grant assistance. FEMA regulations outline the requirements for State Mitigation Plans, which must be completed by November 1, 2004 in order to receive FEMA grant assistance. This interim rule allows FEMA to grant justifiable extensions, in extraordinary circumstances, for State and Indian tribal governments of up to six months, or no later than May 1, 2005. In addition, this interim rule allows mitigation planning grants provided through the Pre-Disaster Mitigation (PDM) program to continue to be available to State, Indian tribal, and local governments after November 1, 2004.

**DATES:** *Effective Date:* September 13, 2004.

*Comment Date:* We will accept written comments through November 12, 2004.

**ADDRESSES:** Please send written comments to the Rules Docket Clerk, Office of the General Counsel, Federal Emergency Management Agency, 500 C Street, SW., room 840,Washington DC 20472, (facsimile) 202–646–4536, or (e-mail) *FEMA-RULES@dhs.gov.*

**FOR FURTHER INFORMATION CONTACT:** Karen Helbrecht, Risk Reduction Branch, Mitigation Division, Federal Emergency Management Agency, 500 C Street, SW., Washington DC 20472, (phone) 202–646–3358, (facsimile) 202–646–3104, or (e-mail) *karen.helbrecht@dhs.gov.*

**SUPPLEMENTARY INFORMATION:**

#### Introduction

On February 26, 2002, FEMA published an interim rule at 67 FR 8844 implementing Section 322 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act or the Act), 42 U.S.C. 5165, enacted under Section 104 of the Disaster Mitigation Act of 2000 (DMA 2000), Public Law 106–390. This identified the requirements for State, tribal, and local mitigation plans. On October 1, 2002, FEMA published a change to that rule at 67 FR 61512, extending the date that the planning requirements take effect. The October 1, 2002 interim rule stated that by November 1, 2004, FEMA approved State Mitigation Plans were required in order to receive non-emergency Stafford Act assistance, and local mitigation plans were required in order to receive mitigation project grants. The critical portion of this interim rule provides a mechanism for Governors or Indian tribal leaders to request an extension to the date that the planning requirements take effect for State level mitigation plans. This interim rule allows extensions up to May 1, 2005 to States or Indian tribal governments who submit the necessary justification.

While all States and many Indian tribal governments have been working on the required State Mitigation Plans, and many have been very successful, a few have encountered extraordinary difficulties in meeting the November 1, 2004 deadline. Due to the significant implications of not having an approved plan, FEMA has decided to provide an option for States and Indian tribal governments that may not be able to meet the deadline, in order to allow all States to develop effective Mitigation plans. The option allows the Governor or Indian tribal leader to ask FEMA for an extension. A Governor or Indian tribal leader would be required to submit a written request to FEMA for the extension. The written request would include the justification for the extension; the reasons the plan has not been completed; the amount of additional time needed to complete the plan; and a strategy for completing the plan. FEMA would review each request, and could grant up to a six-month extension. However, the deadline would not be later than May 1, 2005. Governors or Indian tribal leaders could request this extension at any time after publication of this interim rule.

In addition, the current rule requirement states that States, or Indian tribal governments who choose to apply directly to FEMA, must have an approved mitigation plan by November 1, 2004 to be eligible for planning or project grant funding under the Pre-Disaster Mitigation (PDM) program. This rule change allows PDM planning grants to continue to be available to States and Indian tribal governments who do not have a FEMA approved mitigation plan. Local governments, and Indian tribal governments acting as subgrantees, continue to be eligible for PDM planning grants under the current requirement. Mitigation planning is the foundation to saving lives, protecting properties, and developing disaster resistant communities. The PDM program is the primary mechanism that provides grant assistance for mitigation planning. State and Indian tribal governments will be able to apply for a PDM planning grant in order to develop or update their mitigation plan which, when approved by FEMA, will maintain their eligibility for non-emergency Stafford Act assistance.

Finally, this interim rule makes technical and conforming amendments to other sections of FEMA regulations affected by the provision of Part 201 Mitigation planning, and adjusts the general major disaster allocation for the Hazard Mitigation Grant Program (HMGP) from 15 percent to 7½ percent to be consistent with a recent statutory amendment.

FEMA encourages comments on this interim rule.

#### *Administrative Procedure Act Statement*

In general, FEMA publishes a rule for public comment before issuing a final rule, under the Administrative Procedure Act, 5 U.S.C. 533 and 44 CFR 1.12. The Administrative Procedure Act,

however, provides an exception from that general rule where the agency for good cause finds that the procedures for prior comment and response are impracticable, unnecessary, or contrary to public interest.

This interim rule provides an option for States and Indian tribal governments to request an extension to the date by which they have to develop State Mitigation Plans required as a condition of receiving non-emergency Stafford Act grant assistance. State and Indian tribal governments are currently under the assumption, consistent with the current requirements, that plans are required by November 1, 2004, whereas this interim rule provides a mechanism to extend that date up to May 1, 2005, in certain cases. It does not affect the date that local plans will be required for other programs, such as the PDM program. In order for State and Indian tribal government resources to be appropriately identified and available to complete the required plans, it is essential that the date extension be made effective as soon as possible. If the rule were delayed beyond the November 1, 2004 deadline, and a State or Indian tribal government did not have a FEMA approved mitigation plan, all entities within that State or Indian tribe would be ineligible for grants to restore damaged public facilities, Fire Management Assistance grants, and HMGP funding. The benefits of this rule will only be realized if the rule is immediately effective and available to State and Indian tribal governments prior to the existing November 1, 2004 deadline. As a practical matter, since FEMA anticipates opening the application period for the FY2004/2005 PDM program in September, this rule is necessary to ensure that FEMA can provide timely guidance to States and Indian tribal governments of their eligibility for PDM planning funds, so they do not miss the opportunity to submit the necessary applications. FEMA believes that it is contrary to the public interest to delay the benefits of this rule. In accordance with the Administrative Procedure Act, 5 U.S.C. 553(d)(3), FEMA finds that there is good cause for the interim rule to take effect immediately upon publication in the **Federal Register** in order to meet the needs of States and communities by identifying the new effective date for planning requirement under 44 CFR Part 201.

The rule also allows PDM planning grants to continue to be available to States and Indian tribal governments who do not have a FEMA approved mitigation plan. The existing deadline for States to have a FEMA approved mitigation plan is November 1, 2004, and since the next round of competition for PDM funding will occur after that deadline, it is essential that the change in the planning requirement be made effective as soon as possible. This will allow State and Indian tribal governments to apply and compete for planning grants during the next PDM competitive cycle.

Therefore, FEMA finds that prior notice and comment on this rule would not further the public interest. We actively encourage and solicit comments on this interim rule from interested parties, and we will consider them as well as those submitted on the original interim planning rule in preparing the final rule. For these reasons, FEMA believes that we have good cause to publish an interim rule.

*National Environmental Policy Act*

44 CFR 10.8(d)(2)(ii) excludes this rule from the preparation of an environmental assessment or environmental impact statement, where the rule relates to actions that qualify for categorical exclusion under 44 CFR 10.8(d)(2)(iii), such as the development of plans under this section.

*Executive Order 12866, Regulatory Planning and Review*

FEMA has prepared and reviewed this rule under the provisions of Executive Order 12866, Regulatory Planning and Review. Under Executive Order 12866, 58 FR 51735, October 4, 1993, a significant regulatory action is subject to OMB review and the requirements of the Executive Order. The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The purpose of this rule is to extend the date by which State and Indian tribal governments have to prepare or update their mitigation plans to meet the criteria identified in 44 CFR Part 201. This interim rule provides a mechanism for States and Indian tribal governments to request an extension of the November 1, 2004 deadline for State Mitigation Plans, and allows State and Indian tribal governments that do not have an approved plan to compete for PDM planning funds after the deadline. As such, the rule itself will not have an effect on the economy of more than $100,000,000, nor otherwise constitute a significant regulatory action.

The Office of Management and Budget has concluded that this rule is not significant for purposes of Executive Order 12866.

*Executive Order 12898, Environmental Justice*

Under Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994, FEMA incorporates environmental justice into our policies and programs. The Executive Order requires each Federal agency to conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that those programs, policies, and activities do not have the effect of excluding persons from participation in our programs, denying persons the benefits of our programs, or subjecting persons to discrimination because of their race, color, or national origin.

No action that we can anticipate under the interim rule will have a disproportionately high or adverse human health and environmental effect on any segment of the population. This rule extends the date for development or update of State and Indian tribal mitigation plans in compliance with 44 CFR 201.4. Accordingly, the requirements of Executive Order 12898 do not apply to this interim rule.

*Paperwork Reduction Act of 1995*

This new interim rule simply provides an option to extend the date by which States have to comply with the planning requirements, and clarifies the planning requirements for the PDM program. The changes do not affect the collection of information; therefore, no change to the request for the collection of information is necessary. In summary, this interim rule complies with the provisions of the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A).

*Executive Order 13132, Federalism*

Executive Order 13132, Federalism, dated August 4, 1999, sets forth principles and criteria that agencies must adhere to in formulating and

implementing policies that have federalism implications, that is, regulations that have substantial direct effects on the States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies must closely examine the statutory authority supporting any action that would limit the policymaking discretion of the States, and to the extent practicable, must consult with State and local officials before implementing any such action.

We have reviewed this rule under Executive Order 13132 and have concluded that the rule does not have federalism implications as defined by the Executive Order. We have determined that the rule does not significantly affect the rights, roles, and responsibilities of States, and involves no preemption of State law nor does it limit State policymaking discretion.

We will continue to evaluate the planning requirements and will work with interested parties as we implement the planning requirements of 44 CFR Part 201. In addition, we actively encourage and solicit comments on this interim rule from interested parties, and we will consider them in preparing the final rule.

*Executive Order 13175, Consultation and Coordination With Indian Tribal Governments*

FEMA has reviewed this interim rule under Executive Order 13175, which became effective on February 6, 2001. In reviewing the interim rule, we find that it does not have "tribal implications" as defined in Executive Order 13175 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. Moreover, the interim rule does not impose substantial direct compliance costs on Indian tribal governments, nor does it preempt tribal law, impair treaty rights nor limit the self-governing powers of Indian tribal governments. In fact, this interim rule relieves a burden on Indian tribal governments by allowing them to apply for PDM planning grants after the November 1, 2004 deadline.

*Congressional Review of Agency Rulemaking*

FEMA has sent this interim rule to the Congress and to the General Accounting Office under the Congressional Review of Agency Rulemaking Act, Public Law 104–121. This interim rule is a not "major rule" within the meaning of that Act. It is an administrative action to extend the time State and local governments have to prepare mitigation plans required by Section 322 of the Stafford Act, as enacted in DMA 2000.

The interim rule will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. It will not have "significant adverse effects" on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises. The rule is not an unfunded Federal mandate within the meaning of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, and any enforceable duties that we impose are a condition of Federal assistance or a duty arising from participation in a voluntary Federal program.

**List of Subjects in 44 CFR Parts 201 and 206**

Administrative practice and procedure, Disaster assistance, Grant programs, Mitigation planning, Reporting and recordkeeping requirements.

■ Accordingly, FEMA amends 44 CFR, Parts 201 and 206 as follows:

## PART 201—MITIGATION PLANNING

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

**Authority:** Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376; E.O. 12148, 44 FR 43239, 3 CFR, 1979 Comp., p. 412; and E.O. 12673, 54 FR 12571, 3 CFR, 1989 Comp., p. 214.

■ 2. In § 201.3 add paragraph (c)(7) to read as follows:

**§ 201.3 Responsibilities.**

* * * * *

(c) * * *

(7) If necessary, submit a request from the Governor to the Director of FEMA, requesting an extension to the plan deadline in accordance with § 201.4(a)(2).

* * * * *

■ 3. Revise § 201.4(a) to read as follows:

**§ 201.4 Standard State Mitigation Plans.**

(a) *Plan requirement.* (1) By November 1, 2004, States must have an approved Standard State Mitigation Plan meeting the requirements of this section in order to receive assistance under the Stafford Act, although assistance authorized under disasters declared prior to November 1, 2004 will continue to be made available. Until that date, existing, FEMA approved State Mitigation Plans will be accepted. In any case, emergency assistance provided under 42 U.S.C. 5170a, 5170b, 5173, 5174, 5177, 5179, 5180, 5182, 5183, 5184, 5192 will not be affected. Mitigation planning grants provided through the Pre-Disaster Mitigation (PDM) program, authorized under Section 203 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5133, will also continue to be available. The mitigation plan is the demonstration of the State's commitment to reduce risks from natural hazards and serves as a guide for State decision makers as they commit resources to reducing the effects of natural hazards. States may choose to include the requirements of the HMGP Administrative Plan in their mitigation plan, but must comply with the requirement for updates, amendments, or revisions listed under 44 CFR 206.437.

(2) A Governor, or Indian tribal leader, may request an extension to the plan approval deadline by submitting a request in writing to the Director of FEMA, through the Regional Director. At a minimum, this must be signed by the Governor or the Indian tribal leader, and must include justification for the extension, identification of the reasons the plan has not been completed, identification of the amount of additional time required to complete the plan, and a strategy for finalizing the plan. The Director of FEMA will review each request and may grant a plan approval extension of up to six months. However, any extended plan approval deadline will be no later than May 1, 2005.

* * * * *

■ 4. Revise § 201.6(a)(1) to read as follows:

**§ 201.6 Local Mitigation Plans.**

* * * * *

(a) * * *

(1) For disasters declared on or after November 1, 2004, a local government must have a mitigation plan approved pursuant to this section in order to receive HMGP project grants.

* * * * *

## PART 206—FEDERAL DISASTER ASSISTANCE FOR DISASTERS DECLARED ON OR AFTER NOVEMBER 23, 1988

■ 5. The authority citation for part 206 continues to read as follows:

**Authority:** Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42

U.S.C. 5121–5206; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376; E.O. 12148, 44 FR 43239, 3 CFR, 1979 Comp., p. 412; and E.O. 12673, 54 FR 12571, 3 CFR, 1989 Comp., p. 214.

■ 6. Revise § 206.226(b) to read as follows:

**§ 206.226 Restoration of damaged facilities.**

* * * * *

(b) *Mitigation planning.* In order to receive assistance under this section, as of November 1, 2004 (subject to 44 CFR 201.4(a)(2)), the State must have in place a FEMA approved State Mitigation Plan in accordance with 44 CFR part 201.

* * * * *

■ 7. In § 206.432, revise paragraphs (b) introductory text and (b)(1) to read as follows:

**§ 206.432 Federal grant assistance.**

* * * * *

(b) *Amounts of assistance.* The total of Federal assistance under this subpart shall not exceed either 7½ or 20 percent of the total estimated Federal assistance (excluding administrative costs) provided for a major disaster under 42 U.S.C. 5170b, 5172, 5173, 5174, 5177, 5178, 5183, and 5201 as follows:

(1) *Seven and one-half (7½) percent.* Effective November 1, 2004, a State with an approved Standard State Mitigation Plan, which meets the requirements outlined in 44 CFR 201.4, shall be eligible for assistance under the HMGP not to exceed 7½ percent of the total estimated Federal assistance described in this paragraph. Until that date, existing FEMA approved State Mitigation Plans will be accepted. States may request an extension to the deadline of up to six months to the Director of FEMA by providing written justification in accordance with 44 CFR 201.4(a)(2).

* * * * *

■ 8. Revise § 206.434(b)(1) to read as follows:

**§ 206.434 Eligibility.**

* * * * *

(b) * * *

(1) For all disasters declared on or after November 1, 2004, local and Indian tribal government applicants for project subgrants must have an approved local mitigation plan in accordance with 44 CFR 201.6 prior to receipt of HMGP subgrant funding for projects. Until November 1, 2004, local mitigation plans may be developed concurrent with the implementation of subgrants.

* * * * *

**Michael D. Brown,**

*Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.*

[FR Doc. 04–20609 Filed 9–10–04; 8:45 am]

BILLING CODE 9110–41–P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Parts 0, 1, and 54

**[CC Docket No. 02–6; FCC 04–190]**

### Schools and Libraries Universal Service Support Mechanism

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Commission adopts measures to protect against waste, fraud, and abuse in the administration of the schools and libraries universal service support mechanism (also known as the E-rate program). In particular, the Commission resolves a number of issues that have arisen from audit activities conducted as part of ongoing oversight over the administration of the universal service fund, and we address programmatic concerns raised by our Office of Inspector General.

**DATES:** Effective October 13, 2004 except for §§ 1.8003, 54.504(b)(2), 54.504(c)(1), 54.504(f), 54.508, and 54.516 which contain information collection requirements that are not effective until approved by the Office of Management and Budget. The FCC will publish a document in the **Federal Register** announcing the effective date for those sections.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Schneider, Attorney, Wireline Competition Bureau, Telecommunications Access Policy Division, (202) 418–7400.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Fifth Report and Order, and Order in CC Docket No. 02–6 released on August 13, 2004. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room CY–A257, 445 Twelfth Street, SW., Washington, DC, 20554.

#### I. Introduction

1. In this order, we adopt measures to protect against waste, fraud, and abuse in the administration of the schools and libraries universal service support mechanism (also known as the E-rate program). In particular, we resolve a number of issues that have arisen from audit activities conducted as part of ongoing oversight over the administration of the universal service fund, and we address programmatic concerns raised by our Office of Inspector General (OIG). First, we set forth a framework regarding what amounts should be recovered by the Universal Service Administrative Company (USAC or Administrator) and the Commission when funds have been disbursed in violation of specific statutory provisions and Commission rules. Second, we announce our policy regarding the timeframe in which USAC and the Commission will conduct audits or other investigations relating to use of E-rate funds. Third, we eliminate the current option to offset amounts disbursed in violation of the statute or a rule against other funding commitments. Fourth, we extend our red light rule previously adopted pursuant to the Debt Collection Improvement Act (DCIA) to bar beneficiaries or service providers from receiving additional benefits under the schools and libraries program if they have failed to satisfy any outstanding obligation to repay monies into the fund. Fifth, we adopt a strengthened document retention requirement to enhance our ability to conduct all necessary oversight and provide a stronger enforcement tool for detecting statutory and rule violations. Sixth, we modify our current requirements regarding the timing, content and approval of technology plans. Seventh, we amend our beneficiary certification requirements to enhance our oversight and enforcement activities. Eighth, we direct USAC to submit a plan for timely audit resolution, and we delegate authority to the Chief of the Wireline Competition Bureau to resolve audit findings. Finally, we direct USAC to submit on an annual basis a list of all USAC administrative procedures to the Wireline Competition Bureau (Bureau) for review and further action, if necessary, to ensure that such procedures effectively serve our objective of preventing waste, fraud and abuse.

#### II. Fifth Report and Order

2. Since the inception of the schools and libraries support mechanism, schools and libraries have been subject to audits to determine compliance with the program rules and requirements. Audits are a tool for the Commission and USAC, as directed by the

Commission, to ensure program integrity and to detect and deter waste, fraud, and abuse. Because audits may provide information showing that a beneficiary or service provider failed to comply with the statute or Commission rules applicable during a particular funding year, audits can reveal instances in which universal service funds were improperly disbursed or used in a manner inconsistent with the statute or the Commission's rules. As explained below, we adopt measures relating to recovery of such funds and other measures to strengthen the integrity of the schools and libraries mechanism of the universal service program and enhance our ongoing oversight over this program.

3. We stress that the measures we adopt herein are not the final steps we plan to take for strengthening oversight of the universal service program and combating waste, fraud, and abuse. We remain committed to deterring inappropriate uses of universal service monies and to rapidly detecting and addressing potential misconduct (including waste, fraud, and abuse), and we recognize that achieving these goals is a continual process. We note that we previously sought comment on additional oversight mechanisms, including a requirement that beneficiaries obtain and pay for independent audits of their compliance with our rules. We are continuing to work on various proposals for improving our oversight of the universal service program, and we expect to issue an order adopting additional measures in the near future.

*A. Recovery of Funds*

a. What To Recover

4. It is clear that funds disbursed in violation of the statute or a rule that implements the statute or a substantive program goal must be recovered. In this order we identify rules of this type and provide advance notice to all stakeholders that violation of these rules will result in recovery. In addition, we recognize that other rules may be necessary to protect against waste, fraud and abuse, and that violation of these types of rules will warrant recovery as well, as set forth in this order.

5. On the other hand, we agree with commenters that recovery may not be appropriate for violation of all rules regardless of the reason for their codification. For example, when the administrative costs of recovering funds disbursed in violation of a rule exceed the improperly disbursed amount, it may be reasonable not to seek recovery. Likewise recovery may not be appropriate for violation of procedural rules codified to enhance operation of the e-rate program. We seek to ensure that the determination is made and communicated to applicants in advance. Consistent with this policy, as described more fully below, we intend to evaluate whether there are USAC procedures that should be codified into the Commission's rules and whether violation of each should also be a basis for recovery. Applicants will be required to comply with procedural rules in applying for support—and applications that do not comply will be rejected. If, however, the procedural violation is inadvertently overlooked during the application phase and funds are disbursed, the Commission will not require that they be recovered, except to the extent that such rules are essential to the financial integrity of the program, as designated by the agency, or that circumstances suggest the possibility of waste, fraud, or abuse, which will be evaluated on a case-by-case basis.

6. Amounts disbursed in violation of the statute or a rule that implements the statute or a substantive program goal must be recovered in full. In situations where disbursement of funds is warranted under the statute and rules, but an erroneous amount has been disbursed, the amount of funds that should be recovered is the difference between what the beneficiary is legitimately allowed under our rules and the total amount of funds disbursed to the beneficiary or service provider. We set forth below a number of examples to illustrate the applications of this principle.

7. *Competitive Bidding Requirements.* We conclude that we should recover the full amount disbursed for any funding requests in which the beneficiary failed to comply with the Commission's competitive bidding requirements as set forth in § 54.504 and § 54.511 of our rules and amplified in related Commission orders. For instance, it is appropriate to recover the full amount of funds disbursed for a funding request when the beneficiary signs a contract before the end of the 28-day posting period. Likewise, it is appropriate to recover the full amount disbursed in a situation where the beneficiary failed to consider price as the primary factor when evaluating among competing bids. This conclusion is based on our position that the competitive bidding process is a key component of the schools and libraries program, ensuring that funds support services that satisfy the precise needs of an applicant and that services are provided at the lowest possible rates.

8. *Necessary Resources Certification.* We conclude that a lack of necessary resources to use the supported services warrants full recovery of funds disbursed for all relevant funding requests. The requirements that beneficiaries have sufficient computer equipment, software, staff training, internal connections, maintenance and electrical capacity to make use of the supported services are integral to ensuring that these monies are used for their intended purposes, without waste, fraud or abuse.

9. *Service Substitution.* Parties have the opportunity to make legitimate changes to requested services when events occur that make the original funding request impractical or even impossible to fulfill. Last December, we codified rules to address requests for service or equipment changes, concluding that allowing parties to make such substitutions is consistent with our goal of affording schools and libraries maximum flexibility to choose the offering that meets their needs more effectively and efficiently. We conclude that in situations where a service substitution would meet the criteria now established in our rules, the appropriate amount to recover is the difference between what was originally approved for disbursement and what would have been approved, had the entity requested and obtained authorization for a service substitution. In situations where the service substitution would not meet the criteria established in our rules, the appropriate amount to recover is the full amount associated with the service in question.

10. *Failure To Pay Non-Discounted Share.* We conclude that all funds disbursed should be recovered for any funding requests in which the beneficiary failed to pay its non-discounted share. While our rules do not set forth a specific timeframe for determining when a beneficiary has failed to pay its non-discounted share, we conclude that a reasonable timeframe is 90 days after delivery of service. Allowing schools and libraries to delay for an extended time their payment for services would subvert the intent of our rule that the beneficiary must pay, at a minimum, ten percent of the cost of supported services. We believe, based on USAC's experience to date as Administrator, that a relatively short period "comparable to what occurs in commercial settings—should be established in which beneficiaries are expected to pay their non-discounted share after completion of delivery of service. In other contexts, companies refer payment matters to collection agencies if a customer fails to pay after

several requests for payment. Accordingly, we clarify prospectively that a failure to pay more than 90 days after completion of service (which is roughly equivalent to three monthly billing cycles) presumptively violates our rule that the beneficiary must pay its share. For purposes of resolving any outstanding issues relating to audits conducted prior to the issuance of this clarification, we direct USAC to determine whether full payment had been made as of the time the audit report was finalized. If any amounts remained outstanding at the conclusion of the audit work, that constitutes a rule violation warranting recovery of all amounts disbursed. Information on payment of the non-discounted share shall be sought from the beneficiary.

11. *Duplicative Services.* As noted in the *Schools and Libraries Second Order*, 68 FR 36931, June 20, 2003, our rules prohibit the funding of duplicative services, defined as services that provide the same functionality to the same population in the same location during the same period of time. In such circumstances, we ordinarily will recover the amount associated with the more expensive of the duplicative services, except in situations where there are indications of fraud, where we may recover the full amount of the funding request.

12. *Failure To Complete Service Within the Funding Year.* We conclude that the failure to complete delivery of services by the relevant deadline for a particular funding year is a rule violation that warrants recovery of all funds disbursed for services installed or delivered after the close of the funding year. We note that parties are always free to seek an extension of time to install non-recurring services from USAC, consistent with the conditions set by the Commission for such an extension. Such extensions have been granted in situations where installation cannot be completed for reasons outside the control of the beneficiary. Generally, however, the Commission requires service to be completed within one Funding Year, in order to promote equity among applicants and to avoid waste.

13. *Discount Calculation Violation.* When applicants fail to calculate properly their appropriate discount rate, the amount disbursed in violation of this rule is the difference between the amount of support to which the beneficiary is legitimately allowed and the amount requested or provided. For instance, in a situation in which the beneficiary made a clerical error in calculating the level of participation in the school lunch program, or failed to use an approved methodology for calculating the level of school lunch participation, the beneficiary may legitimately receive support under a recalculated discount rate. In these circumstances, the amount to recover is the difference between the incorrectly calculated amount and the amount recalculated with the appropriate discount. We emphasize, however, that in the narrow circumstance where there is evidence that an applicant has manipulated its discount rate in a deliberate attempt to defraud the government, full recovery may be appropriate. Moreover, in situations where the applicant would not have qualified for any support for internal connections had it properly applied the discount, the recovery would be the entire amount disbursed.

14. *Service Not Provided for Full Funding Year.* Similarly, if an applicant requested and received funding for a full year, and the service provider billed for the full year, but provided services for less than the full year, we believe it would be appropriate to pro-rate support and recover the excess. Such adjustments are ordinarily made prior to disbursement when discovered by USAC through normal review processes.

15. *Recovery Only for Waste, Fraud and Abuse.* We reject the argument some commenters make that applicants should not be required to repay the fund unless waste, fraud or abuse is established. We believe that there may be instances in which rule violations undermine statutory requirements or substantive policy goals of the program, but may not rise to the level of waste, fraud or abuse. For example, a request for an ineligible service might not entail waste, fraud or abuse, but it is still a violation for which recovery is necessary. While we appreciate that it may impose some hardship to make repayment in some situations, a statutory or rule violation cannot be absolved merely because the nature of the violation does not implicate waste, fraud or abuse. Moreover, to limit recovery to situations involving waste, fraud or abuse would place us in the position of condoning violation of the program's rules Further, it would provide no incentives to applicants or service providers to take the necessary steps to familiarize themselves with our rules and put controls in place to ensure rule compliance. Nor do we believe it appropriate for a beneficiary to retain an overpayment if, for some reason, USAC has mistakenly disbursed an amount in excess of that which the entity is allowed under our rules. If there are unique reasons why a particular entity believes recovery for a rule violation is inappropriate, that party is always free to present such information in seeking review of USAC's decision to recover monies, pursuant to § 54.722. We note, however, that we are without authority to waive statutory violations.

16. While we have not, to date, enunciated a bright line standard for determining whether a particular funding request or activities related to it depart from this standard to a degree that constitutes waste, fraud or abuse, we emphasize that we, and USAC in the first instance, retain the discretion to make such determinations on a case-by-case basis in the course of examining specific factual circumstances. For example, section 254(h)(1)(B) of the Act requires that applicants make a bona fide request for services to be used for educational purposes. A funding request may not be bona fide in a situation in which a service provider has charged the beneficiary an inflated price. Thus, it would be appropriate to recover amounts disbursed in excess of what similarly situated customers are normally charged in the marketplace. Similarly, in a situation in which the beneficiary has requested a clearly excessive level of support "which necessarily must be judged in the context of the specific circumstances of the school or library "it would also be appropriate to recover the full amount of the funding request, because the beneficiary has not made a bona fide request based on its reasonable needs. In addition, in specific cases where there is evidence of fraudulent conduct, it would be appropriate to refer such matters to law enforcement officials.

b. When To Recover Funds

17. In this section, we establish an administrative limitations period in which the Commission or USAC will determine that a violation has occurred. We believe that announcing a general policy in this area is in the public interest because it provides applicants and service providers with some certainty of the timing by which an audit or further review of e-rate funding may occur. We also conclude that a *de minimis* exception is in the public interest and direct USAC generally not to seek recovery when the administrative cost is greater than the recovery amount. Finally, we decline to implement a rule generally requiring full recovery when a pattern of violations is discovered, recognizing the punitive nature of such a rule. Rather, we direct USAC to conduct more rigorous scrutiny of applications in subsequent funding years when systematic noncompliance of FCC rules is suspected, and we direct USAC to

refer such situations to the Bureau, as appropriate, for further consideration.

18. *Administrative Limitations Period for Audits or Other Investigations by the Commission or USAC.* We believe that some limitation on the timeframe for audits or other investigations is desirable in order to provide beneficiaries with certainty and closure in the E-rate applications and funding processes. For administrative efficiency, the time frame for such inquiry should match the record retention requirements and, similarly, should go into effect for Funding Year 2004. Accordingly, we announce our policy that we will initiate and complete any inquiries to determine whether or not statutory or rule violations exist within a five year period after final delivery of service for a specific funding year. We note that USAC and the Commission have several means of determining whether a violation has occurred, including reviewing the application, post application year auditing, invoice review and investigations. Under the policy we adopt today, USAC and the Commission shall carry out any audit or investigation that may lead to discovery of any violation of the statute or a rule within five years of the final delivery of service for a specific funding year.

19. In the E-rate context, disbursements often occur for a period up to two years beyond the funding year. Moreover, audit work typically is not performed until after the disbursement cycle has been completed. For consistency, our policy for audits and other investigations mirrors the time that beneficiaries are required to retain documents pursuant to the rule adopted in this order. We believe that conducting inquiries within five years strikes an appropriate balance between preserving the Commission's fiduciary duty to protect the fund against waste, fraud and abuse and the beneficiaries' need for certainty and closure in their E-rate application processes.

20. One commenter argues that fund recovery actions should be subject to a one year statute of limitations, comparable to the limitation for imposition of forfeitures, while others argue that a two year timeframe, beginning the date of the funding commitment decision letter, is appropriate. We emphasize that our policy regarding initiation of audits or other investigations does not affect the statutes of limitations applicable under the DCIA for collection of debts established by the Commission.

21. *Recovery for De Minimis Amounts.* We conclude that it does not serve the public interest to seek to recover funds associated with statutory or rule violations when the administrative costs of seeking recovery outweigh the dollars subject to recovery. Accordingly, we direct USAC not to seek recovery of such *de minimis* amounts. We direct USAC to provide the Wireline Competition Bureau and the Office of Managing Director sufficient information regarding the administrative costs of seeking recovery of improperly disbursed funds so that a *de minimis* amount can be determined.

22. *Recovery for Pattern of Rule Violations.* We decline at this time to adopt a rule requiring recovery of the full amount disbursed in situations in which there is a pattern of rule or statutory violations, but the specific individual violations collectively do not require recovery of all disbursed amounts. We believe it would be difficult to establish a workable bright line standard that USAC could apply in such cases, and therefore decline to adopt such a rule at this time. We direct the Wireline Competition Bureau to consider such situations on a case-by-case basis in the course of resolving audit findings. Moreover, we emphasize that USAC should subject any school or library that exhibits systematic noncompliance with governing FCC rules to more rigorous scrutiny in the subsequent funding years. We direct USAC to implement this practice and to refer such situations to the Bureau, as appropriate, for further consideration.

c. How To Recover

23. *Elimination of the Offset Options.* In the *Commitment Adjustment Implementation Order,* the Commission authorized USAC to offer service providers two offset methods for repayment of funds disbursed in violation of the statute or a rule. One offset method allowed a service provider to offset the debt by "reductions in the amounts owed to the service provider from other existing valid commitments involving the same applicant and service provider in the same funding year." The other offset method permitted a service provider to offset commitments involving the same applicant and service provider in subsequent funding years.

24. Based on our experience with implementation of the *Commitment Adjustment Implementation Order,* we now conclude that it would better serve our interest in protecting universal service funds to eliminate the offset methods adopted in that order as options for recovery of funds in the schools and libraries universal service mechanism. We have observed that, when used, such offset methods can result in a lengthy process that imposes a significant administrative burden on USAC. We note that although a service provider may fully intend to repay the outstanding debt in a timely manner when choosing the offset options adopted in the *Commitment Adjustment Implementation Order,* events may occur during the current or subsequent funding year which may delay or prevent payment. For example, the offset option was made available when there were sufficient pending funding requests to pay for the outstanding debt during the subsequent funding year, but if actual disbursements requested during that funding year do not satisfy the outstanding debt, the debt may continue during later funding years, or indefinitely if there remains an unsatisfied commitment. Even within the current funding year, such an offset may prove to be an attenuated, lengthy process, given that the beneficiary may have more than a full year after the close of the funding year to complete installation of non-recurring services, and may obtain extensions beyond that in specified circumstances. The potential for carrying the outstanding debt over several funding years, or non-payment altogether, hinders the ability of USAC to fully collect funds as necessary. To avoid this, and to promote administrative efficiency, we eliminate the offset options adopted in the *Commitment Adjustment Implementation Order* from the fund recovery plan.

25. *Booking of Recovery Amounts.* The Commission is committed to meeting its obligations under federal laws by maintaining complete and accurate financial reporting. As we have noted in other orders, universal service monies are reflected on the Commission's financial statements. To ensure the Commission meets its goals with respect to accounting for universal service funds on its financial statements, the Commission previously has directed USAC as Administrator of the Universal Service Fund to prepare financial statements for the Universal Service Fund consistent with generally accepted principles for federal agencies. In accordance with the Commission's rules, recovery amounts should be recorded in the accounting records for the Universal Service Fund consistent with Federal Generally Accepted Accounting Principles (GAAP).

d. Treatment of Applicants Subject to Recovery Actions

26. Some commenters stress that an opportunity to contest recovery should be afforded to applicants and service providers, and one commenter argues that applicants and service providers

should receive a full administrative hearing before recovery of funds is sought. We decline to adopt a rule providing for an administrative hearing before the issuance of a letter demanding recovery of funds. Parties are already free today to challenge any action of USAC—including the issuance of a demand for recovery of funds—by filing a request for review with this Commission pursuant to § 54.722 of our rules. We believe that this opportunity sufficiently addresses beneficiaries' needs. We see no significant additional public benefit to justify the creation of another layer of administrative process and the associated administrative costs for all involved.

27. Earlier this year we amended our rules to implement the Debt Collection Improvement Act of 1996, which generally governs the collection of claims owed to the United States. Among other things, we adopted a rule, § 1.1910, providing that the Commission shall withhold action on any application or request for benefits made by an entity that is delinquent in its non-tax debts owed to the Commission, and shall dismiss such applications or requests if the delinquent debt is not resolved. This rule (which we refer to as the "red light rule") applies to any application that is subject to the FCC Registration Number requirement set forth in part 1, subpart W, of our rules. The new DCIA rules specify that the term "Commission" includes the Universal Service Fund.

28. In response to the *Schools and Libraries Second Further Notice,* 69 FR 6181, February 10, 2004, several commenters suggested that we should bar or limit participation in the program when entities have some particular forms of outstanding claims. At present, applicants and some service providers under the schools and libraries mechanism are not required to obtain an FCC Registration Number, and as such, are not subject to the literal terms of § 1.1910 of our rules. We believe adopting analogous requirements for the schools and libraries program would be beneficial to the administration of the program in the prevention of waste, fraud and abuse, however, as it would strengthen incentives for beneficiaries and service providers to comply with the statute and our rules. We therefore amend our rules to bring all E-rate beneficiaries and service providers within the ambit of the red light rule. Accordingly, we amend our rules at 47 CFR 1.8002 and 1.8003 to require all entities that participate in the schools and libraries universal service support mechanism to obtain an FCC Registration Number. This rule change shall go into effect pursuant to the *DCIA Order,* 69 FR 27843, May 17, 2004, and shall apply to all applications and recovery actions pending at that time. Thereafter, USAC shall dismiss any outstanding requests for funding commitments if a school or library, or service provider, as applicable, has not paid the outstanding debt, or made otherwise satisfactory arrangements, within 30 days of the date of the notice provided for in our commitment adjustment procedures. In this regard, we expressly recognize that a school or library's ability to pay outstanding debts may be dependent on action by state or local officials on budgetary requests, and the timing of such budgetary action may be considered in determining satisfactory repayment options. We direct USAC to work with the Wireline Competition Bureau and Office of Managing Director to resolve any implementation issues associated with this rule.

29. Applications will not be dismissed pursuant to our red light rule if the applicant has timely filed a challenge through administrative appeal or a contested judicial proceeding to either the existence or amount of the debt owed to the Commission. Our recent *DCIA Order* expressly notes that appeals made to USAC shall be deemed administrative appeals. Our rules thus provide the opportunity to contest any finding that monies are owed to the fund, and thereby toll the potentially harsh consequences of the red light rule. This addresses the concerns raised by some parties that deferring action on pending requests when there is an outstanding commitment adjustment action would unfairly dissuade parties from pursuing their legitimate appeal rights.

30. Moreover, even if outstanding debts to the universal service fund have been repaid, we think it appropriate to subject subsequent applications from beneficiaries that have been found to have violated the statute or rules in the past to greater review. We believe it prudent to subject any pending applications to more rigorous scrutiny if USAC has determined, based on audit work or other means, that the applicant violated the statute or a Commission rule in the past. Such action is consistent with the framework previously enunciated in our *Puerto Rico Department of Education Order* for situations in which one or more entities is under investigation, or there is other evidence of potential program violations. Such heightened scrutiny could entail, for instance, requiring additional documentary evidence to demonstrate current compliance with all applicable requirements, or submission of a corrective plan of action to address past errors. It may also include site visits or other investigatory activities. Such heightened scrutiny could continue as long as necessary. We envision, however, that in most instances, such heightened scrutiny would no longer be necessary in subsequent years, after USAC determines that a pending application is compliant with the statute and Commission requirements.

*B. Document Retention Requirements*

31. Most commenters addressing this issue support the adoption of a five-year record retention rule, but suggest that the Commission should provide clear guidance on what information needs to be retained for possible audits and/or reviews. We agree. Therefore, in this Order, we amend § 54.516 of our rules to require both applicants and service providers to retain all records related to the application for, receipt and delivery of discounted services for a period of five years after the last day of service delivered for a particular Funding Year. This rule change shall go into effect when this order becomes effective and, as such, will apply to Funding Year 2004 and thereafter. We conclude that the adoption of a five-year record retention requirement will facilitate improved information collection during the auditing process and will enhance the ability of auditors to determine whether applicants and service providers have complied with program rules. Further, we believe that specific recordkeeping requirements not only prevent waste, fraud and abuse, but also protect applicants and/or service providers in the event of vendor disputes.

32. Although we agree with commenters that an explicit list of documents that must be retained in the recordkeeping requirement would be most useful for service providers and program beneficiaries, we do not believe that an exhaustive list of such documents is possible. We base this conclusion on our knowledge that due to the diversity that exists among service providers and program beneficiaries, the descriptive titles or names of relevant documents will vary from entity to entity. To address commenters' concerns, however, we provide for illustrative purposes the following description of documents that service providers and program beneficiaries must retain pursuant to this recordkeeping requirement, as applicable:

- *Pre-bidding Process.* Beneficiaries must retain the technology plan and

technology plan approval letter. If consultants are involved, beneficiaries must retain signed copies of all written agreements with E-rate consultants.

• *Bidding Process.* All documents used during the competitive bidding process must be retained. Beneficiaries must retain documents such as: Request(s) for Proposal (RFP(s)) including evidence of the publication date; documents describing the bid evaluation criteria and weighting, as well as the bid evaluation worksheets; all written correspondence between the beneficiary and prospective bidders regarding the products and service sought; all bids submitted, winning and losing; and documents related to the selection of service provider(s). Service providers must retain any of the relevant documents described above; in particular, a copy of the winning bid submitted to the applicant and any correspondence with the applicant. Service providers participating in the bidding process that do not win the bid need not retain any documents.

• *Contracts.* Both beneficiaries and service providers must retain executed contracts, signed and dated by both parties. All amendments and addendums to the contracts must be retained, as well as other agreements relating to E-rate between the beneficiary and service provider, such as up-front payment arrangements.

• *Application Process.* The beneficiary must retain all documents relied upon to submit the Form 471, including National School Lunch Program eligibility documentation supporting the discount percentage sought; documents to support the necessary resources certification pursuant to § 54.505 of the Commission's rules, including budgets; and documents used to prepare the Item 21 description of services attachment.

• *Purchase and Delivery of Services.* Beneficiaries and service providers should retain all documents related to the purchase and delivery of E-rate eligible services and equipment. Beneficiaries must retain purchase requisitions, purchase orders, packing slips, delivery and installation records showing where equipment was delivered and installed or where services were provided. Service providers must retain all applicable documents listed above.

• *Invoicing.* Both service providers and beneficiaries must retain all invoices. Beneficiaries must retain records proving payment of the invoice, such as accounts payable records, service provider statement, beneficiary check, bank statement or ACH transaction record. Beneficiaries must also be able to show proof of service provider payment to the beneficiary of the BEAR, if applicable. Service providers must retain similar records showing invoice payment by beneficiary to the service provider, USAC payment to the service provider, payment of the BEAR to the beneficiary, through receipt or deposit records, bank statements, beneficiary check or automated clearing house (ACH) transaction record, as applicable.

• *Inventory.* Beneficiaries must retain asset and inventory records of equipment purchased and components of supported internal connections services sufficient to verify the location of such equipment. Beneficiaries must also retain detailed records documenting any transfer of equipment within three years after purchase and the reasons for such a transfer.

• *Forms and Rule Compliance.* All program forms, attachments and documents submitted to USAC must be retained. Beneficiaries and service providers must retain all official notification letters from USAC, as applicable. Beneficiaries must retain FCC Form 470 certification pages (if not certified electronically), FCC Form 471 and certification pages (if not certified electronically), FCC Form 471 Item 21 attachments, FCC Form 479, FCC Form 486, FCC Form 500, FCC Form 472. Beneficiaries must also retain any documents submitted to USAC during program integrity assurance (PIA) review, Selective Review and Invoicing Review, or for SPIN change or other requests. Service providers must retain FCC Form 473, FCC Form 474 and FCC Form 498, as well as service check documents. In addition, beneficiaries must retain documents to provide compliance with other program rules, such as records relevant to show compliance with CIPA.

33. We emphasize that the rule we adopt here requires that program participants retain all documents necessary to demonstrate compliance with the statute and Commission rules regarding the application for, receipt, and delivery of services receiving schools and libraries discounts. Thus, the descriptive list above is provided as a guideline but cannot be considered exhaustive. For example, service providers must provide beneficiaries' billing records, if requested, and will be held accountable for properly billing those applicants for discounted services and for complying with other rules specifically applicable to service providers. Service providers are responsible for maintaining records only with respect to the services they actually provide, not records for applicants on whose contracts they may have bid, but not won.

34. We make additional clarifications to our rules providing for audits of program beneficiaries and service providers participating in the program. In particular, we clarify that schools, libraries, and service providers remain subject to both random audits and to other audits (or investigations) to examine an entity's compliance with the statute and the Commission's rules initiated at the discretion of the Commission, USAC, or another authorized governmental oversight body. We also conclude that failing to comply with an authorized audit or other investigation conducted pursuant to § 54.516 of the Commission's rules (*e.g.*, failing to retain records or failing to make available required documentation) is a rule violation that may warrant recovery of universal service support monies that were previously disbursed for the time period for which such information is being sought.

### *C. Technology Plans*

35. To ensure transparency and consistency in the application of our rules we now modify our requirements regarding technology plan timing and content. Our revised rules require applicants to have an approved technology plan in place before the start of services and to certify at the time that they apply for discounts that their receipt of e-rate support is contingent upon timely approval of the technology plan. Our revised rules also largely adopt the United States Department of Education guidelines for technology plan content, and, in cases where applicants do not fall under the ambit of the Department of Education technology planning requirement, we adopt requirements consistent with USAC's guidelines. Because we continue to believe that the focus of technology planning should be research and planning for technology needs, we decline at this time to adopt rules to require technology plans to include an analysis of the cost of leasing versus purchasing E-rate eligible products and services or a showing that the applicant has considered the most cost-effective way to meet its educational objectives. We see no need, at this time, to address the question of what specific qualifications technology plan approvers should have. We note that the technology plans of libraries and public schools are already reviewed by individual states, and that USAC certifies reviewers for non-public schools. As we describe below, the state is the certified technology plan approver

for libraries and public schools, and we codify this practice in this order. We modify our rules so that non-public schools and entities that cannot or do not choose to secure approval of their technology plan from their states may obtain technology plan approval from USAC-certified entities.

36. *Technology Plan Timing.* We revise § 54.504(b)(2)(vii) so that applicants with technology plans that have not yet been approved when they file FCC Form 470 must certify that they understand their technology plans must be approved prior to the commencement of service. In making this change, we recognize that the timing of technology plan approval in particular states and localities may not coincide perfectly with the application cycle of the schools and libraries support mechanism. At the same time, we emphasize that applicants still are expected to develop a technology plan prior to requesting bids on services in FCC Form 470; all that we are deferring is the timing of the approval of such plan by the state or other approved certifying body. Second, we amend our rules to require that applicants formally certify, in FCC Form 486, that the technology plans on which they based their purchases were approved before they began to receive service. This revision conforms our rules to the current instructions for filing FCC Form 470 and is consistent with the views of commenters. The revision permits applicants to meet our technology plan requirements as long as their technology plans will be approved before they begin receiving service. It also ensures that applicants formally confirm that their technology plans were approved when service begins.

37. In light of the current inconsistency between our rules and the instructions to FCC Form 470, we conclude that it is appropriate to waive the rule for the limited purpose of extinguishing liability for recovery of funds in the narrow circumstance in which a beneficiary obtained approval of its technology plan after the filing of FCC Form 470, but before service commenced. We hereby grant a waiver of § 54.504(b)(2)(vii) of our rules to all applicants that failed to have a technology plan approved at the time they filed their FCC Form 470 or that had obtained approval of a technology plan that covered only part of the funding year, but that obtained approval of a plan that covered the entire funding year before the commencement of service in the relevant funding year. We conclude that in this situation, it would not serve the public interest to enforce the terms of § 54.504(b)(2)(vii) in light of the ambiguity created by the phrasing of the certification contained in the current FCC Form 470. We emphasize, however, that this limited waiver does not extend to instances where the applicant failed to obtain an approval of a technology plan at all. Such failure to obtain any approval is inconsistent with our rules and warrants recovery of all funds disbursed under the relevant funding requests.

38. *Technology Plan Content.* We conclude that technology plans should continue to focus on ensuring that technologies are used effectively to achieve educational goals rather than assuming a greater role in monitoring the procurement process. We reiterate our conclusion that the technology plan should focus on "research and planning for technology needs "rather than act as preliminary RFPs. Thus, while we expect that applicants will compare purchase and leasing options and the cost-effectiveness of different technologies as part of their procurement processes, we decline, consistent with the views of most commenters, to add a requirement that these matters be addressed in technology plans.

39. We agree with the virtually unanimous view of commenters that the Commission's technology plan requirements should be harmonized with the technology planning goals and requirements of the U.S. Department of Education and the U.S. Institute for Museum and Library Services. In fact, USAC has already been treating technology plans approved under the Department of Education's Enhancing Education Through Technology (EETT) as acceptable technology plans subject to one qualification. Consistent with the Commission requirement that program applicants demonstrate that they have the necessary resources required to utilize e-rate discounts, USAC has required that the EETT technology plans be supplemented by an analysis that indicates that the applicant is aware of and will be able to secure the financial resources it will need to achieve its technology aims, including technology training, software, and other elements outside the coverage of the Commission's support program. We adopt this existing policy in recognition of the Department of Education's expertise and USAC's attention to our requirement that applicants show that they have done the necessary planning and are able to secure the required resources to effectively employ the services they desire to purchase. Accordingly, we adopt a rule that codifies this method of compliance with the technology plan requirement.

40. We also adopt a rule that applicants that do not have EETT technology plans, must demonstrate that their plans contain the following elements:

(1) Establish clear goals and a realistic strategy for using telecommunications and information technology to improve education or library services;

(2) Have a professional development strategy to ensure that the staff understands how to use these new technologies to improve education or library services;

(3) Include an assessment of the telecommunication services, hardware, software, and other services that will be needed to improve education or library services;

(4) Provide for a sufficient budget to acquire and support the non-discounted elements of the plan: the hardware, software, professional development, and other services that will be needed to implement the strategy; and

(5) Include an evaluation process that enables the school or library to monitor progress toward the specified goals and make mid-course corrections in response to new developments and opportunities as they arise.

With these elements included in technology plans, applicants will be demonstrating at an early stage of the application process that they are or are preparing to be in compliance with the Commission's rules.

41. Consistent with this rule, the ability of an entity whose technology plan complies with the criteria in the preceding paragraphs to order services is only limited by the scope of its technology plan's strategy for using telecommunications services and information technology to meet its educational goals. Commenters should not fear that strengthened technology plan requirements will lock them into specific services. In fact, applicants are free to switch from wireline to wireless technologies, from high to even higher speed transmission speeds, and to make other similar changes in the services they order as long as those services are designed to deliver the educational applications they have prepared to provide. Only if an applicant desires to order services beyond the scope of its existing technology plan does it need to prepare and seek timely approval of an appropriately revised technology plan.

42. We also decline at this time to take any of the other actions regarding technology plans suggested by commenters. We decline to adopt ALA's suggestion that we require separate filings of proposals to provide service and prices, since we find that it would

be much more costly for USAC to process such filings separately, given the redundancy. We decline to require USAC to provide examples of acceptable technology plans given that applicants can already approach their states or other entities from which they must gain certification for such examples. Although we do not require technology plans from those seeking only "POTS" local and long distance telecommunications services, or cellular service, we decline to eliminate the requirement for those seeking internet access, because we believe that certified plans are important to ensuring that applicants have carefully considered how to employ the service. For administrative efficiency, we also decline to require all applicants to submit their technology plans as attachments to current forms, but note that USAC may request submission of a technology plan for any applicant as part of the application review process and that such plans are subject to the document retention rules adopted in this order. As such, a violation of the technology plan rules we adopt herein will be subject to recovery on a prospective basis.

43. *Technology Plan Approval.* We also modify our rules to address non-public schools that are not eligible to secure approval of their technology plan from their states. USAC has been handling this matter by permitting such schools to obtain approval of their plans from entities that USAC has certified as qualified to provide such evaluations and approval. We now amend our rules to codify this practice.

*D. Certifications*

44. *Form 470.* Section 54.504 of the Commission's rules governs applicants' requests for services and provides specific requirements for completing the FCC Form 470. Pursuant to § 54.504(b)(2), there are several requirements to which applicants must certify compliance before submitting their FCC Form 470 applications. Most of these certification requirements are also listed in Block 5 of the FCC Form 470. However, as noted above, the language in the form does not mirror the precise language in the rule. In particular, § 54.504(b)(2)(v) of the Commission's rules states that applicants certify that "all of the necessary funding in the current funding year has been budgeted and approved to pay for the "non-discount" portion of requested connections and services, as well as any necessary hardware or software, and to undertake the necessary staff training required to use the services effectively." The form states more generally, however, that applicants must certify that "support under the support mechanism is conditional upon the school(s) and library(ies) securing access to all of the resources, including computers, training, software, maintenance, and electrical connections necessary to use the services purchased effectively."

45. As explained above, the certification language on the FCC Form 470 is consistent with the intent of the rule and more closely resembles the real-world experience. Therefore, we revise the current language of § 54.504(b)(2)(v) to require applicants to certify that support under the support mechanism is conditional. We replace the current language of § 54.504(b)(2)(v) with the following sentence: "Support under this support mechanism is conditional upon the school(s) and library(ies) securing access to all of the resources, including computers, training, software, maintenance, internal connections, and electrical connections necessary to use the services purchased effectively. "In addition, we re-designate the current § 54.504(b)(2)(v) as new § 54.504(b)(2)(vi). We believe these revisions will facilitate the ability of applicants to determine what certifications are necessary for proper completion of the application and will facilitate our enforcement and oversight activities.

46. Furthermore, to emphasize that applicants must make cost effective service selections consistent with the *Ysleta Order* we will require applicants to certify on the Form 470 that the services for which bids are being sought are the most cost effective means for meeting their educational needs and technology plan goals. Therefore, we modify § 54.504(b)(2) to add a new certification, § 54.504(b)(2)(vii), which states the following: "All bids submitted will be carefully considered and the bid selected will be for the most cost-effective service or equipment offering, with price being the primary factor, and will be the most cost-effective means of meeting educational needs and technology plan goals."

47. *Form 471.* Under § 54.504(c) of the Commission's rules, applicants are required to submit a completed FCC Form 471 after signing a contract for eligible services. Like the FCC Form 470, the FCC Form 471 lists several matters to which applicants must certify in order to have their applications considered. Currently, however, these requirements are not expressly addressed in part 54 of the Commission's rules. We therefore find it appropriate to amend § 54.504(c) of the Commission's rules by adding a new subsection (1) which will state that the FCC Form 471 shall be signed by the person authorized to order telecommunications and other supported services for the eligible school, library, or consortium and shall include that person's certification that the entity(ies) is/are eligible to receive support and has/have secured access to all of the resources necessary to make effective use of the service purchased; the entity(ies) is/are covered by technology plans that have been or will be approved by a state or other authorized body; the entity(ies) has/have complied with program rules as well as all state and local laws regarding procurement of services; the services will be used solely for educational purposes and will not be sold, resold, or transferred; the applicant understands that the discount level used for shared services is conditional; and the applicant recognizes that its application may be audited. We conclude that codifying these existing certification requirements in the Commission's rules will diminish confusion regarding the criteria to which applicants must certify when completing their FCC Forms 471 while enhancing our enforcement and oversight activities.

48. Consistent with the requirement imposed on the Form 470, we will require applicants to certify on the Form 471 that the selection of services and service providers is based on the most cost effective means of meeting educational needs and technology plan goals. Therefore, we modify § 54.504(c)(1) to add a new certification, § 54.504(c)(1)(xi), which states the following: "All bids submitted were carefully considered and the most cost-effective bid for services or equipment was selected, with price being the primary factor considered, and is the most cost-effective means of meeting educational needs and technology plan goals."

49. *Form 473.* In the *Schools and Libraries Second Further Notice,* we sought comment on whether the Commission, as a condition of support, should require each service provider to make certifications that it has not sought to subvert the effectiveness of the E-rate program's competitive bidding process. Although the Commission recognized that many of those subversive actions are already prohibited by the federal antitrust laws, if not other state or federal statutes or rules, it observed that requiring such certifications would better enable the Commission or other government agencies to enforce the Commission's rules and to seek criminal sanctions where appropriate.

50. We now adopt three certification requirements modeled after the certificate of independent price determination required under federal acquisition regulations, as referenced in the *Schools and Libraries Second Further Notice*. These certifications will serve to emphasize to potential service providers that any practices that thwart the competitive bidding process will not be tolerated, and will facilitate the ability of government agencies to prosecute any misdeeds in this area. Service providers receiving funds through the E-rate program accordingly now must make the following certifications with respect to their participation in the competitive bidding process of the E-rate program in the Service Provider Annual Certification Form, FCC Form 473:

1. I certify that the prices in any offer that this service provider makes pursuant to the schools and libraries universal service support program have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to (i) those prices, (ii) the intention to submit an offer, or (iii) the methods or factors used to calculate the prices offered;

2. I certify that the prices in any offer that this service provider makes pursuant to the schools and libraries universal service support program will not be knowingly disclosed by this service provider, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law; and

3. I certify that no attempt will be made by this service provider to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

## III. Order

51. In this order, we set forth how audit findings related to the schools and libraries support mechanism shall be resolved. This discussion applies to audits conducted by USAC's own internal audit division, as well as audits conducted by independent public accounting firms under contract to USAC.

52. As modified above, USAC shall continue to recover funds whenever it discovers a statutory or rule violation, as described above. The standard for determining such a violation is the same standard that we use in our enforcement actions: specifically, whether a party has willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission, based on a preponderance of the evidence. To the extent audit findings raise matters outside the scope of our orders or existing rules, we expect USAC to clearly identify such findings to the agency.

53. We conclude that a standardized, uniform process for resolving audit findings is necessary, and we direct USAC to submit, no later than 45 days from the publication in the **Federal Register**, a proposed plan for resolving audit findings. USAC's audit resolution plan should detail USAC's proposed procedures for resolving all findings arising from audits conducted by USAC's internal audit department, independent public accounting firms under contract with USAC, or government audit organizations. In addition, USAC's audit resolution plan should specify deadlines to ensure audit findings are resolved in a timely manner.

54. We have set forth in the accompanying Fifth Report and Order a general framework for what amounts should be recovered in specific situations, and we expect future audits to be resolved consistent with that framework. To the extent audits in the future raise issues not addressed herein, we provide a limited delegation to the Wireline Competition Bureau to address such matters. In particular, we direct the Chief of the Wireline Competition Bureau to address audit findings and to act on requests for waiver of rules warranting recovery of funds. We hereby amend §§ 0.91 and 0.291 to reflect such delegation of authority in this limited instance. We emphasize the limited nature of this delegation which we adopt because of the importance of providing rapid responses to audit findings and requests for waiver of rules warranting recovery of funds. We also emphasize that any party aggrieved by any action by the Bureau is, of course, free to seek review by this Commission, pursuant to § 1.115 and commit that we will address any such appeal within six months. Moreover, any action by USAC implementing direction from the Bureau is subject to full Commission review pursuant to § 54.723(b).

55. The Managing Director is the agency" designated follow-up official. Pursuant to the Commission's Audit Follow-up Directive, that office ensures that systems for audit follow-up and resolution are documented and in place, that timely responses are made to all audit reports, and that corrective actions are taken. We clarify that the Office of Managing Director remains the agency's audit follow-up official, and that all actions taken by the Wireline Competition Bureau relating to E-rate fund audits shall be consistent with the agency's general framework for audit resolution and follow-up.

56. USAC shall maintain records of the status of all audit reports and any recommendations made therein, and make such records available to the Commission upon request. USAC also shall submit a report to the Commission on a semi-annual basis summarizing the status of all outstanding audit findings. To the extent findings cannot be resolved within six months, USAC shall describe the status of its efforts, and provide a projected timeframe for completion. We also note that USAC's determination concerning the resolution of audit findings does not limit the Enforcement Bureau's ability to take enforcement action for any statutory or rule violation pursuant to section 503 of the Act.

57. We recognize that, to date, a number of audit reports have contained findings that indicate noncompliance with USAC administrative procedures. Consistent with its obligation to administer this support mechanism without waste, fraud and abuse, we expect USAC to identify for Commission consideration on at least an annual basis all findings raising management concerns that are not addressed by the Commission's existing rules and precedent, and, as appropriate, identify any USAC administrative procedures that should be codified in our rules to facilitate program oversight.

58. Recently, issues have been raised regarding recovery of funds disbursed in instances when applicants failed to follow certain USAC administrative procedures. As discussed above, a number of these procedures, such as guidelines for the content of technology plans and specific guidance on document retention, are being incorporated into the Commission's rules, and their violation may warrant recovery of universal service monies on a prospective basis. We believe that it will be particularly useful to continue to evaluate, on an ongoing basis, whether other procedures adopted by USAC should also be incorporated into the rules and whether their violation should also warrant recovery of previously disbursed monies.

59. We believe that USAC's experience in processing tens of thousands of these applications provides it with insightful information regarding ways in which waste, fraud and abuse may occur in that process. Based on that information, we believe that USAC's development of procedures

to serve our objective to prevent waste, fraud and abuse is invaluable. We direct USAC to submit to the Commission within 45 days from publication in the **Federal Register**, and annually thereafter, a list summarizing all current USAC administrative procedures identifying, where appropriate, the specific rules or statutory requirements that such procedures further, and those procedures that serve to protect against waste, fraud and abuse. We shall review those procedures to determine whether action is needed to ensure appropriate recovery, and shall determine whether such procedures should be adopted as binding rules. Thereafter, USAC and the Commission will generally seek recovery of funds disbursed in violation of the statute or a rule that implements the statute or substantive program goal or that serves to protect against waste, fraud and abuse. USAC and the Commission will not seek recovery of funds disbursed in violation of other rules, except to the extent that such rules are important to ensuring the financial integrity of the program, as designated by the agency.

## IV. Procedural Matters

### *A. Paperwork Reduction Act Analysis*

60. This document contains modified information collection requirements 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 § 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

61. In this present document, we have assessed the effects of the measures adopted to protect against waste, fraud and abuse in the administration of the schools and libraries universal service support mechanism, and find that the added certification requirements in various FCC Forms will not be unduly burdensome on small businesses.

### *B. Final Regulatory Flexibility Analysis*

62. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Schools and Libraries Second Further Notice*. The Commission sought written public comment on the proposals in the *Schools and Libraries Second Further Notice*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

#### 1. Need for, and Objectives of, the Fifth Report and Order

63. In this *Fifth Report and Order*, we adopt measures to protect against waste, fraud and abuse in the administration of the schools and libraries universal service support mechanism, particularly with regard to audit requirements and how to respond to audit findings. We set forth a framework for how much USAC should seek recovery when violations are found and set a five year administrative limitations period for such recovery actions as well as a corresponding five year document retention rule. We also eliminate the option of allowing parties to offset current debts to USAC against expected future payments, and we bar those with outstanding debts to the fund from receiving additional amounts. We also conform our rules concerning the content of and timing of certifications regarding technology plans to current practices. These rules will advance the goals of the schools and libraries program by deterring waste, fraud and abuse, leaving more support available applicants.

#### 2. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

64. There were no comments filed specifically in response to the IRFA. Nevertheless, the agency has considered the potential impact of the rules proposed in the IRFA on small entities. Based on analysis of the relevant data, the Commission concludes the new rules limit the burdens on small entities and result in a *de minimis* recordkeeping requirement. The Commission also concludes that the new rules will positively impact schools and libraries, including small ones, seeking universal service support.

#### 3. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

65. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. 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 SBA. A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." Nationwide, as of 1992, there were approximately 275,801 small organizations. The term "small governmental jurisdiction" is defined as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand." As of 1997, there were about 87,453 governmental jurisdictions in the United States. This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2%) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer.

66. The Commission has determined that the group of small entities directly affected by the rules herein includes eligible schools and libraries and the eligible service providers offering them discounted services, including telecommunications service providers, Internet Service Providers (ISPs) and vendors of internal connections. Further descriptions of these entities are provided below. In addition, the Universal Service Administrative Company is a small organization (non-profit) under the RFA, and we believe that circumstances triggering the new reporting requirement will be limited and does not constitute a significant economic impact on that entity.

#### 4. Schools and Libraries

67. As noted, "small entity" includes non-profit and small government entities. Under the schools and libraries universal service support mechanism, which provides support for elementary and secondary schools and libraries, an elementary school is generally "a non-profit institutional day or residential school that provides elementary education, as determined under state law." A secondary school is generally defined as "a non-profit institutional day or residential school that provides secondary education, as determined under state law," and not offering education beyond grade 12. For-profit schools and libraries, and schools and libraries with endowments in excess of $50,000,000, are not eligible to receive discounts under the program, nor are

libraries whose budgets are not completely separate from any schools. Certain other statutory definitions apply as well. The SBA has defined for-profit, elementary and secondary schools and libraries having $6 million or less in annual receipts as small entities. In Funding Year 2 (July 1, 1999 to June 20, 2000) approximately 83,700 schools and 9,000 libraries received funding under the schools and libraries universal service mechanism. Although we are unable to estimate with precision the number of these entities that would qualify as small entities under SBA's size standard, we estimate that fewer than 83,700 schools and 9,000 libraries might be affected annually by our action, under current operation of the program.

5. Telecommunications Service Providers

68. We have included small incumbent local exchange carriers in this RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation." The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope. We have therefore included small incumbent carriers in this RFA analysis, although we emphasize that this RFA action has no effect on the Commission's analyses and determinations in other, non-RFA contexts.

69. *Incumbent Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a size standard for small incumbent local exchange services. The closest size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1,337 incumbent carriers reported that they were engaged in the provision of local exchange services. Of these 1,337 carriers, an estimated 1,032 have 1,500 or fewer employees and 305 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the rules and policies adopted herein.

70. *Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs) and "Other Local Exchange Carriers."* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to providers of competitive exchange services or to competitive access providers or to "Other Local Exchange Carriers." The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 609 companies reported that they were engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 609 companies, an estimated 458 have 1,500 or fewer employees and 151 have more than 1,500 employees. In addition, 35 carriers reported that they were "Other Local Exchange Carriers." Of the 35 "Other Local Exchange Carriers," an estimated 34 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, and "Other Local Exchange Carriers" are small entities that may be affected by the rules and policies adopted herein.

71. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to interexchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to the Commission's most recent data, 261 companies reported that their primary telecommunications service activity was the provision of payphone services. Of these 261 companies, an estimated 223 have 1,500 or fewer employees and 48 have more than 1,500 employees. Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by the rules and policies adopted herein.

72. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless small businesses within the two separate categories of *Paging and Cellular and Other Wireless Telecommunications.* Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. According to the Commission's most recent data, 1,761 companies reported that they were engaged in the provision of wireless service. Of these 1,761 companies, an estimated 1,175 have 1,500 or fewer employees and 586 have more than 1,500 employees. Consequently, the Commission estimates that most wireless service providers are small entities that may be affected by the rules and policies adopted herein.

73. *Private and Common Carrier Paging.* In the *Paging Third Report and Order*, 62 FR 16004, April 3, 1997, we developed a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. At present, there are approximately 24,000 Private-Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to Commission data, 474 carriers reported that they were engaged in the provision of either paging and messaging services or other mobile services. Of those, the Commission estimates that 457 are small, under the SBA approved small business size standard.

6. Internet Service Providers

74. *Internet Service Providers.* The SBA has developed a small business size standard for "On-Line Information Services," NAICS code 514191. This category comprises establishments "primarily engaged in providing direct access through telecommunications networks to computer-held information compiled or published by others." Under this small business size standard, a small business is one having annual receipts of $18 million or less. Based on firm size data provided by the Bureau of the Census, 3,123 firms are small under SBA's $18 million size standard for this category code. Although some of these Internet Service Providers (ISPs) might not be independently owned and operated, we are unable at this time to estimate with greater precision the number of ISPs that would qualify as small business concerns under SBA's small business size standard. Consequently, we estimate that there are 3,123 or fewer small entity ISPs that may be affected by this analysis.

7. Vendors of Internal Connections

75. The Commission has not developed a small business size standard specifically directed toward manufacturers of internal network connections. The closest applicable definitions of a small entity are the size standards under the SBA rules applicable to manufacturers of "Radio and Television Broadcasting and Communications Equipment" (RTB) and "Other Communications Equipment." According to the SBA's regulations, manufacturers of RTB or other communications equipment must have 750 or fewer employees in order to qualify as a small business. The most recent available Census Bureau data indicates that there are 1,187 establishments with fewer than 1,000 employees in the United States that manufacture radio and television broadcasting and communications equipment, and 271 companies with less than 1,000 employees that manufacture other communications equipment. Some of these manufacturers might not be independently owned and operated. Consequently, we estimate that the majority of the 1,458 internal connections manufacturers are small.

8. Miscellaneous Entities

76. *Wireless Communications Equipment Manufacturers.* The SBA has established a small business size standard for radio and television broadcasting and wireless communications equipment manufacturing. Under this standard, firms are considered small if they have 750 or fewer employees. Census Bureau data for 1997 indicate that, for that year, there were a total of 1,215 establishments in this category. Of those, there were 1,150 that had employment under 500, and an additional 37 that had employment of 500 to 999. The percentage of wireless equipment manufacturers in this category is approximately 61.35%, so the Commission estimates that the number of wireless equipment manufacturers with employment under 500 was actually closer to 706, with and additional 23 establishments having employment of between 500 and 999. Given the above, the Commission estimates that the majority of wireless communications equipment manufacturers are small businesses.

9. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

77. In this *Fifth Report and Order*, we eliminate the option that entities formerly had with respect to funds they had received from the program in error. Instead of requiring them to immediately repay such funds, the program rules allowed them to offset the amounts they owed against future payments that they were due. Unfortunately, as discussed above, the administrative costs of tracking such debts appears to outweigh the benefits of the option and so it has been eliminated.

78. In our continuing effort to crack down on waste, fraud, and abuse by those who owe funds to the program, we also modify our rules to bring all E-rate program beneficiaries and service providers within the ambit of the program's "red light" rule: denying future funding to any party with outstanding debts to the program. To achieve this, we amend §§ 1.8002 and 1.8003 of the Commission's rules to require all entities that participate in the schools and libraries universal service support program to obtain an FCC Registration Number. The agency has already certified that this process imposes only a *de minimis* burden.

79. While we adopt a 5-year document retention rule, this rule should actually reduce, not increase, the burden on small businesses. After all, § 54.516 of the Commission rules previously required relevant documents to be retained by parties indefinitely. Those parties are no longer required to do so. Meanwhile, as discussed above, these record retention rules are required to ensure that program auditors can make full audits where and when they see fit, thereby maximizing the amount of program funds available for legitimate uses. In particular such funds can help finance funding requests that are now approved but left unfunded due to a lack of funds.

80. Although the Commission has formalized its rules concerning the substance and timing of technology plans, the modified rules do not impose any additional, non-trivial burdens; they merely provide further guidance on the requirements of the current technology plan. Schools and libraries must now certify on FCC Form 486 that their technology plans had been approved before they started to receive any E-rate supported services based on them, but schools and libraries have always been required to prepare a technology plan on which to base their E-rate program product and service requests and to get that plan approved. The action of signing an additional time on a form that they already have to file to certify that they have complied with existing rules represents no more than a trivial burden.

81. The framework adopted today, setting forth what amounts should be recovered by USAC when specific statutory and Commission rule requirements are violated, does not involve additional reporting, recordkeeping, or compliance requirements for small entities. Similarly, the rule adopted in this *Fifth Report and Order*, adopting a five year administrative limitations period for initiation of fund recovery actions, does not involve additional reporting, recordkeeping, or compliance requirements for small entities. Rather, it reduces their recordkeeping requirements. The rules adopted, barring entities from receiving additional benefits under the schools and libraries program if they have failed to repay an outstanding debt to the fund, do not impose additional reporting, recordkeeping, or compliance requirements for small entities. Finally, other rules we adopt regarding the certification requirements made on FCC Forms do not require additional reporting or recordkeeping for small entities, as they merely conform our rules to current practices.

10. Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

82. The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): "(1) establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."

83. Although we received no IRFA comments, we considered alternatives to the proposed recordkeeping requirements for small entities. Although we eliminated the options that schools and libraries had to offset amounts they owed to the fund due to rule violations against expected future payments, we did so only after giving the options a reasonable trial. We only eliminated them after concluding that they can involve a lengthy process resulting in a significant administrative burden on USAC, as discussed in more detail above.

84. Although the Commission adopts the standards currently used by SLD,

the rules clearly enable schools and libraries to minimize any duplicative administrative actions by permitting the technology plans that schools must prepare in response to the recent "No Child Left Behind" initiative to serve double duty to the extent that that is appropriate. Thus, schools whose plans have already been approved through the Department of Education's EETT need only meet the single additional standard of showing that they have sufficient resources to finance their portion of the cost of the entire implementation of using telecommunications to advance educational goals. Furthermore, we formally authorize USAC to certify entities that are qualified to approve the technology plans of non-public schools, among others.

85. The new requirement that schools and libraries certify—on FCC Form 486—that their technology plans were already approved before they began receiving any E-rate supported services also relaxes the former rule that required applicants to certify that their plans had been approved before they filed their FCC Form 470.

86. A copy of the Order and FRFA (or summaries thereof) will also be published in the **Federal Register**. In addition, the Commission will send a copy of this order in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act pursuant to 5 U.S.C. 801(a)(1)(A).

### VI. Ordering Clauses

87. Pursuant to the authority contained in sections 1, 4(i), 4(j), 201–205, 214, 254, and 403 of the Communications Act of 1934, as amended, this *Fifth Report and Order* is adopted.

88. The Commission's rules, 47 CFR parts 0, 1 and 54 are amended as set forth, effective October 13, 2004 except for §§ 1.8003, 54.504(b)(2), 54.504(c)(1), 54.504(f), 54.508, and 54.516 which contain information collection requirements that are not effective until approved by the Office of Management and Budget. The FCC will publish a document in the **Federal Register** announcing the effective date for those sections.

89. The Commission will send a copy of this *Fifth Report and Order*, including the FRFA, in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A). In addition, the Commission will send a copy of the Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

### List of Subjects

*47 CFR Part 0*

Organization and functions (Government agencies), Privacy, Reporting and recordkeeping requirements.

*47 CFR Part 1*

Administrative practice and procedure, Communications common carriers, Investigations, Telecommunications.

*47 CFR Part 54*

Reporting and recordkeeping requirements, Telecommunications, Telephone.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

### Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 0, 1, and 54 as follows:

## PART 0—COMMISSION ORGANIZATION

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

**Authority:** Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.

■ 2. Amend § 0.91 by adding paragraph (n) to read as follows:

**§ 0.91 Functions of the Bureau.**

* * * * *

(n) Address audit findings relating to the schools and libraries support mechanism, subject to the overall authority of the Managing Director as the Commission's audit follow-up official.

■ 3. Amend § 0.291 by adding paragraph (i) to read as follows:

**§ 0.291 Authority delegated.**

* * * * *

(i) *Authority concerning schools and libraries support mechanism audits.* The Chief, Wireline Competition Bureau, shall have authority to address audit findings relating to the schools and libraries support mechanism. This authority is not subject to the limitation set forth in paragraph (a)(2) of this section.

## PART 1—PRACTICE AND PROCEDURE

■ 4. The authority citation continues to read as follows:

**Authority:** 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(r), 309 and 325(e).

■ 5. Amend § 1.8002 by revising paragraph (a)(6) to read as follows:

**§ 1.8002 Obtaining an FRN.**

* * * * *

(a) * * *

(6) Any applicant or service provider participating in the Schools and Libraries Universal Service Support Program, part 54, subpart F, of this chapter.

* * * * *

■ 6. Revise § 1.8003 to read as follows:

**§ 1.8003 Providing the FRN in Commission filings.**

The FRN must be provided with any filings requiring the payment of statutory charges under subpart G of this part, anyone applying for a license (whether or not a fee is required), including someone who is exempt from paying statutory charges under subpart G of this part, anyone participating in a spectrum auction, making up-front payments or deposits in a spectrum auction, anyone making a payment on an auction loan, anyone making a contribution to the Universal Service Fund, any applicant or service provider participating in the Schools and Libraries Universal Service Support Program, and anyone paying a forfeiture or other payment. A list of applications and other instances where the FRN is required will be posted on our Internet site and linked to the CORES page.

## PART 54—UNIVERSAL SERVICE

■ 7. The authority citation continues to read as follows:

**Authority:** 47 U.S.C. 1, 4(i), 201, 205, 214, and 254 unless otherwise noted.

■ 8. Amend § 54.504 by revising paragraph (b)(2), by adding paragraphs (c)(1) and (f), and by adding and reserving paragraph (c)(2), to read as follows:

**§ 54.504 Request for services.**

* * * * *

(b) * * *

(2) FCC Form 470 shall be signed by the person authorized to order telecommunications and other supported services for the eligible school, library, or consortium and shall include that person's certification under oath that:

(i) The schools meet the statutory definition of elementary and secondary schools found under section 254(h) of the Act, as amended in the No Child Left Behind Act of 2001, 20 U.S.C. 7801(18) and (38), do not operate as for-profit businesses, and do not have endowments exceeding $50 million;

(ii) The libraries or library consortia eligible for assistance from a State library administrative agency under the Library Services and Technology Act of 1996 do not operate as for-profit businesses and whose budgets are completely separate from any school (including, but not limited to, elementary and secondary schools, colleges, and universities).

(iii) All of the individual schools, libraries, and library consortia receiving services are covered by:

(A) Individual technology plans for using the services requested in the application; and/or

(B) Higher-level technology plans for using the services requested in the application; or

(C) No technology plan needed because application requests basic local and/or long distance service and/or voicemail only.

(iv) The technology plan(s) has/have been approved by a state or other authorized body; the technology plan(s) will be approved by a state or other authorized body; or no technology plan needed because applicant is applying for basic local, cellular, PCS, and/or long distance telephone service and/or voicemail only.

(v) The services the applicant purchases at discounts will be used solely for educational purposes and will not be sold, resold, or transferred in consideration for money or any other thing of value.

(vi) Support under this support mechanism is conditional upon the school(s) and library(ies) securing access to all of the resources, including computers, training, software, maintenance, internal connections, and electrical connections necessary to use the services purchased effectively.

(vii) All bids submitted will be carefully considered and the bid selected will be for the most cost-effective service or equipment offering, with price being the primary factor, and will be the most cost-effective means of meeting educational needs and technology plan goals.

* * * * *

(c) * * *

(1) FCC Form 471 shall be signed by the person authorized to order telecommunications and other supported services for the eligible school, library, or consortium and shall include that person's certification under oath that:

(i) The schools meet the statutory definition of elementary and secondary schools found under section 254(h) of the Act, as amended in the No Child Left Behind Act of 2001, 20 U.S.C. 7801(18) and (38), do not operate as for-profit businesses, and do not have endowments exceeding $50 million.

(ii) The libraries or library consortia eligible for assistance from a State library administrative agency under the Library Services and Technology Act of 1996 do not operate as for-profit businesses and whose budgets are completely separate from any school (including, but not limited to, elementary and secondary schools, colleges, and universities).

(iii) The entities listed on the FCC Form 471 application have secured access to all of the resources, including computers, training, software, maintenance, internal connections, and electrical connections, necessary to make effective use of the services purchased, as well as to pay the discounted charges for eligible services from funds to which access has been secured in the current funding year. The billed entity will pay the non-discount portion of the cost of the goods and services to the service provider(s).

(iv) All of the schools and libraries listed on the FCC Form 471 application are covered by:

(A) An individual technology plan for using the services requested in the application; and/or

(B) Higher-level technology plan(s) for using the services requested in the FCC Form 471 application; or

(C) No technology plan needed; applying for basic local and long distance telephone service only.

(v) Status of technology plan(s) has/have been approved; will be approved by a state or other authorized body; or no technology plan is needed because applicant is applying for basic local, cellular, PCS, and/or long distance telephone service and/or voicemail only.

(vi) The entities listed on the FCC Form 471 application have complied with all applicable state and local laws regarding procurement of services for which support is being sought.

(vii) The services the applicant purchases at discounts will be used solely for educational purposes and will not be sold, resold, or transferred in consideration for money or any other thing of value.

(viii) The entities listed in the application have complied with all program rules and acknowledge that failure to do so may result in denial of discount funding and/or recovery of funding.

(ix) The applicant understands that the discount level used for shared services is conditional, for future years, upon ensuring that the most disadvantaged schools and libraries that are treated as sharing in the service, receive an appropriate share of benefits from those services.

(x) The applicant recognizes that it may be audited pursuant to its application, that it will retain for five years any and all worksheets and other records relied upon to fill out its application, and that, if audited, it will make such records available to the Administrator.

(xi) All bids submitted were carefully considered and the most cost-effective bid for services or equipment was selected, with price being the primary factor considered, and is the most cost-effective means of meeting educational needs and technology plan goals.

* * * * *

(f) *Filing of FCC Form 473.* All service providers eligible to provide telecommunications and other supported services under this subpart shall submit annually a completed FCC Form 473 to the Administrator. FCC Form 473 shall be signed by an authorized person and shall include that person's certification under oath that:

(1) The prices in any offer that this service provider makes pursuant to the schools and libraries universal service support program have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to those prices, the intention to submit an offer, or the methods or factors used to calculate the prices offered;

(2) The prices in any offer that this service provider makes pursuant to the schools and libraries universal service support program will not be knowingly disclosed by this service provider, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law; and

(3) No attempt will be made by this service provider to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

■ 9. Add § 54.508 to subpart E to read as follows:

**§ 54.508 Technology plans.**

(a) *Contents.* The technology plans referred to in this subpart must include the following five elements:

(1) A clear statement of goals and a realistic strategy for using telecommunications and information technology to improve education or library services;

(2) A professional development strategy to ensure that the staff understands how to use these new technologies to improve education or library services;

(3) An assessment of the telecommunication services, hardware, software, and other services that will be needed to improve education or library services;

(4) A budget sufficient to acquire and support the non-discounted elements of the plan: the hardware, software, professional development, and other services that will be needed to implement the strategy; and

(5) An evaluation process that enables the school or library to monitor progress toward the specified goals and make mid-course corrections in response to new developments and opportunities as they arise.

(b) *Relevance of approval under Enhancing Education through Technology.* Technology plans that meet the standards of the Department of Education's Enhancing Education Through Technology (EETT), 20 U.S.C. 6764, are sufficient for satisfying paragraphs (a)(1), (a)(2), (a)(3) and (a)(5) of this section, but applicants must supplement such plans with an analysis demonstrating that they meet the budgetary requirement described in paragraph (a)(4) of this section. Furthermore, to the extent that the Department of Education adopts future technology plan requirements that require one or more of the five elements described in paragraph (a) of this section, such plans will be acceptable for satisfying those elements of paragraph (a) of this section. Applicants with such plans will only need to supplement such plans with the analysis needed to satisfy those elements of paragraph (a) of this section not covered by the future Department of Education technology plan requirements.

(c) *Timing of certification.* As required under 54.504(b)(2)(vii) and (c)(1)(v), applicants must certify that they have prepared any required technology plans. They must also confirm, in FCC Form 486, that their plan was approved before they began receiving services pursuant to it.

(d) *Parties qualified to approve technology plans required in this subpart.* Applicants required to prepare and obtain approval of technology plans under this subpart must obtain such approval from either their state, the Administrator, or an independent entity approved by the Commission or certified by the Administrator as qualified to provide such approval. All parties who will provide such approval must apply the standards set forth in paragraphs (a) and (b) of this section.

■ 10. Revise § 54.516 to read as follows:

**§ 54.516 Auditing.**

(a) *Recordkeeping requirements*—(1) *Schools and libraries.* Schools and libraries shall retain all documents related to the application for, receipt, and delivery of discounted telecommunications and other supported services for at least 5 years after the last day of service delivered in a particular Funding Year. Any other document that demonstrates compliance with the statutory or regulatory requirements for the schools and libraries mechanism shall be retained as well. Schools and libraries shall maintain asset and inventory records of equipment purchased as components of supported internal connections services sufficient to verify the actual location of such equipment for a period of five years after purchase.

(2) *Service providers.* Service providers shall retain documents related to the delivery of discounted telecommunications and other supported services for at least 5 years after the last day of the delivery of discounted services. Any other document that demonstrates compliance with the statutory or regulatory requirements for the schools and libraries mechanism shall be retained as well.

(b) *Production of records.* Schools, libraries, and service providers shall produce such records at the request of any representative (including any auditor) appointed by a state education department, the Administrator, the FCC, or any local, state or federal agency with jurisdiction over the entity.

(c) *Audits.* Schools, libraries, and service providers shall be subject to audits and other investigations to evaluate their compliance with the statutory and regulatory requirements for the schools and libraries universal service support mechanism, including those requirements pertaining to what services and products are purchased, what services and products are delivered, and how services and products are being used. Schools and libraries receiving discounted services must provide consent before a service provider releases confidential information to the auditor, reviewer, or other representative.

[FR Doc. 04–20363 Filed 9–10–04; 8:45 am]

BILLING CODE 6712–01–P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 51

**[WC Docket No. 04–313, CC Docket No. 01–338; FCC 04–179]**

## Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers

**AGENCY:** Federal Communications Commission.

**ACTION:** Interim requirements.

**SUMMARY:** The Commission establishes interim requirements and details a 12-month transition plan governing competing carriers' unbundled access to incumbent local exchange carriers' (LECs') network elements. These requirements extend for an interim period the effectiveness of existing contracts between carriers to avoid disruption in the telecommunications industry while new rules are being written pursuant to a Notice of Proposed Rulemaking simultaneously issued by the Commission.

**DATES:** Effective September 13, 2004.

**ADDRESSES:** Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. *See* **SUPPLEMENTARY INFORMATION** for further filing instructions.

**FOR FURTHER INFORMATION CONTACT:** Ian Dillner, Attorney, Competition Policy Division, Wireline Competition Bureau, at (202) 418–1191, or at *Ian.Dillner@fcc.gov*.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Order* in WC Docket No. 04–313 and CC Docket No. 01–338, adopted July 21, 2004, and released August 20, 2004 (Order). The complete text of this Order 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. This document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160. It is also available on the Commission's Web site at *http://www.fcc.gov*.

### Synopsis of the Order

1. *Interim Requirements.* The pressing need for market certainty as the Commission works to issue final unbundling rules warrants the implementation of a plan to ensure stability in the interim. This Order

therefore requires incumbent LECs to continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004. These rates, terms, and conditions shall remain in place until the earlier of the effective date of final unbundling rules promulgated by the Commission or six months after **Federal Register** publication of the Order, except to the extent that they are or have been superseded by (1) voluntarily negotiated agreements, (2) an intervening Commission order affecting specific unbundling obligations (*e.g.*, an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a State public utility commission order raising the rates for network elements.

2. *Transition Plan.* As mentioned above, the document also sets forth a transition plan to govern the six months following the initial period described above, in the absence of a Commission ruling that switching, enterprise market loops and/or dedicated transport must be made available pursuant to section 251(c)(3) in any particular case. First, in the absence of a Commission ruling that switching is subject to unbundling, an incumbent LEC shall only be required to lease the switching element to a requesting carrier in combination with shared transport and loops (*i.e.*, as a component of the "UNE platform") at a rate equal to the higher of (1) the rate at which the requesting carrier leased that combination of elements on June 15, 2004, plus one dollar, or (2) the rate the State public utility commission establishes, if any, between June 16, 2004, and six months after **Federal Register** publication of this Order, for this combination of elements, plus one dollar. Second, in the absence of a Commission ruling that enterprise market loops and/or dedicated transport are subject to section 251(c)(3) unbundling in any particular case, an incumbent LEC shall only be required to lease the element at issue to a requesting carrier at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for that element on June 15, 2004, or (2) 115% of the rate the State public utility commission establishes, if any, between June 16, 2004, and six months after **Federal Register** publication of this Order, for that element. With respect to all elements at issue here, this transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers at these rates. As during the interim period, carriers shall remain free to negotiate alternative arrangements (including rates) superseding our requirements (and State public utility commission rates) during the transition period. Subject to the comments requested in response to the Notice of Proposed Rulemaking, released simultaneously but summarized separately, we intend to incorporate this second phase of the plan into our final rules.

### Congressional Review Act

3. The Commission will not send a copy of this Order pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A). This Order does not promulgate new rules, but rather extends for an interim period the effectiveness of existing contracts between carriers, which are based on vacated Commission rules, until the Commission develops final rules. This Order does not contain a major rule. *See* 5 U.S.C. 804(2).

### Paperwork Reduction Act

4. This Order does not contain new or modified information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

### Ordering Clause

5. Accordingly, it is ordered that the interim requirements set forth in the Order in WC Docket No. 04–313 and CC Docket No. 01–338 shall be effective immediately upon publication in the **Federal Register**.

Federal Communications Commission.

**William F. Caton,**

*Deputy Secretary.*

[FR Doc. 04–20466 Filed 9–10–04; 8:45 am]

BILLING CODE 6712–01–P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

**[DA 04–1420; MM Docket No. 02–23; RM–10359]**

## Radio Broadcasting Services; Keeseville, NY, Hartford and White River Junction, VT

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** This document allots Channel 231A at Keeseville, New York in response to a counterproposal filed by Hall Communications, Inc. It also denies the initiating proposal filed by Great Northern Radio, LLC, licensee of Station WSSH(FM), Channel 237A, White River Junction, Vermont, and Family Broadcasting, Inc., licensee of WWOD(FM), Channel 282C3, Hartford, Vermont to reallot Channel 282C3 from Hartford, Vermont to Keeseville, New York and Channel 237A from White River Junction to Hartford, and modify the licenses of Stations WWOD(FM) and WSSH(FM), respectively, to reflect the changes. Channel 231A can be allotted to Keeseville in compliance with the Commission's minimum distance separation requirements at a site 5.0 kilometers (3.1 miles) northwest of the community. The coordinates for Channel 231A at Keeseville are 344–31–45 NL and 73–32–00 WL.

**DATES:** Effective October 12, 2004.

**FOR FURTHER INFORMATION CONTACT:** Victoria M. McCauley, Media Bureau, (202) 418–2180.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Report and Order, MM Docket No. 02–23, adopted August 25, 2004, and released August 27, 2004. The full text of this Commission decision is available for inspection and copying during regular business hours in 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, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC, 20054, telephone 1–800–378–3160 or *http://www.BCPIWEB.com*. The Commission will send a copy of this Report and Order in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

### List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ Part 73 of title 47 of the Code of Federal Regulations is amended 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 New York, is amended by adding Keeseville, Channel 231A.

Federal Communications Commission.
**John A. Karousos,**
*Assistant Chief, Audio Division, Media Bureau.*
[FR Doc. 04–20612 Filed 9–10–04; 8:45 am]
BILLING CODE 6712–01–P

## DEPARTMENT OF TRANSPORTATION

### Research and Special Programs Administration

### 49 CFR Parts 171, 172, and 173

**[Docket No. RSPA–99–6283 (HM–230)]**

**RIN 2137–AD40**

## Hazardous Materials Regulations; Compatibility With the Regulations of the International Atomic Energy Agency; Correction; Final Rule

**AGENCY:** Research and Special Programs Administration (RSPA), DOT.

**ACTION:** Final rule.

**SUMMARY:** RSPA is correcting errors in its final rule in this docket, published in the **Federal Register** on January 26, 2004, that amended requirements in the Hazardous Materials Regulations (HMR) pertaining to the transportation of radioactive materials based on changes contained in the International Atomic Energy Agency (IAEA) publication, entitled "IAEA Safety Standards Series: Regulations for the Safe Transport of Radioactive Material," 1996 Edition, No. TS–R–1.

**DATES:** *Effective Date:* This final rule is effective on October 1, 2004.

**FOR FURTHER INFORMATION CONTACT:** Dr. Fred D. Ferate II, Office of Hazardous Materials Technology, (202) 366–4545, or Charles E. Betts, Office of Hazardous Materials Standards, (202) 366–8553; Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001.

**SUPPLEMENTARY INFORMATION:**

### I. Background

On January 26, 2004, the Research and Special Programs Administration (RSPA, we) published a final rule under Docket HM–230 (69 FR 3632) amending requirements in the HMR pertaining to the transportation of radioactive materials based on changes contained in the IAEA publication entitled "IAEA Safety Standards Series: Regulations for the Safe Transport of Radioactive Material," 1996 Edition, No. TS–R–1. Specifically, the final rule:

- Adopted the nuclide-specific exemption activity concentrations and the nuclide-specific exemption consignment activities listed in TS–R–1 to assure continued consistency between domestic and international regulations for the basic definition of radioactive material;
- Provided an exception in the HMR that certain naturally occurring radioactive materials would not be subject to the requirements of the HMR so long as their specific activities do not exceed 10 times the activity concentration exemption values;
- Incorporated the TS–R–1 changes in the $A_1$ and $A_2$ values into the HMR;
- Adopted the new proper shipping names and UN identification numbers, except for those referring to Type C packages, for fissile LSA material and for fissile SCOs;
- Required, if customary units are used, that the appropriate quantity and customary units be placed within parentheses positioned after the original quantity expressed in the International System of Units (SI units);
- Adopted the use of the Criticality Safety Index (CSI) to refer to what was formerly the criticality control transport index, and to restrict the use of the concept of transport index (TI) to a number derived purely from the maximum radiation level at one meter from the package;
- Required that the new fissile label be placed on each fissile material package, and that the CSI for that package be noted on the fissile label;
- Adopted the requirement that excepted packages must be marked with the UN identification number, that industrial packagings be marked with the package type, and that Type IP–2 and IP–3 industrial packages and Type A packages be marked with the international vehicle registration code of the country of origin of packaging design;
- Removed former requirements which became redundant upon adoption of the new proper shipping names, such as the requirement that the shipping description contain the words "Radioactive Material" unless those words are included in the proper shipping name;
- Removed plutonium-238 from the definition of fissile material. Removed the reference to Pu-238 in the list of fissile radionuclides for which the weight in grams or kilograms may be listed instead of or in addition to the activity, in the shipping paper or radioactive label description of the radioactive contents of a package;
- Adopted a definition of contamination, and included an authority to transport unpackaged LSA material and SCO, and an authority to use qualified tank containers, freight containers and metal intermediate bulk containers as industrial packagings, types 2 and 3 (IP–2 and IP–3);
- Adopted a new class of LSA–I material, consisting of radioactive material in which the activity is distributed throughout and the estimated average specific activity does not exceed 30 times the activity concentration exemption level, and removed the present category referring to mill tailings, contaminated earth, concrete, rubble, other debris, and activated material that is essentially uniformly distributed, with specific activity not exceeding $10^{-6}$ $A_2$/g.
- Incorporated the TS–R–1 changes for packagings containing more than 0.1 kg of uranium hexafluoride ($UF_6$);
- Required $UF_6$ packagings to meet the pressure, drop and thermal test requirements, prohibited the use of pressure relief devices, and require that packagings be certified in accordance with TS–R–1 requirements;
- Removed the definition of "fissile material controlled shipment;" revised § 173.453 to reflect the NRC "fissile material exemption provisions," and revised §§ 173.457 and 173.459 to remove the references to "fissile material, controlled shipment" and to base requirements for non-exclusive use and exclusive use shipments of fissile material packages on TS–R–1 package and conveyance CSI limits;
- Accepted the IAEA transitional requirements and begin the phase-out of packages satisfying the 1967 IAEA requirements, including DOT specification packages;
- Prohibited the manufacture of all Type B specification packages conforming to Safety Series No. 6 (1967) as of the effective date of this rule; the use of these packages would be allowed for four years after the effective date of this rule; and
- Added a requirement that the active material in an instrument or article intended to be transported in an excepted package be completely enclosed by the non-active components.

This document corrects editorial and technical errors which have come to our attention following publication of the rule.

### II. Section-by-Section Review

*Part 171*

*Section 171.7*

In paragraph (a)(3), in the "Table of material incorporated by reference," we are correcting the table heading to read "49 CFR reference."

*Section 171.11*

In the January 26, 2004 final rule, the shipping paper requirements for highway route controlled quantities of radioactive material were moved from § 172.203(d)(4) to § 172.203(d)(10); however, the reference in § 171.11(d)(6)(i) was not changed. Therefore, we are correcting § 171.11(d)(6)(i) by replacing the reference to § 172.203(d)(4)" with "§ 172.203(d)(10)." Additionally, we are correcting § 171.11(d)(6)(iv) to remove the reference to § 173.428, because this was not intended nor proposed in the notice of proposed rulemaking (NPRM).

*Part 172*

*Section 172.101 Hazardous Materials Table (HMT).*

The HMT is corrected as follows:

—For the entry "Radioactive material, excepted package-instruments *or* articles" the applicable packaging authorizations are added to column 8C of the HMT.

—The entry "Radioactive material, surface contaminated objects (SCO–I *or* SCO–II) non fissile or fissile-excepted" is corrected to italicize the words "non fissile or fissile-excepted."

—For the entry "Radioactive material, transported under special arrangement, fissile" in column 4 of the HMT, "UN331" is corrected to read "UN3331."

—The entry "Radioactive material, Type A package, fissile *non-specdial form*" is corrected to read "Radioactive material, Type A package, fissile *non-special form.*"

*Section 172.203*

In paragraphs (d)(1) and (d)(5), a typographical error is corrected.

*Section 172.403*

An incorrect section reference is corrected in paragraph (g)(1) and paragraph (h)(4) is corrected to indicate that the category of Class 7 label for an overpack is to be determined from the table in § 172.403(c) using the transport index (TI) derived according to § 172.403(h)(3).

*Part 173*

*Section 173.403*

In § 173.403, in the definitions for "*Low Specific Activity (LSA) material*" and "*Radiation level,*" several typographical errors are corrected.

*Section 173.411*

Section 173.411 is corrected to add language authorizing the use of certain tank containers, freight containers, and metal intermediate bulk containers as IP–2 or IP–3 containers. Although proposed in the NPRM, this language was inadvertently omitted in the final rule.

*Section 173.415*

Paragraph (d) is corrected to clarify that any foreign-manufactured Type A package meeting the standards in the "IAEA Regulations for the Safe Transport of Radioactive Material No. TS–R–1," and bearing the marking "Type A," may be used for domestic and export shipments of Class 7 (radioactive) materials provided the offeror obtains and maintains the applicable test, documentation and engineering evaluations.

*Section 173.417*

In paragraph (a)(2), typographical errors are corrected in "Table 2—Allowable Content of Uranium Hexafluoride ($UF_6$ "Heels" in a Specification 7A Cylinder)."

*Section 173.420*

Paragraph (a)(2)(ii) is corrected by inserting the word "or" immediately after the semi-colon.

*Section 173.427*

Section 173.427 is corrected as follows:

—In paragraph (a), a duplicative phrase ", unless excepted by paragraph (d) of this section," is removed.

—In paragraph (b)(3), a reference to "Type B" is removed.

—Paragraph (b)(4) is corrected to specify that for domestic transportation, an exclusive use shipment of LSA material and SCO may not exceed an $A_2$ quantity when in a packaging which meets the requirements of §§ 173.24, 173.24a, and 173.410. This language was omitted in the final rule.

—In paragraph (e), Table 6 is reformatted to dispel the appearance that the SCO entries are a subset of LSA–III.

*Section 173.433*

In paragraph (d)(6), the left side of the equation is corrected to read "Exempt activity concentration limit for mixture."

*Section 173.435*

In the "Table of $A_1$ and $A_2$ values for radionuclides", several typographical errors are corrected. In addition, in the January 26, 2004 final rule, the Curie values in the $A_1/A_2$ table were rounded to two significant figures. As a result, the Curie values, when converted back to Terabequerels, are sometimes higher and sometimes lower than the original values, by as much as 3.6%. Since, some individuals are inputting the Curie values into their computer programs, and this would result in some $A_1$ and $A_2$ values being higher than the authorized amounts a footnote "b" is added to the $A_1/A_2$ table to clarify that the Curie values are for information only and the Terabecquerel values are the regulatory standard. The Curie values in the $A_1/A_2$ table will be corrected in a future rulemaking.

*Section 173.443*

In paragraph (a), we are correcting an incorrect reference to "Table 11" to read "Table 9".

## III. Regulatory Analyses and Notices

*A. Executive Order 12866 and DOT Regulatory Policies and Procedures*

This final rule is not a significant action under section 3(f) of Executive Order 12866 and was not reviewed by the Office of Management and Budget. This final rule is not a significant action under the Regulatory Policies and Procedures of the Department of Transportation. The revisions adopted in this final rule do not alter the cost-benefit analysis and conclusions contained in the Regulatory Evaluation prepared for the January 26, 2004 final rule. The regulatory Evaluation is available for review in the public docket for this rulemaking.

*B. Executive Order 13132*

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). This final rule preempts State, local and Indian tribe requirements, but does not propose any regulation that has direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

The Federal hazardous material transportation law, 49 U.S.C. 5101–5127, contains an express preemption provision (49 U.S.C. 5125(b)) that preempts State, local, and Indian tribe requirements on certain covered subjects. Covered subjects are:

(1) The designation, description, and classification of hazardous material;

(2) The packing, repacking, handling, labeling, marking, and placarding of hazardous material;

(3) The preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents;

(4) The written notification, recording, and reporting of the unintentional release in transportation of hazardous material; or

(5) The design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

This final rule addresses the classification, packaging, marking, labeling, and handling of hazardous material, among other covered subjects and preempts any State, local, or Indian tribe requirements not meeting the "substantively the same" standard. This rule is necessary to incorporate changes already adopted in international standards. If the amendments adopted in this final rule were not made, U.S. companies, including numerous small entities competing in foreign markets, will be at an economic disadvantage. These companies would be forced to comply with a dual system of regulation. The amendments are intended to avoid this result.

Federal hazardous materials transportation law provides at 49 U.S.C. 5125(b)(2) that, if the Secretary of Transportation issues a regulation concerning any of the covered subjects, the Secretary must determine and publish in the **Federal Register** the effective date of Federal preemption. The effective date may not be earlier than the 90th day following the date of issuance of the final rule and not later than two years after the date of issuance. The effective date of our January 26, 2004 final rule, including the effective date of Federal preemption is October 1, 2004. Because this final rule makes editorial corrections, the effective date of Federal preemption of this final rule is also October 1, 2004.

*C. Executive Order 13175*

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"). Because this final rule does not have tribal implications, does not impose substantial direct compliance costs on Indian tribal governments, and does not preempt tribal law, the funding and consultation requirements of Executive Order 13175 do not apply and a tribal summary impact statement is not required.

*D. Regulatory Flexibility Act, Executive Order 13272, and DOT Procedures and Polices*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines a rule is not expected to have a significant economic impact on a substantial number of small entities. The corrections contained in this final rule will have little or no effect on the regulated industry. Based on the assessment in the regulatory evaluation, to the January 26, 2004 final rule, I hereby certify that, while this rule applies to a substantial number of small entities, there will not be a significant economic impact on those small entities. A detailed Regulatory Flexibility analysis is available for review in the docket.

This final rule has been developed in accordance with Executive Order 13272 ("Proper Consideration of Small Entities in Agency Rulemaking") and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act to ensure that potential impacts of draft rules on small entities are properly considered.

*E. Paperwork Reduction Act*

This final rule imposes no new information collection requirements.

*F. Regulation Identifier Number (RIN)*

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

*G. Unfunded Mandates Reform Act*

This final rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of $120.7 million or more to either State, local, or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objectives of the rule.

*H. Environmental Assessment*

The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321–4347), requires Federal agencies to consider the consequences of major Federal actions and prepare a detailed statement on actions significantly affecting the quality of the human environment. The Nuclear Regulatory Commission (NRC) prepared an environmental assessment (EA) of Major Revision to Packaging and Transportation of Radioactive Material Regulations", Final Report, March 2002, on its proposed rule which addresses issues also raised in this rulemaking. On the basis of this EA, we find that there are no significant environmental impacts associated with this final rule. A copy of the environmental assessment prepared by the NRC is available for review in the docket.

*I. Privacy Act*

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov*.

**List of Subjects**

*49 CFR Part 171*

Exports, Hazardous materials transportation, Hazardous waste, Imports, Incorporation by reference, Reporting and recordkeeping requirements.

*49 CFR Part 172*

Education, Hazardous materials transportation, Hazardous waste, Labeling, Markings, Packagings and containers, Reporting and recordkeeping requirements.

*49 CFR Part 173*

Hazardous materials transportation, packaging and containers, Radioactive materials, Reporting and recordkeeping requirements, Uranium.

■ In consideration of the foregoing, we are making the following corrections to FR Doc. 04–67, appearing on page 3632 in the **Federal Register** of Monday, January 26, 2004:

## PART 171—[CORRECTED]

■ 1. On page 3665, in § 171.7, in paragraph (a)(2), in the Table of material incorporated by reference, correct the table heading entry "9 CFR reference" to read "49 CFR reference".

■ 2. On page 3665, in § 171.11, correct paragraph (d)(6) to read as follows:

**§ 171.11 Use of ICAO Technical Instructions.**

* * * * *

(d) * * *

(6) For radioactive materials:

(i) Shipping papers for highway route controlled quantity radioactive

materials shipments must meet the requirements of § 173.203(d)(10) of this subchapter.

(ii) Competent authority certification and any necessary revalidation for Type B, Type B(U), Type B(M), and fissile materials packages must be obtained from the appropriate authorities as specified in §§ 173.471, 173.472 and 173.473 of this subchapter, and all requirements of the certificates and revalidations must be met.

(iii) Except for limited quantities of Class 7 (radioactive) material, the provisions of §§ 172.204(c)(4), 173.448(e), (f) and (g)(3) of this subchapter apply.

(iv) Excepted packages of radioactive material, instruments or articles, or articles containing natural uranium or thorium, must meet the provisions of § 173.421, 173.424, or 173.426 of this subchapter, as appropriate.

(v) Type A package contents shall be limited in accordance with § 173.431 of this subchapter.

(vi) The definition for "radioactive material" in § 173.403 of this subchapter applies to radioactive materials transported under the provisions of this section.

* * * * *

## PART 172—[CORRECTED]

■ 3. On page 3666, in the Hazardous Materials Table, correct the following entries to read as follows:

**§ 172.101 Purpose and use of hazardous materials table.**

* * * * *

■ a. For the entry Radioactive material, excepted package—instruments *or* articles", the entries "422, 424" are added in column 8C.

■ b. The entry "Radioactive material, surface contaminated objects (SCO–I *or* SCO–II) non fissile or fissile-excepted" in column 2 is removed, and the entry "Radioactive material, surface contaminated objects (SCO–I *or* SCO–II) *non fissile or fissile-excepted*" is added in its place.

■ c. For the entry "Radioactive material, transported under special arrangement, fissile" in column 4, the entry "UN331" is corrected to read "UN3331".

■ d. The entry "Radioactive material, Type A package, fissile *non-specdial form*" in column 2 is removed, and the entry "Radioactive material, Type A package, fissile *non-special form*" is added in its place.

■ 4. On page 3668, in the first column, correct paragraphs (d)(1) and (d)(5) of § 172.203 to read as follows:

**§ 172.203 Additional description requirements.**

* * * * *

(d) * * *

(1) The name of each radionuclide in the Class 7 (radioactive) material that is listed in § 173.435 of this subchapter. For mixtures of radionuclides, the radionulides that must be shown must be determined in accordance with § 173.433(g) of this subchapter. Abbreviations, *e.g.*, "$^{99}$Mo," are authorized.

* * * * *

(5) The transport index assigned to each package in the shipment bearing RADIOACTIVE YELLOW–II or RADIOACTIVE YELLOW–III labels.

* * * * *

■ 5. On page 3669, in the second and third columns, correct paragraphs (g)(1) and (h)(4) of § 172.403 to read as follows:

**§ 172.403 Class 7 (radioactive) materials.**

* * * * *

(g) * * *

(1) *Contents.* Except for LSA–1 material, the names of the radionuclides as taken from the listing of radionuclides in § 173.435 of this subchapter (symbols which conform to established radiation protection terminology are authorized, *i.e.*, $^{99}$Mo, $^{60}$Co, etc.). For mixtures of radionuclides, with consideration of space available on the label, the radionuclides that must be shown must be determined in accordance with § 173.433(g) of this subchapter. For LSA–I material, the term "LSA–I" may be used in place of the names of the radionuclides.

* * * * *

(h) * * *

(4) The category of Class 7 label for the overpack must be determined from the table in § 172.403(c) using the TI derived according to paragraph (h)(3) of this section, and the maximum radiation level on the surface of the overpack.

* * * * *

## PART 173—[CORRECTED]

■ 6. On pages 3671 and 3672, in § 173.403, correct the definitions for "*Low Specific Activity (LSA) material*" and "*Radiation level*" to read as follows:

**§ 173.403 Definitions.**

* * * * *

*Low Specific Activity (LSA) material* means Class 7 (radioactive) material with limited specific activity which satisfies the descriptions and limits set forth below. Shielding materials may not be considered in determining the estimated average specific activity of the package contents. LSA material must be in one of three groups:

(1) LSA–I:

(i) Uranium and thorium ores, concentrates of uranium and thorium ores, and other ores containing naturally occurring radionuclides which are intended to be processed for the use of these radionuclides; or

(ii) Solid unirradiated natural uranium or depleted uranium or natural thorium or their solid or liquid compounds or mixtures; or

(iii) Radioactive material other than fissile material, for which $A_2$ value is unlimited; or

(iv) Other radioactive material, excluding fissile material in quantities not excepted under § 173.453, in which the activity is distributed throughout and the estimated average specific activity does not exceed 30 times the values for activity concentration specified in § 173.436, or 30 times the default values listed in Table 8 of § 173.433.

(2) LSA–II:

(i) Water with tritium concentration up to 0.8 TBq/L (20.0 Ci/L); or

(ii) Other radioactive material in which the activity is distributed throughout and the average specific activity does not exceed $10^{-4}$ $A_2$/g for solids and gases, and $10^{-5}$ $A_2$/g for liquids.

(3) LSA–III. Solids (*e.g.*, consolidated wastes, activated materials), excluding powders, that meet the requirements of § 173.468 and in which:

(i) The radioactive material is distributed in a solid compact binding agent (such as concrete, bitumen, ceramic, etc.):

(ii) The radioactive material is a relatively insoluble material, so that, even under loss of packaging, the loss of Class 7 (radioactive) material per package by leaching when placed in water for seven days would not exceed 0.1 $A_2$; and

(iii) The estimated average specific activity of the solid, excluding any shielding material, does not exceed $2 \times 10^{-3}$ $A_2$/g.

* * * * *

*Radiation level* means the radiation dose-equivalent rate expressed in millisieverts per hour or mSv/h (millirems per hour or mrem/h). Neutron flux densities may be converted into radiation levels according to Table 1:

TABLE 1.—NEUTRON FLUENCE RATES TO BE REGARDED AS EQUIVALENT TO A RADIATION LEVEL OF 0.01 MSV/H (1 MREM/H) [1]

| Energy of neutron | Flux density equivalent to 0.01 mSv/h (1 mrem/h) neutrons per square centimeter per second (n/cm$^2$/s) |
|---|---|
| Thermal (2.510E–8) MeV | 272.0 |
| 1 keV | 272.0 |
| 10 keV | 281.0 |
| 100 keV | 47.0 |
| 500 keV | 11.0 |
| 1 MeV | 7.5 |
| 5 MeV | 6.4 |
| 10 MeV | 6.7 |

[1] Flux densities equivalent for energies between those listed in this table may be obtained by linear interpolation.

* * * * *

■ 7. On page 3673, in the second column, in § 173.411, paragraph (b) is corrected to read as follows:

**§ 173.411 Industrial packagings.**

* * * * *

(b) *Industrial packaging certification and tests.* (1) Each IP–1 must meet the general design requirements prescribed in § 173.410.

(2) Each IP–2 must meet the general design requirements prescribed in § 173.410 and when subjected to the tests specified in § 173.465(c) and (d) or evaluated against these tests by any of the methods authorized by § 173.461(a), must prevent:

(i) Loss or dispersal of the radioactive contents; and

(ii) A loss of shielding integrity which result in more than a 20% increase in the radiation level at any external surface of the package.

(3) Each IP–3 packaging must meet the requirements for an IP–1 and an IP–2, and must meet the requirements specified in § 173.412(a) through (j).

(4) Tank containers may be used as Industrial package Types 2 or 3 (Type IP–2 or Type IP–3) provided that:

(i) They satisfy the requirements for Type IP–1 specified in paragraph (b)(1);

(ii) They are designed to conform to the standards prescribed in Chapter 6.7, of the United Nations Recommendations on the Transport of Dangerous Goods, (IBR, *see* § 171.7 of this subchapter), "Requirements for the Design, Construction, Inspection and Testing of Portable Tanks and Multiple-Element Gas Containers (MEGCs)," or other requirements at least equivalent to those standards;

(iii) They are capable of withstanding a test pressure of 265 kPa (37.1 psig); and

(iv) They are designed so that any additional shielding which is provided shall be capable of withstanding the static and dynamic stresses resulting from handling and routine conditions of transport and of preventing a loss of shielding integrity which would result in more than a 20% increase in the radiation level at any external surface of the tank containers.

(5) Tanks, other than tank containers, including DOT Specification IM 101 or IM 102 steel portable tanks (§§ 178.270, 178.271, 178.272 of this subchapter), may be used as Industrial package Types 2 or 3 (Type IP–2) or (Type IP–3) for transporting LSA–I and LSA–II liquids and gases as prescribed in Table 6, provided that they conform to standards at least equivalent to those prescribed in paragraph (b)(4).

(6) Freight containers may be used as Industrial packages Types 2 or 3 (Type IP–2) or (Type IP–3) provided that:

(i) The radioactive contents are restricted to solid materials;

(ii) They satisfy the requirements for Type IP–1 specified in paragraph (b)(1); and

(iii) They are designed to conform to the standards prescribed in the International Organization for Standardization document ISO 1496–1: "Series 1 Freight Containers—Specifications and Testing—Part 1: General Cargo Containers; excluding dimensions and ratings (IBR, *see* § 171.7 of this subchapter). They shall be designed such that if subjected to the tests prescribed in that document and the accelerations occurring during routine conditions of transport they would prevent:

(A) Loss or dispersal of the radioactive contents; and

(B) Loss of shielding integrity which would result in more than a 20% increase in the radiation level at any external surface of the freight containers.

(7) Metal intermediate bulk containers may also be used as Industrial package Type 2 or 3 (Type IP–2 or Type IP–3), provided that:

(i) They satisfy the requirements for Type IP–1 specified in paragraph (b)(1); and

(ii) They are designed to conform to the standards prescribed in Chapter 6.5 of the United Nations Recommendations on the Transport of Dangerous Goods, (IBR, see § 171.7 of this subchapter), "Requirements for the Construction and Testing of Intermediate Bulk Containers," for Packing Group I or II, and if they were subjected to the tests prescribed in that document, but with the drop test conducted in the most damaging orientation, they would prevent:

(A) Loss or dispersal of the radioactive contents; and

(B) Loss of shielding integrity which would result in more than a 20% increase in the radiation level at any external surface of the intermediate bulk containers.

* * * * *

■ 8. On page 3673, in the third column, correct paragraph (d) of § 173.415 to read as follows:

**§ 173.415 Authorized Type A packages.**

* * * * *

(d) Any foreign-made packaging that meets the standards in "IAEA Regulations for the Safe Transport of Radioactive Material No. TS–R–1" (IBR, see § 171.7 of this subchapter) and bears the marking "Type A". Such packagings may be used for domestic and export shipments of Class 7 (radioactive) materials provided the offeror obtains the applicable documentation of tests and engineering evaluations and maintains the documentation on file in accordance with paragraph (a) of this section. These packagings must conform

with requirements of the country of origin (as indicated by the packaging marking) and the IAEA regulations applicable to Type A packagings.

■ 9. On page 3674, correct paragraph (a)(2) introductory text of § 173.417 to read as follows:

**§ 173.417 Authorized fissile materials packages.**

(a) * * *

(2) A residual "heel" of enriched solid uranium hexafluoride may be transported without a protective overpack in any metal cylinder that meets both the requirements of § 173.415 and § 178.350 of this subchapter for Specification 7A–Type A packaging, and the requirements of § 173.420 for packagings containing greater than 0.1 kg of uranium hexafluoride. Any such shipment must be made in accordance with Table 2, as follows:

* * * * *

TABLE 2.—ALLOWABLE CONTENT OF URANIUM HEXAFLUORIDE ($UF_6$ "HEEL" IN A SPECIFICATION 7A CYLINDER)

| Maximum cylinder diameter | | Cylinder volume | | Maximum Uranium 235-enrichment (weight) percent | Maximum "Heel" weight per cylinder | | | |
|---|---|---|---|---|---|---|---|---|
| | | | | | $UF_6$ | | Uranium-235 | |
| Centimeters | Inches | Liters | Cubic feet | | kg | lb | kg | lb |
| 12.7 | 5 | 8.8 | 0.311 | 100.0 | 0.045 | 0.1 | 0.031 | 0.07 |
| 20.3 | 8 | 39.0 | 1.359 | 12.5 | 0.227 | 0.5 | 0.019 | 0.04 |
| 30.5 | 12 | 68.0 | 2.410 | 5.0 | 0.454 | 1.0 | 0.015 | 0.03 |
| 76.0 | 30 | 725.0 | 25.64 | 5.0 | 11.3 | 25.0 | 0.383 | 0.84 |
| 122.0 | 48 | 3,084.0 | [1] 108.9 | 4.5 | 22.7 | 50.0 | 0.690 | 1.52 |
| 122.0 | 48 | 4,041.0 | [2] 142.7 | 4.5 | 22.7 | 50.0 | 0.690 | 1.52 |

[1] 10 ton.
[2] 14 ton

* * * * *

■ 10. On page 3675, in the first column, correct paragraph (a)(2)(ii) of § 173.420 to read as follows:

**§ 173.420 Uranium hexafluoride (fissile, fissile excepted and non-fissile).**

(a) * * *

(2) * * *

(ii) Specifications for Class DOT–106A multi-unit tank car tanks (see §§ 179.300 and 179.301 of this subchapter); or

* * * * *

■ 11. On pages 3676 and 3677, correct paragraphs (a), (b)(3), (b)(4) and (e) to read as follows:

**§ 173.427 Transport requirements for low specific activity (LSA) Class 7 (radioactive) materials and surface contaminated objects (SCO).**

(a) In addition to other applicable requirements specified in this subchapter, LSA materials and SCO, unless excepted by paragraph (c) or (d) of this section, must be packaged in accordance with paragraph (b) of this section and must be transported in accordance with the following conditions:

* * * * *

(b) * * *

(3) In any Type B(U) or B(M) packaging authorized pursuant to § 173.416;

(4) In a packaging which meets the requirements of §§ 173.24, 173.24a, and 173.410, but only for domestic transportation of an exclusive use shipment that does not exceed an $A_2$ quantity.

* * * * *

(e) Tables 5 and 6 are as follows:

TABLE 5.—CONVEYANCE ACTIVITY LIMITS FOR LSA MATERIAL AND SCO

| Nature of material | Activity limit for conveyances |
|---|---|
| 1. LSA–I | No limit. |
| 2. LSA–II and LSA–III; Non-combustible solids | No limit. |
| 3. LSA–II and LSA–III; Combustible solids and all liquids and gases | 100 $A_2$ |
| 4. SCO | 100 $A_2$ |

TABLE 6.—INDUSTRIAL PACKAGE INTEGRITY REQUIREMENTS FOR LSA MATERIAL AND SCO

| Contents | Industrial packaging type | |
|---|---|---|
| | Exclusive use shipment | Non exclusive use shipment |
| 1. LSA–I: | | |
| Solid | IP–1 | IP–1 |
| Liquid | IP–1 | IP–2 |
| 2. LSA–II: | | |
| Solid | IP–2 | IP–2 |
| Liquid and gas | IP–2 | IP–3 |
| 3. LSA–III | IP–2 | IP–3 |
| 4. SCO–I | IP–1 | IP–1 |
| 5. SCO–II | IP–2 | IP–2 |

■ 12. On page 3678, correct paragraph (d)(6) of § 173.433 to read as follows:

**§ 173.433 Requirements for determining basic radionuclide values, and for the listing of radionuclides on shipping papers and labels.**

* * * * *

(d) * * *

(6) The exempt activity concentration for mixtures of nuclides may be determined as follows:

$$\text{Exempt activity concentration limit for mixture} = \frac{1}{\sum_i \frac{f(i)}{[A](i)}}$$

Where:

f(i) is the fraction of activity concentration of nuclide i in the mixture; and [A](i) is the activity concentration for exempt material containing nuclide i.

* * * * *

■ 13. In § 173.435, the Table of $A_1$ and $A_2$ values is corrected by adding a footnote "b" to the table headings of columns 4 and 6 and correcting pages 3679, 3680 and 3683, in the Table of $A_1$ and $A_2$ values for radionuclides to read as follows:

**§ 173.435 Table of $A_1$ and $A_2$ values for radionuclides.**

| Symbol of radionuclide | Element and atomic number | $A_1$ (TBq) | $A_1$ (Ci) [b] | $A_2$ (TBq) | $A_2$ (Ci) [b] | Specific activity (Tbq/g) | Specific activity (Ci/g) |
|---|---|---|---|---|---|---|---|
| * * * | | | | | | | |
| Bi-205 | Bismuth (83) | $7.0 \times 10^{-1}$ | $1.9 \times 10^{1}$ | $7.0 \times 10^{-1}$ | $1.9 \times 10^{1}$ | $1.5 \times 10^{3}$ | $4.2 \times 10^{4}$ |
| * * * | | | | | | | |
| Cm-248 | | $2.0 \times 10^{-2}$ | $5.4 \times 10^{-1}$ | $3.0 \times 10^{-4}$ | $8.1 \times 10^{-3}$ | $1.6 \times 10^{-4}$ | $4.2 \times 10^{-3}$ |
| * * * | | | | | | | |
| Eu-150 (long lived) | | $7.0 \times 10^{-1}$ | $1.9 \times 10^{1}$ | $7.0 \times 10^{-1}$ | $1.9 \times 10^{1}$ | $6.1 \times 10^{4}$ | $1.6 \times 10^{6}$ |
| * * * | | | | | | | |
| Te-132 (a) | | $5.0 \times 10^{-1}$ | $1.4 \times 10^{1}$ | $4.0 \times 10^{-1}$ | $1.1 \times 10^{1}$ | $1.1 \times 10^{4}$ | $3.0 \times 10^{5}$ |
| * * * | | | | | | | |

* * * * * * *

[b] The values of $A_1$ and $A_2$ in curies (Ci) are approximate and for information only; the regulatory standard units are Terabecquerels (TBq), (see § 171.10).

* * * * *

■ 14. On page 3691, in the first column, in § 173.443, paragraph (a) introductory text is corrected to read as follows:

**§ 173.443 Contamination control.**

(a) The level of non-fixed (removable) radioactive contamination on the external surfaces of each package offered for transport must be kept as low as reasonable achievable. The level of non-fixed radioactive contamination may not exceed the limits set forth in Table 9 and must be determined by either:

* * * * *

Issued in Washington, DC, on September 1, 2004, under authority Delegated in 49 CFR Part 1.

**Samuel G. Bonasso,**

*Deputy Administrator, Research and Special Programs Administration.*

[FR Doc. 04–20549 Filed 9–10–04; 8:45 am]

BILLING CODE 4910–60–P

# Proposed Rules

Federal Register
Vol. 69, No. 176
Monday, September 13, 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. FAA–2004–19082; Directorate Identifier 2004–NM–79–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Boeing Model 747–200F and –400 Series Airplanes; Model 767–400ER Series Airplanes; and Model 777 Series Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to adopt a new airworthiness directive (AD) for certain Boeing Model 747–200F and –400 series airplanes; Model 767–400ER series airplanes; and Model 777 series airplanes. This proposed AD would require replacing the frequency converter(s) used to supply electrical power for utility outlets (for the galley, medical equipment, or personal computers) with modified frequency converter(s). This proposed AD also would require any specified action and related concurrent actions, as necessary. This proposed AD is prompted by a report that a hard short condition between the frequency converter's output and its downstream circuit breakers will produce a continuous circuit that could cause the undersized output wiring to overheat. We are proposing this AD to prevent the overheating of the frequency converter's undersized output wiring, which could lead to the failure of a wire bundle, and consequent adverse effects on other systems sharing the affected wire bundle.

**DATES:** We must receive comments on this proposed AD by October 28, 2004.

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

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

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

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

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

**SUPPLEMENTARY INFORMATION:**

### Docket Management System (DMS)

The FAA has implemented new procedures for maintaining AD dockets electronically. As of May 17, 2004, new AD actions are posted on DMS and assigned a docket number. We track each action and assign a corresponding directorate identifier. The DMS AD docket number is in the form "Docket No. FAA–2004–99999." The Transport Airplane Directorate identifier is in the form "Directorate Identifier 2004–NM–999–AD." Each DMS AD docket also lists the directorate identifier ("Old Docket Number") as a cross-reference for searching purposes.

### Comments Invited

We invite you to submit any written relevant data, views, or arguments regarding this proposed AD. Send your comments to an address listed under **ADDRESSES.** Include "Docket No. FAA–2004–19082; Directorate Identifier 2004–NM–79–AD" in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments submitted by the closing date and may amend the proposed AD in light of those comments.

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

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

### Examining the Docket

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

### Discussion

Boeing analysis has shown that on certain Boeing Model 747–200F and –400 series airplanes, Model 767–400ER series airplanes, and Model 777 series airplanes, a hard short condition between the output of the frequency converter (usually located in the main

equipment center) and its downstream circuit breaker will produce a continuous current of 55 amps. The continuous current causes the output wiring to exceed its wire temperature rating of 150 degrees Celsius. This condition, if not corrected, could lead to the failure of a wire bundle, and consequent adverse effects on other systems sharing the affected wire bundle.

**Relevant Service Information**

We have reviewed and approved Boeing Service Bulletins 747–25–3313, Revision 1, dated May 15, 2003 (for Model 747–200F and –400 series airplanes); 767–25–0335, dated November 7, 2002 (for Model 767–400ER series airplanes); and 777–25–0210, dated October 17, 2002 (for Model 777 series airplanes). The service bulletins describe procedures for replacing the frequency converter used to supply electrical power to utility outlets (for the galley, medical equipment, or personal computers) with a modified frequency converter, and any other specified actions, as applicable. The replacement involves removing the frequency converters, sending the frequency converter to the vendor (Avionic Instruments, Inc.) for rework, and installing the reworked frequency converter. The other specified actions involve performing a functional test, installing cautionary tags or placards on frequency converter switches/outlets in the cabin, and contacting the vendor for rework coordination, as applicable. Accomplishing the actions specified in the service bulletins is intended to adequately address the unsafe condition.

Boeing Service Bulletin 747–25–3313 refers to JAMCO Service Bulletin CAW74–25–1697, dated June 7, 2002, as an additional source of service information for procedures to remove and install certain galley frequency converters.

**Concurrent Service Bulletin**

For certain airplanes, Boeing Service Bulletin 777–25–0210 recommends prior or concurrent accomplishment of Monogram Systems Service Bulletin 872869–25–2098, dated May 1, 2002. The Monogram Systems service bulletin describes procedures for deactivating a galley frequency converter.

**FAA's Determination and Requirements of the Proposed AD**

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other airplanes of this same type design. Therefore, we are proposing this AD, which would require replacing the frequency converter(s) used to supply power for utility outlets (for the galley, medical equipment, or personal computers) with modified frequency converter(s); and any other specified action and related concurrent actions, as necessary. The proposed AD would require you to use the applicable Boeing service information described previously to perform these actions.

**Costs of Compliance**

This proposed AD would affect about 147 airplanes worldwide. The following table provides the estimated costs for U.S. operators to comply with this proposed AD.

ESTIMATED COSTS

| Boeing Model | Work hours | Average labor rate per hour | Cost per airplane | Number of U.S.-registered airplanes | Fleet cost |
|---|---|---|---|---|---|
| 747–200F, –400 series airplanes. | 5 per converter (1 converter on each airplane). | $65 | $325 | 0 | $0 |
| | 5 per converter (2 converters on each airplane). | 65 | 650 | 0 | 0 |
| 767–400ER series airplane | 2 per airplanes | 65 | 130 | 21 | 2,730 |
| 777 series airplanes | 4 per airplane | 65 | 260 | 8 | 2,080 |
| Additional concurrent action for 777 series airplanes. | 1 per airplane | 65 | 65 | 6 | 390 |

Currently, there are no affected Model 747–200F or –400 series airplanes on the U.S. Register. However, an affected airplane that is imported and placed on the U.S. Register in the future would be subject to the costs specified above for those airplanes.

**Regulatory Findings**

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

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

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

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

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

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

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Safety.

**The Proposed Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

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

**Boeing:** Docket No. FAA–2004–19082; Directorate Identifier 2004–NM–79–AD.

**Comments Due Date**

(a) The Federal Aviation Administration (FAA) must receive comments on this AD action by October 28, 2004.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to the airplanes listed in Table 1 of this AD, certificated in any category:

TABLE 1.—APPLICABILITY

| Boeing model— | As listed in Boeing service bulletin— |
|---|---|
| 747–200F and –400 series airplanes | 747–25–3313, Revision 1, dated May 15, 2003. |
| 767–400ER series airplanes | 767–25–0335, dated November 7, 2002. |
| 777 series airplanes | 777–25–0210, dated October 17, 2002. |

**Unsafe Condition**

(d) This AD was prompted by a report that a hard short condition between the frequency converter's output and its downstream circuit breakers will produce a continuous current, which could cause the undersized output wiring to overheat. We are issuing this AD to prevent the overheating of the frequency converter's output wiring which could lead to the failure of a wire bundle, and consequent adverse effects on other systems sharing the affected wire bundle.

**Compliance**

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

**Replacement**

(f) Within 18 months after the effective date of this AD, replace the frequency converter(s) used to supply electrical power to utility outlets (for the galley, medical equipment, or personal computers) with modified frequency converter(s); and do other applicable specified actions; by doing all of the actions in the Accomplishment Instructions of the applicable service bulletin listed in Table 2 of this AD.

TABLE 2.—APPLICABLE SERVICE BULLETINS

| For model— | Use Boeing service bulletin— |
|---|---|
| 747–200F and –400 series airplanes | 747–25–3313, Revision 1, dated May 15, 2003. |
| 767–400ER series airplanes | 767–25–0335, dated November 7, 2002. |
| 777 series airplanes | 777–25–0210, dated October 17, 2002. |

**Note 1:** Boeing Service Bulletin 747–25–3313, Revision 1, dated May 15, 2003, refers to JAMCO Service Bulletin CAW74–25–1697, dated June 7, 2002, as an additional source of information for procedures to remove and install certain galley frequency converters.

**Concurrent Service Bulletin**

(g) For airplanes listed as Group 3 in the Effectivity of Boeing Service Bulletin 777–25–0210, dated October 17, 2002: Prior to or concurrently with the actions in Boeing Service Bulletin 777–25–0210, dated October 17, 2002, deactivate the galley frequency converter in accordance with the Accomplishment Instructions of Monogram Systems Service Bulletin 872869–25–2098, dated May 1, 2002.

**Alternative Methods of Compliance (AMOCs)**

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

Issued in Renton, Washington, on September 1, 2004.

**Ali Bahrami,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 04–20596 Filed 9–10–04; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[COTP San Diego 04–019]**

**RIN 1625–AA87**

## Security Zone; San Diego Bay, CA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to expand the geographical boundaries of the permanent security zone at Naval Base San Diego. This action is required to provide adequate area for the U.S. Navy to install an upgraded barrier system and provide the minimum required separation distances between the barrier and protected assets at Naval Station San Diego. The proposed security zone would run adjacent to the navigation channel between Pier 14 and Pier 5. From the edge of the navigation channel west of Pier 5, the proposed security zone extends to a point 650 feet opposite of Pier 1.

The existing security zone at Naval Station San Diego, implemented on April 15, 2003, does not provide the area necessary for this upgraded barrier system.

**DATES:** Comments and related material must reach the Coast Guard on or before October 13, 2004.

**ADDRESSES:** You may mail comments and related material to Coast Guard Sector San Diego, 2716 North Harbor Drive, San Diego, California, 92101. Sector San Diego, Prevention Department maintains the public docket for these rulemakings. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at Coast Guard Sector San Diego, 2716 North Harbor Drive, San Diego, California, 92101, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** MSTC Todd Taylor at (619) 683–6495.

**SUPPLEMENTARY INFORMATION:**

**Request for Comments**

We encourage you to participate in these rulemakings by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (COTP San Diego 04–019), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments

and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know your submission reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change these proposed rules in view of them.

**Public Meeting**

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to Marine Safety Office San Diego at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid these rulemakings, we will hold one at a time and place announced by a later notice in the **Federal Register**.

**Background and Purpose**

On May 12, 2003, the Coast Guard published a final rule creating a permanent security zone at Naval Station San Diego (68 FR 25288). This security zone allowed the U.S. Navy to install a small barrier system to protect critical assets at Naval Station San Diego. The U.S. Navy now intends to install a permanent waterfront boat barrier to protect all assets berthed at Naval Station San Diego. The existing security zone does not provide enough area to install the permanent barrier and provide the required minimum separation distance between the barrier and protected assets.

**Discussion of the Proposed Rule**

Existing U.S. Navy Instructions (OPNAVINST 5530.14C Chapter 2) identify a minimum separation distance of 400 feet between the Port Security Barrier and protected assets. Because the security zone must not enter the navigation channel, a 400-foot separation is not practical along the south end of the waterfront between Pier 5 and Pier 13. Between those piers, the Coast Guard proposes extending the security zone to the edge of the navigation channel. From Pier 5 north to Pier 1, the Coast Guard proposes extending the security zone to a point 650 feet opposite the northern end of Pier 1. From that point, the security zone would extend to the starting point of the existing security zone. From Pier 5 north, the proposed security zone is shoreside of the navigation channel.

The modification and expansion of this security zone will prevent recreational and commercial craft from interfering with military operations involving all naval vessels home-ported at Naval Base San Diego, and it will protect transiting recreational and commercial vessels, and their respective crews, from the navigational hazards posed by such military operations. It will also safeguard vessels and waterside facilities from destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of a similar nature.

In its effort to thwart terrorist activity, the Coast Guard has increased safety and security measures on U.S. ports and waterways. As part of the Diplomatic Security and Antiterrorism Act of 1986 (Pub. L. 99–399), Congress amended section 7 of the Ports and Waterways Safety Act (PWSA), 33 U.S.C. 1226, to allow the Coast Guard to take actions, including the establishment of security and safety zones, to prevent or respond to acts of terrorism against individuals, vessels, or public or commercial structures. The Coast Guard also has authority to establish security zones pursuant to the Act of June 15, 1917, as amended by the Magnuson Act of August 9, 1950 (50 U.S.C. 191 *et seq.*) and implementing regulations promulgated by the President in subparts 6.01 and 6.04 of part 6 of title 33 of the Code of Federal Regulations.

Vessels or persons violating this section will be subject to the penalties set forth in 33 U.S.C. 1232 and 50 U.S.C. 192. Pursuant to 33 U.S.C. 1232, any violation of the security zone described herein, is punishable by civil penalties (not to exceed $32,500 per violation, where each day of a continuing violation is a separate violation), criminal penalties (imprisonment up to 5–10 years and a maximum fine of $250,000), and in rem liability against the offending vessel. Any person who violates this section, using a dangerous weapon, or who engages in conduct that causes bodily injury or fear of imminent bodily injury to any officer authorized to enforce this regulation, also faces imprisonment up to 12 years. Vessels or persons violating this section are also subject to the penalties set forth in 50 U.S.C. 192: seizure and forfeiture of the vessel to the United States, a maximum criminal fine of $10,000, and imprisonment up to 10 years, and a civil penalty of not more than $25,000 for each day of a continuing violation.

The Captain of the Port will enforce this zone and may enlist the aid and cooperation of any Federal, State, county, municipal, and private agency to assist in the enforcement of the regulation. This regulation is proposed under the authority of 33 U.S.C. 1226 in addition to the authority contained in 50 U.S.C. 191 and 33 U.S.C. 1231.

**Regulatory Evaluation**

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

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

Due to National Security interests, the implementation of this security zone is necessary for the protection of the United States and its people. The size of the zone is the minimum necessary to provide adequate protection for U.S. Naval vessels, their crews, adjoining areas, and the public. The entities most likely to be affected, if any, are pleasure craft engaged in recreational activities and sightseeing. Any hardships experienced by persons or vessels are considered minimal compared to the national interest in protecting U.S. Naval vessels, their crews, and the public.

**Small Entities**

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rules would not have a significant economic impact on a substantial number of small entities because the expanded zone will still allow sufficient room for vessels to transit the channel unimpeded.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that these rules 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 these rules 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 these proposed rules so that they can better evaluate its effects on them and participate in the rulemakings. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact MSTC Todd Taylor, Sector San Diego at (619) 683–6495. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

**Collection of Information**

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

**Federalism**

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

**Unfunded Mandates Reform Act**

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

**Taking of Private Property**

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

**Civil Justice Reform**

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

**Protection of Children**

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. The rule is not economically significant and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

**Indian Tribal Governments**

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. We invite your comments on how these proposed rules might impact tribal governments, even if that impact may not constitute a "tribal implication" under the Order.

**Energy Effects**

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

**Technical Standards**

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

**Environment**

We have analyzed this proposed rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation.

The U.S. Navy has separately considered the impact of their proposed project including the placement of anti-small boat barrier booms. The Coast Guard's analysis pertains solely to the expanded placement of the small markers designating the security zones already in the waterway. A draft "Environmental Analysis Check List" and a draft "Categorical Exclusion Determination" (CED) are available in the docket where indicated under **ADDRESSES**. Comments on this section will be considered before we make the final decision on whether the rule should be categorically excluded from further environmental review.

**List of Subjects in 33 CFR Part 165**

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

For the reasons discussed in the preamble, the Coast Guard proposes to amend 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. Revise § 165.1101 to read as follows:

**§ 165.1101 Security Zone: San Diego Bay, CA.**

(a) *Location.* The following area is a security zone: the water area within Naval Station, San Diego enclosed by a line connecting the following points: Beginning at 32°41′16.5″ N, 117°08′01″ W (Point A); thence running southwesterly to 32°41′00.0″ N,

117°08′12.7″ W (Point B); to 32°40′36.0″ N 117°07′49.1″ W (Point C); to 32°40′27.4″ N, 117°07′34.6″ W (Point D); to 32°39′36.4″ N, 117°07′24.8″ W (Point E); to 32°39′38.5″ N 117°07′06.5″ W, (Point F); thence running generally northwesterly along the shoreline of the Naval Station to the beginning point. All coordinates referenced use datum: NAD 1983.

(b) *Regulations.* (1) In accordance with the general regulations in § 165.33 of this part, entry into the area of this zone is prohibited unless authorized by the Captain of the Port San Diego; Commander, Naval Base San Diego; Commander, Navy Region Southwest; or the Commanding Officer, Naval Station, San Diego.

(2) Persons desiring to transit the area of the security zone may contact the Captain of the Port at telephone number 619–683–6495 or on VHF channel 16 (156.8 MHz) to seek permission to transit the area. If permission is granted, all persons and vessels must comply with the instructions of the Captain of the Port or his or her designated representative.

(c) *Authority.* In addition to 33 U.S.C. 1231 and 50 U.S.C. 191, the authority for this section includes 33 U.S.C. 1226.

(d) *Enforcement.* The U.S. Coast Guard may be assisted in the patrol and enforcement of this security zone by the U. S. Navy.

Dated: August 25, 2004.

**John E. Long,**

*Captain, U.S. Coast Guard, Captain of the Port, San Diego.*

[FR Doc. 04–20545 Filed 9–10–04; 8:45 am]

BILLING CODE 4910–15–P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[COTP San Francisco Bay 04–007]**

**RIN 1625–AA87**

## Security Zone; Suisun Bay, Concord, CA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Supplemental notice of proposed rulemaking.

**SUMMARY:** The Coast Guard is issuing a supplement to our notice of proposed rulemaking (NPRM) published on July 19, 2004 (69 FR 42950). The NPRM incorrectly stated that lighted buoys would be used to mark the perimeter of the proposed security zones around three piers at the Military Ocean Terminal Concord (MOTCO), California (formerly the United States Naval Weapons Station Concord, California). In addition, the NPRM stated that the MOTCO Piers were numbered from east to west instead of west to east. Because of these errors, this supplement is intended to correct the errors in the initial NPRM and re-initiate the 60-day public comment period.

The Coast Guard proposes to establish fixed security zones in the navigable waters of the United States around each of the three piers at the Military Ocean Terminal Concord (MOTCO), California (formerly United States Naval Weapons Center Concord, California), any combination of which would be enforced by the Captain of the Port (COTP) San Francisco Bay during the onloading or offloading of military equipment and ordnance, depending on which pier, or piers, are being used. In light of recent terrorist actions against the United States, these proposed security zones are necessary to ensure the safe onloading and offloading of military equipment and to ensure the safety of the public from potential subversive acts. The proposed security zones would prohibit all persons and vessels from entering, transiting through or anchoring within portions of the Suisun Bay within 500 yards of any MOTCO pier, or piers, where military onload or offload operations are taking place, unless authorized by the COTP or his designated representative.

**DATES:** Comments and related material must reach the Coast Guard on or before November 12, 2004.

**ADDRESSES:** You may mail comments and related material to the Waterways Management Branch, U.S. Coast Guard Marine Safety Office San Francisco Bay, Coast Guard Island, Alameda, California 94501. The Waterways Management Branch maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at the Waterways Management Branch between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Lieutenant Doug Ebbers, U.S. Coast Guard Marine Safety Office San Francisco Bay, at (510) 437–3073.

**SUPPLEMENTARY INFORMATION:**

### Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (04–007), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know that your submission reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

### Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to the Waterways Management Branch at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a separate notice in the **Federal Register**.

### Background and Purpose

Since the September 11, 2001, terrorist attacks on the World Trade Center in New York, the Pentagon in Arlington, Virginia and Flight 93, the Federal Bureau of Investigation (FBI) has issued several warnings concerning the potential for additional terrorist attacks within the United States. In addition, the ongoing hostilities in Afghanistan and Iraq have made it prudent for U.S. ports to be on a higher state of alert because Al-Qaeda and other organizations have declared an ongoing intention to conduct armed attacks on U.S. interests worldwide.

The threat of maritime attacks is real as evidenced by the attack on the USS Cole and the subsequent attack in October 2002 against a tank vessel off the coast of Yemen. These threats manifest a continuing threat to U.S. assets as described in the President's finding in Executive Order 13273 of August 21, 2002 (67 FR 56215, September 3, 2002), that the security of the U.S. is endangered by the September 11, 2001, attacks and that such aggression continues to endanger the international relations of the United States. *See also* Continuation of the National Emergency with Respect to Certain Terrorist Attacks (67 FR 58317, September 13, 2002), and Continuation of the National Emergency with Respect to Persons Who Commit, Threaten To Commit, Or Support Terrorism (67 FR 59447, September 20, 2002). The U.S. Maritime Administration (MARAD) in

Advisory 02–07 advised U.S. shipping interests to maintain a heightened status of alert against possible terrorist attacks. MARAD more recently issued Advisory 03–05 informing operators of maritime interests of increased threat possibilities to vessels and facilities and a higher risk of terrorist attack to the transportation community in the United States. The ongoing foreign hostilities have made it prudent for U.S. ports and waterways to be on a higher state of alert because the Al-Qaeda organization and other similar organizations have declared an ongoing intention to conduct armed attacks on U.S. interests worldwide.

In its effort to thwart terrorist activity, the Coast Guard has increased safety and security measures on U.S. ports and waterways. As part of the Diplomatic Security and Antiterrorism Act of 1986 (Pub. L. 99–399), Congress amended section 7 of the Ports and Waterways Safety Act (PWSA), 33 U.S.C. 1226, to allow the Coast Guard to take actions, including the establishment of security and safety zones, to prevent or respond to acts of terrorism against individuals, vessels, or public or commercial structures. The Coast Guard also has authority to establish security zones pursuant to the Act of June 15, 1917, as amended by the Magnuson Act of August 9, 1950 (50 U.S.C. 191 *et seq.*), and implementing regulations promulgated by the President in subparts 6.01 and 6.04 of part 6 of title 33 of the Code of Federal Regulations.

In this particular proposed rulemaking, to address the aforementioned security concerns and to take steps to prevent the catastrophic impact that a terrorist attack against the MOTCO facility would have on the public, we propose to establish three security zones in the navigable waters of the United States within 500 yards of any MOTCO pier, or piers, where military onload or offload operations are taking place to safeguard vessels, cargo and crew. These proposed security zones are necessary to safeguard the MOTCO terminal and the surrounding property from sabotage or other subversive acts, accidents or criminal acts. These zones are also necessary to protect military operations from compromise and interference and to specifically protect the people, ports, waterways, and properties of the Port Chicago and Suisun Bay areas. Due to heightened security concerns and the catastrophic impact a terrorist attack on this facility would have on the public, environment, transportation system, surrounding areas, and nearby communities, establishing security zones is a prudent and necessary action for this facility.

Previously, for each military operation at MOTCO, a temporary final rule would be written and published to establish a temporary security zone around the entire MOTCO facility, and the maritime public would be advised of the security zone using a Broadcast Notice to Mariners (BNM). In this rulemaking, we propose to create three smaller security zones that would surround only the pier, or piers, being used for a military onload or offload, and the security zone(s) would only be enforced during an onload or offload operation. This would accomplish the same goal of providing additional security for the facility during military operations, and would continue the practice of notifying mariners of the security zone(s), but would remove the need to publish a temporary final rule in the **Federal Register** each time an operation occurs. This proposed rule would add § 165.1199, Security Zones; Suisun Bay, Concord, California, to Title 33 of the Code of Federal Regulations.

**Discussion of Proposed Rule**

The Coast Guard proposes to establish fixed security zones encompassing the navigable waters, extending from the surface to the sea floor, within 500 yards around each of the three MOTCO piers, any combination of which would be enforced by the COTP during the onloading or offloading of military equipment and ordnance, depending on which pier, or piers, are being used. There are three existing piers at the MOTCO facility. Originally there were four piers, numbered One through Four from west to east, but Pier One was destroyed in an explosion in 1944. Therefore, Pier Two is now the westernmost pier. The proposed 500-yard security zone around Pier Two would encompass portions of both the Roe Island Channel and the Port Chicago Reach sections of the deepwater channel. The proposed 500-yard security zone around Pier Three would encompass a small portion of the Roe Island Channel and most of the Port Chicago Reach section of the deepwater channel. The proposed 500-yard security zone around Pier Four would encompass portions of both the Port Chicago Reach and the Middle Ground West Reach sections of the deepwater channel. If more than one pier is involved in onload or offload operations at the same time, the proposed security zone for each of the piers being used would be enforced.

Prior to the commencement of a military onload or offload, the COTP San Francisco Bay will cause notification of enforcement of the security zone(s) to be made by issuing a Local Notice to Mariners and a Broadcast Notice to Mariners to inform the affected segments of the public. During periods that the security zone(s) are being enforced, Coast Guard patrol personnel will notify mariners to keep out of the security zone(s) as they approach the area. In addition, Coast Guard Group San Francisco Bay maintains a telephone line that is maintained 24 hours a day, 7 days a week. The public can contact Group San Francisco Bay at (415) 399–3530 to obtain information concerning enforcement of this rule. When the security zone(s) are no longer needed, the COTP will cease enforcement of the security zone(s) and issue a Broadcast Notice to Mariners to notify the public. Upon notice of suspension of enforcement, all persons and vessels are granted general permissions to enter, move within and exit the security zone(s).

In addition to restricting access to the pier, or piers, where military operations are taking place, each of these proposed security zones would provide necessary standoff distance for blast and collision, surveillance and detection perimeter, and a margin of response time for security personnel. This proposed rule, for security reasons, would prohibit entry of any vessel or person inside any of the security zones without specific authorization from the Captain of the Port or his designated representative.

Vessels or persons violating this section would be subject to the penalties set forth in 33 U.S.C. 1232 and 50 U.S.C. 192. Pursuant to 33 U.S.C. 1232, any violation of the security zones described herein is punishable by civil penalties (not to exceed $32,500 per violation, where each day of a continuing violation is a separate violation), criminal penalties (imprisonment up to 6 years and a maximum fine of $250,000) and *in rem* liability against the offending vessel. Any person who violates this section using a dangerous weapon, or who engages in conduct that causes bodily injury or fear of imminent bodily injury to any officer authorized to enforce this regulation also faces imprisonment up to 12 years. Vessels or persons violating this section are also subject to the penalties set forth in 50 U.S.C. 192: seizure and forfeiture of the vessel to the United States, a maximum criminal fine of $10,000, and imprisonment up to 10 years.

The Captain of the Port would enforce these proposed zones and may enlist the aid and cooperation of any Federal, State, county, municipal, and private agency to assist in the enforcement of the regulation. This regulation is proposed under the authority of 33

U.S.C. 1226 in addition to the authority contained in 50 U.S.C. 191 and 33 U.S.C. 1231.

**Regulatory Evaluation**

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

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. Although this proposed rule restricts access to the waters encompassed by the security zones, the effect of this proposed rule would not be significant because: (i) The zones would encompass only small portions of the waterway; (ii) smaller vessels would be able to pass safely around the zones; and (iii) larger vessels may be allowed to enter these zones on a case-by-case basis with permission of the Captain of the Port or his designated representative.

The sizes of the proposed zones are the minimum necessary to provide adequate protection for MOTCO, vessels engaged in operations at MOTCO, their crews, other vessels operating in the vicinity, and the public. The entities most likely to be affected are commercial vessels transiting to or from Suisun Bay via the Port Chicago Reach section of the channel and pleasure craft engaged in recreational activities and sightseeing.

**Small Entities**

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule may affect the following entities, some of which may be small entities: The owners and operators of vessels intending to anchor or transit to or from Suisun Bay via the Port Chicago Reach section of the channel, and owners and operators of private vessels intending to fish or sightsee near the MOTCO facility.

The proposed security zones would not have a significant economic impact on a substantial number of small entities for several reasons: (i) Although the security zones would occupy sections of the navigable channel adjacent to the Marine Ocean Terminal Concord (MOTCO), vessels may receive authorization to transit through the zones by the Captain of the Port or his designated representative on a case-by-case basis, (ii) small vessel traffic would be able to pass safely around the area, and (iii) vessels engaged in recreational activities, sightseeing and commercial fishing would have ample space outside of the security zones to engage in these activities. Small entities and the maritime public would be advised of these security zones via public notice to mariners and by Coast Guard patrol personnel.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed 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 (Public Law 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Lieutenant Doug Ebbers, Waterways Management Branch, U.S. Coast Guard Marine Safety Office San Francisco Bay, at (510) 437–3073. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

**Collection of Information**

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

**Federalism**

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

**Unfunded Mandates Reform Act**

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

**Taking of Private Property**

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

**Civil Justice Reform**

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

**Protection of Children**

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

**Indian Tribal Governments**

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

**Energy Effects**

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have

determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

**Technical Standards**

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies. This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

**Environment**

We have analyzed this proposed rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this proposed rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation because it would establish security zones.

A draft "Environmental Analysis Check List" and a draft "Categorical Exclusion Determination" (CED) will be available in the docket where indicated under **ADDRESSES**. Comments on this section will be considered before we make the final decision on whether the rule should be categorically excluded from further environmental review.

**List of Subjects in 33 CFR Part 165**

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

For the reasons discussed in the preamble, the Coast Guard proposes to amend 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 § 165.1199, to read as follows:

**§ 165.1199 Security Zones; Military Ocean Terminal Concord (MOTCO), Concord, California.**

(a) *Location.* The security zone(s) encompass the navigable waters of Suisun Bay, California, extending from the surface to the sea floor, within 500 yards of the three Military Ocean Terminal Concord (MOTCO) piers in Concord, California.

(b) *Regulations.* (1) The Captain of the Port (COTP) San Francisco Bay will enforce the security zone(s) established by this section during military onload or offload operations only upon notice. Upon notice of enforcement by the COTP, entering, transiting through or anchoring in the zone(s) is prohibited unless authorized by the COTP or his designated representative. Upon notice of suspension of enforcement by the COTP, all persons and vessels are granted general permissions to enter, transit, and exit the security zone(s).

(2) If more than 1 pier is involved in onload or offload operations at the same time, the 500-yard security zone for each involved pier will be enforced.

(3) Persons desiring to transit the area of a security zone may contact the Patrol Commander on scene on VHF-FM channel 13 or 16 or the COTP at telephone number 415–399–3547 to seek permission to transit the area. If permission is granted, all persons and vessels must comply with the instructions of the COTP or his designated representative.

(c) *Enforcement.* All persons and vessels must comply with the instructions of the Coast Guard Captain of the Port or the designated on-scene patrol personnel. Patrol personnel comprise commissioned, warrant, and petty officers of the Coast Guard onboard Coast Guard, Coast Guard Auxiliary, local, state, and federal law enforcement vessels. The U.S. Coast Guard may be assisted in the patrol and enforcement of the security zones by local law enforcement and the MOTCO police as necessary. Upon being hailed by U.S. Coast Guard patrol personnel by siren, radio, flashing light, or other means, the operator of a vessel must proceed as directed.

(d) *Notice of enforcement or suspension of enforcement of security zone(s).* The COTP San Francisco Bay will cause notification of enforcement of the security zone(s) to be made by issuing a Local Notice to Mariners and a Broadcast Notice to Mariners to inform the affected segments of the public. During periods that the security zone(s) are being enforced, Coast Guard patrol personnel will notify mariners to keep out of the security zone(s) as they approach the area. In addition, Coast Guard Group San Francisco Bay maintains a telephone line that is maintained 24 hours a day, 7 days a week. The public can contact Group San Francisco Bay at (415) 399–3530 to obtain information concerning enforcement of this rule. When the security zone(s) are no longer needed, the COTP will cease enforcement of the security zone(s) and issue a Broadcast Notice to Mariners to notify the public. Upon notice of suspension of enforcement, all persons and vessels are granted general permissions to enter, move within and exit the security zone(s).

Dated: September 2, 2004.

**Gerald M. Swanson,**

*Captain, U.S. Coast Guard, Captain of the Port, San Francisco Bay, California.*

[FR Doc. 04–20544 Filed 9–10–04; 8:45 am]

BILLING CODE 4910–15–P

## FEDERAL COMMUNICATIONS COMMISSION

**47 CFR Part 51**

**[WC Docket No. 04–313, CC Docket No. 01–338; FCC 04–179]**

## Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** This Notice of Proposed Rulemaking (NPRM) solicits comment on final unbundling rules that will implement the obligations of section 251(c)(3) of the Communications Act of 1934, as amended, in a manner consistent with the March 2, 2004 decision of the U.S. Court of Appeals for the District of Columbia Circuit (DC Circuit) in *United States Telecom Ass'n* v. *FCC*. The NPRM poses critical questions concerning how the

Commission might amend its interpretation of "impairment" as that term is used in section 251(d)(2)(B) of the Act, as well as asking how the Commission should respond to other factors when evaluating whether an incumbent carrier must provision a particular network element to competitors on an unbundled basis.

**DATES:** Comments are due on or before October 4, 2004, and reply comments are due on or before October 19, 2004.

**ADDRESSES:** Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. See **SUPPLEMENTARY INFORMATION** for further filing instructions.

**FOR FURTHER INFORMATION CONTACT:** Ian Dillner, Attorney, Competition Policy Division, Wireline Competition Bureau, at (202) 418–1191, or at *Ian.Dillner@fcc.gov*.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Notice of Proposed Rulemaking* in WC Docket No. 04–313 and CC Docket No. 01–338, adopted July 21, 2004, and released August 20, 2004 (NPRM). The complete text of this NPRM 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. This document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160. It is also available on the Commission's Web site at *http://www.fcc.gov*.

Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. All filings should refer to WC Docket No. 04–313 and CC Docket No. 01–338. Comments filed through ECFS can be sent as an electronic file via the Internet at *http://www.fcc.gov/e-file/ecfs.html*. Only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, postal service mailing address, and the applicable docket numbers, which in this instance are WC Docket No. 04–313 and CC Docket No. 01–338. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to *ecfshelp@fcc.gov*, and should include the following words in the regarding line of the message: "get form<your e-mail address>." A sample form and directions will be sent in reply.

Parties who choose to file by paper must file an original and four copies of each filing. Parties filing by paper must also send five (5) courtesy copies to the attention of Janice M. Myles, Wireline Competition Bureau, Competition Policy Division, 445 12th Street, SW., Suite 5–C327, Washington, DC 20554, or via e-mail *janice.myles@fcc.gov*. Paper filings and courtesy copies must be delivered in the following manner. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail).

The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. This facility is the only location where hand-delivered or messenger-delivered paper filings or courtesy copies for the Commission's Secretary and Commission staff will be accepted. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554.

All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

Each comment and reply comment must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with section 1.48 and all other applicable sections of the Commission's rules. We direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission.

## Synopsis of the Notice of Proposed Rulemaking

1. *Background.* The Telecommunications Act of 1996 requires that incumbent local exchange carriers (LECs) provide unbundled network elements (UNEs) to other telecommunications carriers. In particular, section 251(c)(3) requires incumbent LECs to provide to requesting telecommunications carriers "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with . . . the requirements of this section and section 252." Section 251(d)(2)(B) authorizes the Commission to determine which elements are subject to unbundling. That section directs the Commission to consider, "at a minimum," whether access to proprietary network elements is "necessary" and whether failure to provide a non-proprietary element on an unbundled basis would "impair" a requesting carrier's ability to provide service.

2. The Commission has made several attempts to interpret these provisions and to set forth which network elements must be unbundled, and in what circumstances. Most recently, in August 2003, the Commission issued its *Triennial Review Order, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01–338, 96–98, 98–147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 68 FR 52276, Sept. 2, 2003, *vacated and remanded in part, affirmed in part, United States Telecom Association* v. *FCC*, 359 F.3d 554 (DC Cir. 2004). That order was subsequently vacated and remanded in part by the United States Court of Appeals for the District of Columbia Circuit. *See USTA II*, 359 F.3d 554 (DC Cir. 2004). This NPRM seeks comment on (1) how the Commission might best craft appropriate and sustainable unbundling policies in light of the DC Circuit's decision and, (2) appropriate transition mechanisms to govern unbundled access to network elements in the event the Commission determines that particular elements are not subject to the section 251(c)(3) unbundling requirement.

3. *Notice of Proposed Rulemaking.* First, the Commission seeks comment on how to respond to the DC Circuit's *USTA II* decision in establishing sustainable new unbundling rules under sections 251(c) and 251(d)(2) of the Act. As an initial matter, the document seeks comment on what changes to the Commission's unbundling framework are necessary, given the guidance of the *USTA II* court. To that end, the

Commission seeks comment on how various incumbent LEC service offerings and obligations, such as tariffed offerings and Bell Operating Company (BOC) access obligations under section 271, fit into the Commission's unbundling framework. Moreover, we seek comment on how best to define relevant markets (*e.g.*, product markets, geographic markets, customer classes) to develop rules that account for market variability and to conduct the service-specific inquiry to which *USTA II* refers. Also, the Commission seeks comment on how to respond to the DC Circuit's guidance on other threshold factors, including the relationship between universal service support and the provision of UNEs.

4. Moving beyond the threshold unbundling issues, the NPRM seeks comment on how to apply the Commission's unbundling framework to make determinations on access to individual network elements. Thus, we seek comment on which specific network elements the Commission should require incumbent LECs to make available as UNEs, and how the Commission should make these determinations. Further, the Commission invites parties to comment on any other issues it should address in light of *USTA II*.

5. The NPRM also seeks comment regarding the second phase of the twelve-month transition plan described in the simultaneously released Order, summarized separately. The first phase of this plan is designed to ensure the continued availability of unbundled switching, dedicated transport and enterprise market loops over the next six months. The second phase is meant to mitigate the disruption that might otherwise ensue in the absence of a Commission finding that any or all of those elements are subject to unbundling. The NPRM seeks comment on whether additional transition mechanisms apart from or beyond this second phase are appropriate. For example, we seek comment on what additional transition mechanisms, if any, would help to prevent service disruptions during cut-overs from UNE facilities to a carrier's own (or third-party) facilities, or for conversions to tariffed or other service arrangements.

**Paperwork Reduction Act**

This NPRM does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any proposed "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

**Initial Regulatory Flexibility Analysis**

6. As required by the RFA, the Commission has prepared this IRFA of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this NPRM. Written public comments are sought on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for SBA Advocacy.

*A. Need for, and Objectives of, the Proposed Rule*

7. We initiate this proceeding to begin a comprehensive examination of the circumstances under which incumbent LECs must make UNEs available to requesting carriers pursuant to sections 251(c)(3) and 251(d)(2) of the Act. The Commission last reviewed its unbundling rules comprehensively in 2003 in the Triennial Review Order. Portions of the Triennial Review Order were vacated and/or remanded by the DC Circuit in its *USTA II* decision. The NPRM seeks comment on how the Commission should respond to the DC Circuit's opinion, both in terms of creating a legally sustainable impairment standard and applying that standard to individual network elements.

*B. Legal Basis*

8. The legal basis for any action that may be taken pursuant to the NPRM is contained in sections 1, 3, 4, 201–205, 251, 256, 271, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 153, 154, 201–205, 251, 252, 256, 271, 303(r).

*C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Would Apply*

9. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein. 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).

10. In this section, we further describe and estimate the number of small entity licensees and regulatees that may be affected by our action. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be the data that the Commission publishes in its Trends in Telephone Service report. The SBA has developed small business size standards for wireline and wireless small businesses within the three commercial census categories of Wired Telecommunications Carriers, Paging, and Cellular and Other Wireless Telecommunications. Under these categories, a business is small if it has 1,500 or fewer employees. Below, using the above size standards and others, we discuss the total estimated numbers of small businesses that might be affected by our actions.

11. We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation." The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope. We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

12. *Wired Telecommunications Carriers.* The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees. According to Census Bureau data for 1997, there were 2,225 firms in this category, total, that operated for the entire year. Of this total, 2,201 firms had employment of 999 or fewer employees, and an additional 24 firms had employment of 1,000 employees or more. Thus, under this size standard, the great majority of firms can be considered small.

13. *Incumbent Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The

appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1,310 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,310 carriers, an estimated 1,025 have 1,500 or fewer employees and 285 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our proposed action.

14. *Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 563 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 563 carriers, an estimated 472 have 1,500 or fewer employees and 91 have more than 1,500 employees. In addition, 14 carriers have reported that they are "Shared-Tenant Service Providers," and all 14 are estimated to have 1.500 or fewer employees. In addition, 37 carriers have reported that they are "Other Local Service Providers." Of the 37, an estimated 36 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities that may be affected by our proposed action.

15. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 281 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 254 have 1,500 or fewer employees and 27 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our proposed action.

16. *Operator Service Providers (OSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 23 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 22 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our proposed action. Prepaid Calling Card Providers. The SBA has developed a size standard for a small business within the category of Telecommunications Resellers. Under that SBA size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 32 companies reported that they were engaged in the provision of prepaid calling cards. Of these 32 companies, an estimated 31 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that the great majority of prepaid calling card providers are small entities that may be affected by the rules and policies adopted herein.

17. *Other Toll Carriers.* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to "Other Toll Carriers." This category includes toll carriers that do not fall within the categories of interexchange carriers, OSPs, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission's data, 65 companies reported that their primary telecommunications service activity was the provision of other toll services. Of these 65 companies, an estimated 62 have 1,500 or fewer employees and three have more than 1,500 employees. Consequently, the Commission estimates that most "Other Toll Carriers" are small entities that may be affected by the rules and policies adopted herein.

18. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of "Paging" and "Cellular and Other Wireless Telecommunications." Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year. Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more. Thus, under this category and associated small business size standard, the great majority of firms can be considered small. For the census category Cellular and Other Wireless Telecommunications, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year. Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more. Thus, under this second category and size standard, the great majority of firms can, again, be considered small. Broadband PCS. The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of $40 million or less in the three previous calendar years. For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years." These standards defining "small entity" in the context of broadband PCS auctions have been approved by the SBA. No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses. Subsequent events, concerning Auction 305, including judicial and agency

determinations, resulted in a total of 163 C and F Block licenses being available for grant. In addition, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

19. *Narrowband Personal Communications Services.* The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second auction commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, "small businesses" were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses. To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the Narrowband PCS Second Report and Order, 65 FR 35875, Jun. 6, 2000. A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small business size standards. A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses. Three of these claimed status as a small or very small entity and won 311 licenses.

20. *220 MHz Radio Service—Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to "Cellular and Other Wireless Telecommunications" companies. This category provides that a small business is a wireless company employing no more than 1,500 persons. According to the Census Bureau data for 1997, only twelve firms out of a total of 1,238 such firms that operated for the entire year in 1997, had 1,000 or more employees. If this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA's small business standard.

21. *220 MHz Radio Service—Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the 220 MHz Third Report and Order, 62 FR 16004 Apr. 3, 1997, we adopted a small business size standard for defining "small" and "very small" businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. This small business standard indicates that a "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. A "very small business" is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years. The SBA has approved these small size standards. Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998. In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses. A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.

22. *Specialized Mobile Radio.* The Commission awards "small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years. The Commission awards "very small entity" bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years. The SBA has approved these small business size standards for the 900 MHz Service. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band. A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.

23. *Common Carrier Paging.* The SBA has developed a small business size standard for wireless firms within the broad economic census categories of "Cellular and Other Wireless Telecommunications." Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year. Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more. Thus, under this category and associated small business size standard, the great majority of firms can be considered small.

24. In the Paging Second Report and Order, 62 FR 11616, Mar. 12, 1997, the Commission adopted a size standard for "small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. The SBA has approved this definition. An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses. An auction of MEA and Economic Area

(EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold. One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses. Currently, there are approximately 74,000 Common Carrier Paging licenses. According to the most recent Trends in Telephone Service, 379 private and common carriers reported that they were engaged in the provision of either paging or "other mobile" services. Of these, we estimate that 373 are small, under the SBA-approved small business size standard. We estimate that the majority of common carrier paging providers would qualify as small entities under the SBA definition.

25. *700 MHz Guard Band Licenses.* In the 700 MHz Guard Band Order, we adopted size standards for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. SBA approval of these definitions is not required. An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses. Rural Radiotelephone Service. The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service. A significant subset of the Rural Radiotelephone Service is the BETRS. The Commission uses the SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons. There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

26. *Air-Ground Radiotelephone Service.* The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service. We will use SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons. There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA small business size standard.

27. *Aviation and Marine Radio Services.* Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other Telecommunications," which is 1,500 or fewer employees. Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875–157.4500 MHz (ship transmit) and 161.775–162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a "small" business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $15 million dollars. In addition, a "very small" business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $3 million dollars. There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as "small" businesses under the above special small business size standards.

28. *Fixed Microwave Services.* Fixed microwave services include common carrier, private operational-fixed, and broadcast auxiliary radio services. At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other Telecommunications," which is 1,500 or fewer employees. The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 22,015 common carrier fixed licensees and up to 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies proposed herein. We noted, however, that the common carrier microwave fixed licensee category includes some large entities.

29. *Offshore Radiotelephone Service.* This service operates on several ultra high frequencies (UHF) television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico. There are presently approximately 55 licensees in this service. We are unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for "Cellular and Other Wireless Telecommunications" services. Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.

30. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years,

and a "very small business" as an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these definitions. The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity. An auction for one license in the 1670–1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

31. *39 GHz Service.* The Commission created a special small business size standard for 39 GHz licenses—an entity that has average gross revenues of $40 million or less in the three previous calendar years. An additional size standard for "very small business" is: an entity that, together with affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. The SBA has approved these small business size standards. The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by the rules and polices proposed herein.

32. *Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Instructional Television Fixed Service.* Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS). In connection with the 1996 MDS auction, the Commission defined "small business" as an entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years. The SBA has approved of this standard. The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 claimed status as a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities.

33. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating $12.5 million or less in annual receipts. According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year. Of this total, 1,180 firms had annual receipts of under $10 million, and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the proposed rules and policies.

34. Finally, while SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities. There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, we tentatively conclude that at least 1,932 ITFS licensees are small businesses.

35. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications. The auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years. An additional small business size standard for "very small business" was added as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. The SBA has approved these small business size standards in the context of LMDS auctions. There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses bidding that won 119 licenses.

36. *218–219 MHz Service.* The first auction of 218–219 MHz (previously referred to as the Interactive and Video Data Service or IVDS) spectrum resulted in 178 entities winning licenses for 594 Metropolitan Statistical Areas (MSAs). Of the 594 licenses, 567 were won by 167 entities qualifying as a small business. For that auction, we defined a small business as an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years. In the 218–219 MHz Report and Order and Memorandum Opinion and Order, we defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding $15 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding $3 million for the preceding three years. The SBA has approved of these definitions. At this time, we cannot estimate the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218–219 MHz spectrum. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this analysis that in future auctions, many, and perhaps all, of the licenses may be awarded to small businesses.

37. *Incumbent 24 GHz Licensees.* This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard is that of "Cellular and Other Wireless Telecommunications" companies. This category provides that such a company is small if it employs no more than 1,500 persons. According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year. Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more. Thus, under this size standard, the great majority of firms can be considered small. These broader census data notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small

entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

38. *Future 24 GHz Licensees.* With respect to new applicants in the 24 GHz band, we have defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding $15 million. "Very small business" in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years. The SBA has approved these definitions. The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held.

39. *Internet Service Providers.* The SBA has developed a small business size standard for Internet Service Providers. This category comprises establishments "primarily engaged in providing direct access through telecommunications networks to computer-held information compiled or published by others." Under the SBA size standard, such a business is small if it has average annual receipts of $21 million or less. According to Census Bureau data for 1997, there were 2,751 firms in this category that operated for the entire year. Of these, 2,659 firms had annual receipts of under $10 million, and an additional 67 firms had receipts of between $10 million and $24,999,999. Thus, under this size standard, the great majority of firms can be considered small entities.

*D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities*

40. In this NPRM, we seek comment on proposed rules that would establish unbundling requirements for incumbent LECs, pursuant to sections 251(c) and 251(d)(2) of the Act. The Commission last reviewed its unbundling rules comprehensively in 2003 in the Triennial Review Order. Portions of the Triennial Review Order were vacated and/or remanded by the DC Circuit in its *USTA II* decision. The NPRM seeks comment on how the Commission should respond to the DC Circuit's opinion, in terms of both how to create a legally sustainable impairment standard, as well as applying that standard to individual network elements.

*E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered*

41. The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): "(1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."

42. In this NPRM, we seek comment on how to develop legally sustainable rules for access to unbundled network elements. We seek comment, for instance, on how best to define markets, including product markets and customer classes. We also wish to solicit comment on the economic effect that various UNE approaches might have on small entity telecommunications providers.

*F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule*

43. None.

**Ordering Clause**

Accordingly, it is ordered that the Notice of Proposed Rulemaking is adopted.

Federal Communications Commission.

**William F. Caton,**

*Deputy Secretary*

[FR Doc. 04–20467 Filed 9–10–04; 8:45 am]

BILLING CODE 6712–01–P

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 224

**[I.D. 040704A]**

### Endangered Fish and Wildlife; Advance Notice of Proposed Rulemaking (ANPR) for Right Whale Ship Strike Reduction; Extension of Public Comment Period

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice to extend public comment period.

**SUMMARY:** NMFS is extending the public comment period on the Advance Notice of Proposed Rulemaking (ANPR) published June 1, 2004. The ANPR announces a strategy to reduce mortalities to North Atlantic right whales as a result of vessel collisions. NMFS is extending the public comment period through November 15, 2004, to allow for adequate time to conduct stakeholder meetings along the Atlantic coast in association with the ANPR comment period.

**DATES:** Written and electronic comments on the ANPR must be received (see **ADDRESSES**) no later than 5 p.m. eastern standard time on November 15, 2004.

**ADDRESSES:** Comments should be sent to:

- Mail: Chief, Marine Mammal Conservation Division, Attn: Right Whale Ship Strike Strategy, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.
- Fax: (301)427–2522, Attn: Right Whale Ship Strike Strategy.
- E-mail: *shipstrike.comments@noaa.gov.*
- Federal Rulemaking portal: *http://www.regulations.gov* (follow instructions for submitting comments).

The June 1, 2004, ANPR may be obtained at *www.nmfs.noaa.gov/pr/* under the "Recent News and Hot Topics" link. Using the drop-down menu, the link "Ship Strike Strategy" provides access to the ANPR, as well as links to background and supporting documentation related to the proposed strategy.

**FOR FURTHER INFORMATION CONTACT:** Michael Payne, Division Chief, Office of Protected Resources, NMFS, at (301) 713–2322; Pat Gerrior, Fishery Biologist, Northeast Regional Office, NMFS, at (508) 495–2264; or Barb Zoodsma, Fishery Biologist, Southeast Regional Office, NMFS, at (904) 321–2806.

**SUPPLEMENTARY INFORMATION:** This notice provides additional opportunity for public involvement in the development and implementation of a strategy to reduce the likelihood and threat of ship strike mortalities to North Atlantic right whales. The strategy is described in greater detail in the ANPR published June 1, 2004 (69 FR 30857). In summary, it is a multi-faceted plan that includes potential routing changes, speed reductions, and the use of dynamic management areas as proposed operational measures.

NMFS has already held five public meetings (Boston, MA; Jersey City, NJ; Wilmington, NC; Jacksonville, FL; and Silver Spring, MD) in July and August 2004 to present the strategy and solicit information on the development and implementation of the proposed new operational measures. The agency is extending the comment period through

November 15, 2004, to convene a series of smaller stakeholder meetings through its regional Right Whale Recovery Implementation Teams. Comments received during the extended ANPR comment period, and in the associated stakeholder meetings, will assist the agency in determining what actions are necessary to reduce the threat of ship collisions to right whales.

Dated: September 7, 2004.

**Laurie K. Allen**

*Director, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 04–20539 Filed 9–10–04; 8:45 am]

BILLING CODE 3510–22–S

# Notices

Federal Register
Vol. 69, No. 176
Monday, September 13, 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.

## COMMISSION ON CIVIL RIGHTS

### Sunshine Act Notice

**AGENCY:** Commission on Civil Rights.

**DATE AND TIME:** Friday, September 17, 2004, 9:30 a.m.

**PLACE:** U.S. Commission on Civil Rights, 624 9th Street, NW., Room 540, Washington, DC 20425.

**STATUS:**

**Agenda**

I. Approval of Agenda
II. Approval of Minutes of July 16, 2004 Meeting
III. Announcements
IV. Staff Director's Report
V. FY 2006 Budget Estimate to OMB
VI. State Advisory Committee Appointments for Alaska, Colorado, Nevada, Ohio, South Dakota, and Utah
VII. "Broken Promises: Evaluating the Native American Health Care System" Report
VIII. "Toward Equal Access: Eliminating Language Barriers from Federal Programs" Report
IX. "Funding Federal Civil Rights Enforcement: 2005" Report
X. Future Agenda Items

11 a.m.—Briefing on Voting and Election Reform—Is America Ready to Vote?: Voting Barriers, Provisional & Absentee Ballots, and Voter Enfranchisement

**FOR FURTHER INFORMATION CONTACT:** Les Jin, Press and Communications (202) 376–7700.

**Debra A. Carr,**
*Deputy General Counsel.*
[FR Doc. 04–20637 Filed 9–8–04; 4:15 am]
**BILLING CODE 6335–01–M**

## 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:* Technology Letter of Explanation.

*Agency Form Number:* N/A.

*OMB Approval Number:* 0694–0047.

*Type of Request:* Extension of a currently approved collection of information.

*Burden:* 8,807 hours.

*Average Time per Response:* ½ to 2 hours.

*Number of Respondents:* 5,050 respondents.

*Needs and Uses:* The information contained in these letters will assure BIS that no unauthorized technical data will be exported for unauthorized end-uses or to unauthorized destinations and thus provide assurance that U.S. national security and foreign policy programs are followed.

*Affected Public:* Individuals, businesses or other for-profit institutions.

*Respondent's Obligation:* Required to obtain or retain benefits.

*OMB Desk Officer:* David Rostker.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, DOC 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 Dave Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, Washington, DC 20230.

Dated: September 7, 2004.

**Madeleine Clayton,**
*Management Analyst, Office of the Chief Information Officer.*
[FR Doc. 04–20554 Filed 9–10–04; 8:45 am]
**BILLING CODE 3510–33–P**

## DEPARTMENT OF COMMERCE

### Economic Development Administration

### Announcement of Performance Review Board Members

**AGENCY:** Economic Development Administration, Department of Commerce.

**ACTION:** Notice.

**SUMMARY:** This notice announces the names of new and existing members of the Economic Development Administration's Performance Review Board.

**FOR FURTHER INFORMATION CONTACT:** Darlene Haywood, International Trade Administration, Office of Human Resources Management, at (202) 482–2850, Room 7060, Washington DC 20230.

**SUPPLEMENTARY INFORMATION:** 5 CFR 430.310 requires agencies to publish notice of Performance Review Board appointees in the **Federal Register** before their service begins. The role of the Performance Review Board is to review and make recommendations to the appointing authority on performance management issues such as appraisals, pay adjustments, bonuses, and Presidential Rank Awards for members of the Senior Executive Service. Dr. David Sampson, Assistant Secretary, Economic Development Administration (EDA), has named the following members of the Economic Development Administration Performance Review Board:

1. Mary Pleffner, Deputy Assistant Secretary for Management Services and Chief Financial Officer, EDA (Chairperson)
2. Sandy Baruah, Chief of Staff, EDA (new)
3. Lisa Casias, Deputy Director for Financial Management Policy, Office of the Secretary (new)
4. Denise Wells, Director, Office of Administrative Services, Office of the Secretary (new)
5. Fred Schwien—Executive Secretary, Office of the Secretary (new)
6. Eleanor Lewis, Chief Counsel for International Commerce, Department of Commerce (outside reviewer)
7. Darlene F. Haywood, Executive Secretary to the EDA Performance Review Board, ITA Office of Human Resources Management

Dated: September 7, 2004.

**Doris W. Brown,**

*Human Resources Officer.*

[FR Doc. 04–20611 Filed 9–10–04; 8:45 am]

BILLING CODE 3510–25–P

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–122–822]**

### Certain Corrosion–Resistant Carbon Steel Flat Products from Canada: Preliminary Results of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, U.S. Department of Commerce.

**SUMMARY:** In response to timely requests, the U.S. Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on certain corrosion–resistant carbon steel flat products (CORE) from Canada for the period August 1, 2002, through July 31, 2003. The Department preliminarily determines that sales were made to the United States at less than normal value (NV) by Stelco Inc. ("Stelco"). If these preliminary results are adopted in our final results of this administrative review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on entries of Stelco merchandise during the period of review. The Department preliminarily determines that sales were not made to the United States at less than NV by Dofasco Inc. and Sorevco and Company, Ltd. (collectively "Dofasco"). If these preliminary results are adopted in our final results of this administrative review, we will instruct CBP to liquidate without regard to antidumping duties entries of Dofasco merchandise during the period of review. The preliminary results are listed in the section titled "Preliminary Results of Review," *infra*.

**EFFECTIVE DATE:** September 13, 2004.

**FOR FURTHER INFORMATION CONTACT:** Javier Barrientos (Dofasco) or Jaqueline Arrowsmith (Stelco), Office VI, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th & Constitution Avenue, NW., Washington, DC 20230; telephone: 202–482–2243 and 202–482–5255, respectively.

**SUPPLEMENTARY INFORMATION:**

#### Background

The Department published the antidumping duty order on CORE from Canada on August 19, 1993 (58 FR 44162). On August 1, 2003, the Department published in the **Federal Register** a notice of "Opportunity to Request Administrative Review" of the antidumping duty order on CORE from Canada for the period August 1, 2002, through July 30, 2003. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 68 FR 45218 (August 1, 2003). Based on timely requests, in accordance with section 751(a) of the Act, on September 30, 2003, the Department initiated an administrative review of the antidumping duty order on corrosion–resistant carbon steel flat products from Canada, covering the period August 1, 2002, through July 31, 2003. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part and Deferral of Administrative Reviews*, 68 FR 56262 (September 30, 2003). This administrative review was initiated on the following exporters: Continuous Colour Coat, Ltd. ("CCC"), Dofasco Inc. ("Dofasco"), Ideal Roofing Company, Ltd. ("Ideal Roofing"), Impact Steel Canada, Ltd. ("Impact Steel"), Russel Metals Export ("Russel Metals"), Sorevco and Company, Ltd. ("Sorevco"), and Stelco Inc. ("Stelco"). On December 19, 2003, the Department published a rescission, in part, of its administrative review with respect to CCC, Impact Steel, and Ideal Roofing. *See Corrosion–Resistant Carbon Steel Flat Products From Canada: Rescission, in Part, of Antidumping Duty Administrative Review*, 68 FR 70764 (December 19, 2003). On March 30, 2004, the Department published a rescission, in part, of its administrative review with respect to Russell Metals. *See Notice of Rescission, in Part, of Antidumping Duty Administrative Review: Corrosion–Resistant Carbon Steel Flat Products From Canada*, 69 FR 16521 (March 30, 2004).

On April 29, 2004, the Department extended the deadline for the preliminary results of this antidumping duty administrative review from May 2, 2004, until no later than August 30, 2004. *See Notice of Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review: Corrosion–Resistant Carbon Steel Flat Products From Canada*, 69 FR 23495 (April 29, 2004).

#### Period of Review

The period of review (POR) is August 1, 2002, through July 31, 2003.

#### Scope of the Antidumping Duty Order

The product covered by this antidumping duty order is certain corrosion–resistant steel, and includes flat–rolled carbon steel products, of rectangular shape, either clad, plated, or coated with corrosion–resistant metals such as zinc, aluminum, or zinc-, aluminum-, nickel- or iron–based alloys, whether or not corrugated or painted, varnished or coated with plastics or other nonmetallic substances in addition to the metallic coating, in coils (whether or not in successively superimposed layers) and of a width of 0.5 inch or greater, or in straight lengths which, if of a thickness less than 4.75 millimeters, are of a width of 0.5 inch or greater and which measures at least 10 times the thickness or if of a thickness of 4.75 millimeters or more are of a width which exceeds 150 millimeters and measures at least twice the thickness, as currently classifiable in the Harmonized Tariff Schedule (HTS) under item numbers 7210.30.0030, 7210.30.0060, 7210.41.0000, 7210.49.0030, 7210.49.0090, 7210.61.0000, 7210.69.0000, 7210.70.6030, 7210.70.6060, 7210.70.6090, 7210.90.1000, 7210.90.6000, 7210.90.9000, 7212.20.0000, 7212.30.1030, 7212.30.1090, 7212.30.3000, 7212.30.5000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7212.60.0000, 7215.90.1000, 7215.90.3000, 7215.90.5000, 7217.20.1500, 7217.30.1530, 7217.30.1560, 7217.90.1000, 7217.90.5030, 7217.90.5060, and 7217.90.5090. Included in this review are corrosion–resistant flat–rolled products of non–rectangular cross–section where such cross–section is achieved subsequent to the rolling process (i.e., products which have been "worked after rolling") for example, products which have been beveled or rounded at the edges. Excluded from this review are flat–rolled steel products either plated or coated with tin, lead, chromium, chromium oxides, both tin and lead ("terne plate"), or both chromium and chromium oxides ("tin–free steel"), whether or not painted, varnished or coated with plastics or other nonmetallic substances in addition to the metallic coating. Also excluded from this review are clad products in straight lengths of 0.1875 inch or more in composite thickness and of a width which exceeds 150 millimeters and measures at least twice the thickness. Also excluded from this review are certain clad stainless flat–rolled products, which are three–layered corrosion–resistant carbon steel flat–rolled products less than 4.75 millimeters in composite thickness that consist of a carbon steel flat–rolled

product clad on both sides with stainless steel in a 20%-60%-20% ratio.

**Verification**

International Steel Group ("ISG"), a domestic producer and interested party in this administrative review, requested verification of Stelco's questionnaire responses in its January 8, 2004 letter to the Department. Pursuant to 351.307(b)(1)(v) of the Department's regulations, the Secretary will verify factual information in a review if:

(A) A domestic interested party, not later than 100 days after the date of publication of the notice of initiation of review, submits a written request for verification; and (B) The Secretary conducted no verification under this paragraph during either of the two immediately preceding administrative reviews.

The Department did not verify Stelco during either of the two immediately preceding reviews, and the request from ISG was within the 100–day time limit. Therefore, in accordance with 351.307(b)(1)(v) of the Department's regulations, the Department conducted verification of certain sales and cost information provided by Stelco using standard verification procedures, on–site inspection of the manufacturer's facilities, and the examination of relevant sales and financial records. Our verification results are outlined in the public and proprietary versions of the *Memorandum to File: Report on the Sales Verification of Stelco Inc. in the Tenth Antidumping Duty Administrative Review for Certain Corrosion–Resistant Carbon Steel Flat Products from Canada*, dated August 18, 2004 ("*Sales Verification Report*"), and the *Memorandum to File: Report on the Cost Verification of Stelco Inc. in the Tenth Antidumping Duty Administrative Review for Certain Corrosion–Resistant Carbon Steel Flat Products from Canada*, forthcoming, which are on file in the Central Records Unit, room B–099 of the main Commerce Building.

Pursuant to section 351.307(b)(1)(iv) of the Department's regulations, which allows for verification if the Department determines that "good cause" exists, petitioner submitted requests for verification of Dofasco's sales and cost responses on: May 6, 2004; June 24, 2004; and, July 30, 2004. Petitioner argues that Dofasco's original and supplemental questionnaire responses contained many errors and that Dofasco's alleged errors and contradictions in its model–match submissions give good cause for the Department to conduct verification. *See Model–match Criteria* section below. To date, the Department has not verified Dofasco's sales or cost information.

**ANALYSIS**

**Affiliation and Collapsing**

For purposes of this review, we have collapsed Dofasco, Sorevco, and Do Sol Galva Ltd. (DSG) and treated them as a single respondent, as we have done in prior segments of the proceeding. *See Final Determinations of Sales at Less Than Fair Value: Certain Hot–Rolled Carbon Steel Flat Products, Certain Cold–Rolled Carbon Steel Flat Products, Certain Corrosion–Resistant Carbon Steel Flat Products, and Certain Cut–to–Length Carbon Steel Plate From Canada*, 58 FR 37099, 37107 (July 9, 1993), for our analysis regarding collapsing Sorevco. There have been no changes to the pertinent facts of this decision, such as, for example, ownership structure, that warrant reconsideration of our decision to collapse Sorevco. For our analysis regarding collapsing DSG, *see Memorandum from Javier Barrientos (AD/CVD Financial Analyst) through Mark E. Hoadley (Acting Program Manager) to the File; Certain Corrosion–Resistant Carbon Steel Flat Products from Canada: (Collapsing of Dofasco Inc. (Dofasco) and Do Sol Galva (DSG))*, August 30, 2004, which is on file in the Central Records Unit, room B–099 of the main Commerce Building. As we are collapsing Dofasco, Sorevco, and DSG for purposes of the preliminary results, we will instruct CBP to apply Dofasco's rate to merchandise produced, exported, or processed by Sorevco or DSG.

Consistent with our determination in past segments of this proceeding, we have not collapsed Dofasco and its toll producer DJ Galvanizing Ltd. Partnership ("DJG") (formerly DNN Galvanizing Ltd. Partnership ("DNN")) in these preliminary results. Therefore, for CORE that is processed by DJG before it is exported to the United States, we will, for assessment and cash deposit purposes, instruct CBP to: 1) apply Dofasco's rate on merchandise supplied by Dofasco or DSG; 2) apply the company specific rate on merchandise supplied by other previously reviewed companies; and, 3) apply the "all others" rate for merchandise supplied by companies which have not been reviewed in the past. The Department recognizes, however, that given the nature of their affiliation, an issue could arise with respect to whether there is a potential for manipulation of price or production and, if so, whether Dofasco and DJG should receive the same antidumping duty rate. Therefore, the Department is soliciting comments on this issue for the final results of review.

**Model–Match Criteria**

Dofasco and petitioner submitted comments with regard to model–match criteria on the following dates: January 26, 2004 (Dofasco); May 5, 2004 (Dofasco); June 2, 2004 (petitioner); June 7, 2004 (Dofasco); June 17, 2004 (petitioner); June 21, 2004 (Dofasco); June 24, 2004 (Petitioner); July 26, 2004 (Dofasco); August 10, 2004 (petitioner); and, August 13, 2004 (Dofasco). Dofasco argues that it is proper to compare sales of CORE by incorporating a model–match criterion for surface characteristic that captures the different applications and uses of the products based on that criterion. Dofasco claims that the higher cost of CORE for exposed, as opposed to unexposed, applications also justifies the inclusion of a new model–match criteria. Petitioner argues that this same issue has been brought up in past administrative reviews of this proceeding and the Department did not modify the criteria. In addition, petitioner states that this is not a new technology and that material cost differences are not there as Dofasco claims.

For purposes of the preliminary results, we did not change the model–match criteria we use for this antidumping duty order. For further discussion, *see Memorandum from Javier Barrientos (AD/CVD Financial Analyst) through Mark E. Hoadley (Acting Program Manager) to Barbara E. Tillman (Director); Preliminary Results: Certain Corrosion–Resistant Carbon Steel Flat Products from Canada (Model–Match Methodology)* August 30, 2004.

**Product Comparisons**

In accordance with section 771(16) of the Tariff Act of 1930, as amended (the Act), we considered all products produced by the respondents that are covered by the description in the "Scope of the Antidumping Duty Order" section, above, and sold in the home market during the POR, to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. Where there were no sales of identical merchandise in the home market to compare to U.S. sales, we compared U.S. sales to the most similar foreign like product on the basis of the characteristics listed in Appendix V of the Department's November 7, 2003 antidumping questionnaires.

**Normal Value Comparisons**

To determine whether sales of subject merchandise to the United States were made at less than NV, we compared the export price (EP) or the constructed export price (CEP) to NV, as described in the "Export Price" and "Normal Value" sections of this notice. In accordance with section 777A(d)(2) of the Act, we calculated monthly weighted–average prices for NV and compared these to individual U.S. transaction prices.

**Export Price**

In accordance with section 772(a) of the Act, we used EP when the subject merchandise was sold, directly or indirectly, to the first unaffiliated purchaser in the United States prior to importation, and CEP was not otherwise warranted by facts on the record. In accordance with section 772(b) of the Act, CEP is the price at which subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise, or by a seller affiliated with the producer or exporter. As discussed below, based on evidence on the record, we conclude that certain sales are made by Dofasco's U.S. affiliate, Dofasco U.S.A. (DUSA), and should thus be classified as CEP sales. Also as discussed below, we conclude that Dofasco's other sales are EP, and that all Stelco sales are EP.

Dofasco's sales in the United States through DUSA were either channel 2 (shipped directly to the U.S. customer) or channel 3 (shipped indirectly to the U.S. customer) sales. We find that for channel 2 sales both parties to the transaction (DUSA and the unaffiliated customer) were located in the United States, and that the transfer of ownership was executed in the United States. Therefore, consistent with our determination in the last review, we are classifying Dofasco's Channel 2 sales as CEP sales. *See Proprietary Memorandum: Classification of Dofasco's sales as either EP or CEP*, January 6, 2004.

For all other sales, while DUSA may be involved in providing some sales services, the sales are made by Dofasco. Thus, because these sales are made in Canada, we are treating these sales as EP sales. Similarly, while Stelco USA is involved in Stelco's U.S. sales, evidence on the record indicates that the sales were made by Stelco (in Canada), not Stelco USA.

The Department calculated EP or CEP based on packed prices to customers in the United States. We made deductions from the starting price (net of discounts and rebates) for movement expenses (foreign and U.S. movement, U.S. customs duty and brokerage, and post–sale warehousing) in accordance with section 772(c)(2) of the Act and section 351.401(e) of the Department's regulations. In addition, for CEP sales, in accordance with sections 772(d)(1) and (2) of the Act, we deducted from the starting price credit expenses, indirect selling expenses, including inventory carrying costs, commissions, royalties, and warranty expenses incurred in the United States and Canada associated with economic activities in the United States. As in prior reviews, certain Dofasco sales have undergone minor further processing in the United States as a condition of sale to the customer. The Department has deducted the price charged to Dofasco by the unaffiliated contractor for this minor further processing from gross unit price to determine U.S. price, consistent with Section 772(d)(2) of the Act. *See Certain Corrosion–Resistant Carbon Steel Flat Products and Certain Cut–to-Length Carbon Steel Plate from Canada: Final Results of Antidumping Duty Administrative Reviews, and Determination Not to Revoke in Part*, 65 FR 9243 (February 24, 2000) ("*Canadian Steel 5th*rdquo;); *Certain Corrosion–Resistant Carbon Steel Flat Products and Certain Cut–to-Length Carbon Steel Plate from Canada, Preliminary Results of Antidumping Duty Administrative Reviews*, 64 FR 45228, 45231 (August 19, 1999); *see also Certain Corrosion Resistant Carbon Steel Flat Products From Canada: Preliminary Results of Antidumping Duty Administrative Review*, 68 FR 53105 (September, 9, 2003), for a discussion and as finalized, *i.e., Certain Corrosion–Resistant Carbon Steel Flat Products and Certain Cut–to-Length Carbon Steel Plate from Canada: Final Results of Antidumping Duty Administrative Review*, 69 FR 2566 (January 16, 2004) ("*Canadian Steel 9th*").

As provided in section 351.401(i) of the Department's regulations, we determined the date of sale based on the date on which the exporter or producer established the material terms of sale. Dofasco reported that, except for long–term contracts and sales of secondary products, the date on which all material terms of sale are established is the final order acknowledgment or re–acknowledgment date. Therefore, we used this reported date as the date of sale. For Dofasco's sales made pursuant to long–term contracts, we used date of the contract as date of sale. For Dofasco's sales of secondary products for which there is no order acknowledgment date, we preliminarily determine that date of shipment best reflects the date on which the material terms of sale are established. Accordingly, we have relied on the date of shipment as the date of sale. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat from Canada*, 68 FR 52741 (Sept. 5, 2003) and Accompanying Issues and Decision Memorandum at Comment 3 ("*Wheat from Canada*").

Stelco reported that, generally, the date of sale is the date of invoice because this is when material terms of sale are fixed. For these sales, we used the date of invoice as the date of sale. In those instances when the date of shipment occurred prior to the date of invoice, Stelco reported the date of shipment as the date of sale. Accordingly, for these preliminary results, for these sales we used the date of shipment as the date of sale. *See, e.g., Wheat from Canada* at Comment 3.

**Normal Value**

*A. Home Market Viability*

In order to determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating NV (*i.e.*, the aggregate volume of home market sales of the foreign like product is five percent or more of the aggregate volume of U.S. sales), we compared the volume of each respondent's home market sales of the foreign like product to the volume of U.S. sales of subject merchandise. *See* section 773(a)(1)(C) of the Act. Based on this comparison, we determined that Dofasco's and Stelco's quantity of sales in their home market each exceeded five percent of their sales to the United States of CORE. *See* 19 CFR 351.404(b). Moreover, there is no evidence on the record supporting a particular market situation in the exporting companies' country that would not permit a proper comparison of home market and U.S. prices. Therefore, in accordance with section 773(a)(1)(B)(i) of the Act, we have based NV on the price at which the foreign like product was first sold for consumption in the home market, in the usual commercial quantities in the ordinary course of trade and, to the extent practicable, at the same level of trade (LOT) as the EP or CEP. *See* " Level of Trade" section below.

*B. Affiliated Party Transactions and Arm's–Length Test*

We used sales to affiliated customers in the home market only where we determined such sales were made at

arm's–length prices (*i.e.*, at prices comparable to the prices at which the respondent sold identical merchandise to unaffiliated customers). To test whether the sales to affiliates were made at arm's–length prices, we compared the unit prices of sales to affiliated and unaffiliated customers net of all movement charges, direct selling expenses, discounts and packing. In accordance with the Department's practice, if the prices charged to an affiliated party were, on average, between 98 and 102 percent of the prices charged to unaffiliated parties for merchandise identical or most similar to that sold to the affiliated party, we consider the sales to be at arm's–length prices. *See* 19 CFR 351.403(c). Where the affiliated party transactions did not pass the arm's–length test, all sales to that affiliated party have been excluded from the NV calculation. In addition, because the aggregate volume of sales to these affiliates is less than 5 percent of total home market sales, we did not request downstream sales. *See 19 CFR 351.403(d); see also Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 FR 69186 (November 15, 2002).

*C. Cost of Production Analysis*

The Department disregarded certain Dofasco sales that failed the cost test in its last completed review. *See Canadian Steel 9th*. The Department disregarded certain Stelco sales that failed the cost test in its last completed review. *See Canadian Steel 5th*. We, therefore, have reasonable grounds to believe or suspect, pursuant to section 773(b)(2)(A)(ii) of the Act, that sales of the foreign like product under consideration for the determination of NV in this review may have been made at prices below the cost of production (COP). Thus, pursuant to section 773(b)(1) of the Act, we examined whether Dofasco's and Stelco's sales in the home market were made at prices below the COP.

We compared sales of the foreign like product in the home market with model–specific COP figures in the POR. In accordance with section 773(b)(3) of the Act, we calculated COP based on the sum of the costs of materials and fabrication employed in producing the foreign like product, plus selling, general and administrative (SG&A) expenses, and all costs and expenses incidental to placing the foreign like product in a packed condition and ready for shipment. In our sales–below-cost analysis, we used home market sales and COP information provided by Dofasco and Stelco in their questionnaire responses.

We compared the weighted–average COPs to home market sales of the foreign like product, as required under section 773(b) of the Act, in order to determine whether these sales had been made at prices below the COP. In determining whether to disregard home market sales made at prices below the COP, we examined whether such sales were made (1) within an extended period of time in substantial quantities, and (2) at prices which permitted the recovery of all costs within a reasonable period of time in the normal course of trade, in accordance with section 773(b)(1)(A) and (B) of the Act. On a product–specific basis, we compared the COP to home market prices, less any movement charges, discounts, and direct and indirect selling expenses.

Pursuant to section 773(b)(2)(C) of the Act, where less than 20 percent of a respondent's sales of a given model were at prices less than the COP, we did not disregard any below–cost sales of that model because the below–cost sales were not made in substantial quantities within an extended period of time. Where 20 percent or more of a respondent's sales of a given model were at prices less than the COP, we disregarded the below–cost sales because they were made in substantial quantities within an extended period of time, in accordance with sections 773(b)(2)(B) and (C) of the Act. Because we compared prices to average costs in the POR, we also determined that the below–cost prices did not permit the recovery of costs within a reasonable period of time, in accordance with section 773(b)(1)(B) of the Act.

*D. Constructed Value*

In accordance with section 773(a)(4) of the Act, we used CV as the basis for NV when there were no above–cost contemporaneous sales of identical or similar merchandise in the comparison market. We calculated CV in accordance with section 773(e) of the Act. We included the cost of materials and fabrication, SG&A, and profit. In accordance with section 773(e)(2)(A) of the Act, we based SG&A expenses and profit on the amounts incurred and realized by the respondent in connection with the production and sale of the foreign like product in the ordinary course of trade for consumption in the foreign country. For selling expenses, we used the weighted–average home market selling expenses.

For those product comparisons for which there were sales at prices above the COP, we based NV on home market prices to affiliated (when made at prices determined to be arms–length) or unaffiliated parties, in accordance with section 351.403 of the Department's regulations. Home market starting prices were based on packed prices to affiliated or unaffiliated purchasers in the home market net of discounts and rebates. We made adjustments, where applicable, for packing and movement expenses, in accordance with sections 773(a)(6)(A) and (B) of the Act. We also made adjustments for differences in cost attributable to differences in physical characteristics of the merchandise, pursuant to section 773(a)(6)(C)(ii) of the Act, and for circumstance–of-sales (COS) differences, in accordance with 773(a)(6)(C)(iii) of the Act and section 351.410 of the Department's regulations. For comparisons to EP, we made COS adjustments to NV by deducting home market direct selling expenses (*e.g.*, credit, warranties, and royalties) and adding U.S. direct selling expenses. For comparison to CEP, we made COS adjustments by deducting home market direct selling expenses pursuant to section 773(a)(6)(C)(iii) of the Act and section 351.410 of the Department's regulations. We offset commissions paid on sales to the United States by the lesser of U.S. commissions or comparison (home) market indirect selling expenses.

**Level of Trade**

In accordance with section 773(a)(1)(B)(i) of the Act, to the extent practicable, we determined NV based on sales in the comparison market at the same LOT as U.S. sales. *See* 19 CFR 351.412. The NV LOT is the level of the starting–price sale in the comparison market or, when NV is based on CV, the level of the sales from which we derive SG&A and profit. For EP, the U.S. LOT is also the level of the starting–price sale, which is usually from exporter to importer. For CEP, it is the level of the constructed sale from the exporter to the importer.

To determine whether NV sales are at a different LOT than EP or CEP sales, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer in the home market. If the comparison–market sales are at a different LOT, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison–market sales at the LOT of the export transaction, we make a LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales, if the NV level is more remote from the factory than the CEP level and there is no basis for determining whether the difference in the levels between NV and CEP affects

price comparability, we adjust NV under section 773(a)(7)(B) of the Act ( the CEP offset provision). *See Notice of Final Determination of Sales at Less than Fair Value: Certain Cut–to-Length Carbon Steel Plate from South Africa*, 62 FR 61731 (November 19, 1997). For the CEP sales, we consider only the selling activities reflected in the price after the deduction of expenses and CEP profit under section 772(d) of the Act. See Micron Technology Inc. v. United States, 243 F.3d 1301, 1314–1315 (Fed. Cir. 2001).

In the current review, as in the previous review, Dofasco claimed that sales in both the home market and the United States market were made at different LOTs. In the previous review we concluded that Dofasco did sell at different LOTs based on the selling functions performed. *See Canadian Steel 9th*. No new information on the record exists suggesting that the distribution systems in either the U.S. or Canadian markets, including the selling functions, classes of customer, and selling expenses for each respondent, have materially changed. Therefore, we have preliminarily concluded that Dofasco did sell at different LOTs based on the selling functions performed. However, the Department did not find that there existed a pattern of consistent price differences among the three levels of trade in the home market. *See Memorandum from Javier Barrientos (AD/CVD Financial Analyst) through Mark E. Hoadley (Acting Program Manager) to the File; Certain Corrosion–Resistant Carbon Steel Flat Products from Canada: Analysis of Dofasco Inc. (Dofasco) and Do Sol Galva (DSG) for the Preliminary Results*, (August 30, 2004). Therefore, we did not make LOT adjustments when comparing sales at different LOTs. Finally, after comparing the CEP LOT with the NV LOT (*i.e.*, after excluding the selling functions performed by Dofasco's U.S. affiliate from our analysis) we have preliminarily determined that the NV LOT is not more remote from the factory than the CEP LOT. As indicated by Exhibit I.A.12 of Dofasco's Section A response, dated January 26, 2004, as well as other parts of Dofasco's response, the vast majority of selling functions for both U.S. and home market sales are performed by Dofasco in Canada. Therefore, a "CEP offset" is not warranted under section 773(a)(7)(B) of the Act.

In the current review, Stelco stated in its response that it was not claiming an LOT adjustment. However, Stelco did provide a chart of its selling functions, which we reviewed and analyzed. We also discussed these sales functions during our verification of the sales process. *See Sales Verification Report*. As a result of our analysis, we have preliminarily concluded that Stelco did not sell at different LOTs.

**Currency Conversion**

For purposes of the preliminary results, in accordance with section 773A of the Act, we made currency conversions based on the official exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank of New York.

**Preliminary Results of Review**

As a result of this review, we preliminarily find that the following weighted–average dumping margins exist:

CORROSION–RESISTANT CARBON STEEL FLAT PRODUCTS FROM CANADA

| Producer/Manufacturer/ Exporter | Weighted–Average Margin |
|---|---|
| Dofasco Inc., Sorevco Inc., Do Sol Galva Ltd. | 0.00% |
| Stelco Inc. | 0.02% |

**Cash Deposit Requirements**

If the preliminary results are adopted in the final results of review, the following deposit requirements will be effective upon completion of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication of the final results of this administrative review, as provided in section 751(a)(1) of the Act: 1) the cash deposit rate for Dofasco, Sorevco, and DSG will be that established in the final results of this review for Dofasco (and entities collapsed with Dofasco); 2) the cash deposit rate for Stelco will be that established in the final results of this review (currently *de minimis*); 3) for previously reviewed or investigated companies not covered in this review, the cash deposit rate will continue to be the company–specific rate published for the most recent period; 4) if the exporter is not a firm covered in this review, a prior review, or the original less than fair value (LTFV) investigation conducted by the Department, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; 5) if neither the exporter nor the manufacturer is a firm covered in this or any previous proceeding conducted by the Department, the cash deposit rate will continue to be the "all others" rate established in the LTFV investigation, which is 18.71 percent. *See Amended Final Determinations of Sales at Less Than Fair Value and Antidumping Orders: Certain Corrosion–Resistant Carbon Steel Flat Products and Certain Cut–to-Length Carbon Steel Plate From Canada*, 60 FR 49582 (September 26, 1995). For shipments processed by DJG we will, 1) apply Dofasco's rate on merchandise supplied by Dofasco or DSG; 2) apply the company specific rate on merchandise supplied by other previously reviewed companies; and, 3) apply the "all others" rate for merchandise supplied by companies which have not been reviewed in the past. These cash deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

**Duty Assessment**

Upon publication of the final results of review, the Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries. The Department will issue appraisement instructions directly to CBP within fifteen days of publication of the final results of review. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the results and for future deposits of estimated duties. For duty assessment purposes, we calculate an importer–specific assessment rate by dividing the total dumping margins calculated for the U.S. sales of each importer by the respective total entered value of these sales. If the preliminary results are adopted in the final results of review, this rate will be used for the assessment of antidumping duties on all entries of the subject merchandise by that importer during the POR.

The Department clarified its "automatic assessment" regulation on May 6, 2003 (68 FR 23954). This clarification will apply to entries of subject merchandise during the period of review produced by companies included in these final results of review for which the reviewed companies did not know their merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the "all others" rate if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, *see Notice of Policy Concerning Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

**Public Comment**

Pursuant to 19 CFR 351.224(b), the Department will disclose to any party to

the proceeding the calculations performed in connection with these preliminary results, within five days after the date of publication of this notice. Pursuant to 19 CFR 351.309, interested parties may submit case briefs in response to these preliminary results no later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in case briefs, may be filed no later than 5 days after the time limit for filing case briefs. Parties who submit arguments in this proceeding are requested to submit with the argument: (1) a statement of the issue, (2) a brief summary of the argument, and (3) a table of authorities. Further, the Department requests that parties submitting written comments provide the Department with an additional copy of the public version of any such comments on a computer diskette. Case and rebuttal briefs must be served on interested parties in accordance with section 351.303(f) of the Department's regulations. Any interested party may request a hearing within 30 days of publication of this notice. Any hearing, if requested, will normally be held two days after the date for submission of rebuttal briefs. The Department will issue the final results of this administrative review, which will include the results of its analysis of issues raised in any such written comments or at a hearing, within 120 days after the publication of this notice, unless extended. *See* 19 CFR 351.213(h).

**Notification to Interested Parties**

This notice serves as a preliminary reminder to improters of their responsibility under regulation 19 CFR 351.402(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 the subsequent assessment of double antidumping duties.

This administrative revidw and notice is published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: August 30, 2004.

**James J. Jochum,**

*Assistant Secretary for Import Administration.*

[FR Doc. E4–2166 Filed 9–10–04; 8:45 am]

BILLING CODE 3510–DS–S

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Application for Duty-Free Entry of Scientific Instrument

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether an instrument of equivalent scientific value, for the purposes for which the instrument shown below is intended to be used, is being manufactured in the United States.

Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be filed within 20 days with the Statutory Import Programs Staff, U.S. Department of Commerce, Washington, DC 20230. Applications may be examined between 8:30 a.m. and 5 p.m. in Suite 4100W, U.S. Department of Commerce, Franklin Court Building, 1099 14th Street, NW., Washington, DC

*Docket Number:* 04–016.

*Applicant:* University of Colorado School of Medicine, Fitzsimons Campus, P.O. Box 6508, Aurora, CO 80045.

*Instrument:* Electron Microscope, Model Technai G² 12 BioTWIN.

*Manufacturer:* FEI Company, The Netherlands. Intended

*Use:* The instrument is intended to be used in imaging and photographing a wide variety of tissue specimens with an objective lens that optimizes amplitude and contrast for use with stained specimens as well as phase contrast imaging used for immunolabeling frozen-thin sections using administrative control over settings to prevent system damage.

*Application accepted by Commissioner of Customs:* August 18, 2004.

**Gerald A. Zerdy,**

*Program Manager, Statutory Import Programs Staff.*

[FR Doc. E4–2167 Filed 9–10–04; 8:45 am]

BILLING CODE 3510–DS–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 083104F]**

### North Pacific Fishery Management Council; Public Meetings

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice of public meetings.

**SUMMARY:** The North Pacific Fishery Management Council (Council) and its advisory committees will hold public meetings from October 4 through October 12, 2004, in Sitka, AK.

**DATES:** The Council's Advisory Panel will begin at 8 a.m., Monday, October 4 and continue through Friday, October 8, 2004. The Scientific and Statistical Committee will begin at 8 a.m. on Monday, October 4, and continue through Wednesday, October 6, 2004.

The Council will begin its plenary session at 8 a.m. on Wednesday, October 4 continuing through Tuesday October 12. All meetings are open to the public except executive sessions. The Enforcement Committee will meet Tuesday, October 5 from 1 p.m. to 5 p.m.

**ADDRESSES:** The meeting will be held at the Centennial Building, 330 Harbor Drive, Sitka, AK.

*Council address:* North Pacific Fishery Management Council, 605 W. 4th Avenue, Suite 306, Anchorage, AK 99501–2252.

**FOR FURTHER INFORMATION CONTACT:** Council staff, telephone: 907–271–2809.

**SUPPLEMENTARY INFORMATION:** *Council Plenary Session:* The agenda for the Council's plenary session will include the following issues. The Council may take appropriate action on any of the issues identified.

1. Reports
   Executive Director's Report
   National Marine Fisheries Service Management Report
   Enforcement Report
   Coast Guard Report
   Alaska Department of Fish & Game (ADF&G) Report
   U.S. Fish & Wildlife Service Report
   Protected Species Report
2. Gulf of Alaska Groundfish (GOA) Rationalization: Review progress and refine alternatives.
3. GOA Rockfish Demonstration Project: Review progress and clarify Elements and Options for analysis.
4. Essential Fish Habitat (EFH) and Habitat Area Particular Concern (HAPC): Initial Review of Environmental Assessment, receive Center for Independent Experts review and comment report, review spatial analysis of revised alternative 5b, and take action as necessary.
5. Improved Retention/Improved Utilization (IR/IU): Receive progress report on Amendment 80a and 80b.
6. Community Development Quota (CDQ) Program: Status Report on analysis of management alternatives for CDQ reserves, report on CDQ

community eligibility, report on confidentiality of CDQ information submitted to NMFS.

7. Halibut/Sablefish Individual Fishing Quotas (IFQs) Program: Initial review of regulatory amendment package for IFQ/CDQ Area 4C/4D, initial review of regulatory amendment package for IFQ amendments (housekeeping and block).

8. Halibut Subsistence: Receive report on ADF&G Subsistence Halibut Survey, initial review of regulatory amendment package.

9. Scallop Fishery Management Plan (FMP): Final action to modify License Limitation Program and update FMP.

10. Crab FMP: Review Crab Stock Assessment Fishery Evaluation (SAFE) report.

11. Groundfish Management: Receive report from Non-Target Species Committee, review initial discussion paper on rockfish management (T), review discussion paper on Aleutian Island Pollock Incidental Catch Allowance (T), initial groundfish specifications, final action on FMP updates.

12. Staff Tasking: Review tasking and Committee (including AP policy) and provide direction to staff/action as necessary.

13. Other Business:

*Scientific and Statistical Committee (SSC):* The SSC agenda will include the following issues:

1. EFH and HAPC
2. IR/IU
3. Halibut Subsistence and IFQ program adjustments
4. Crab Management
5. Groundfish Management

*Advisory Panel:* The Advisory Panel will address the same agenda issues as the Council.

Although non-emergency issues not contained in this agenda may come before these groups 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**

These meetings are 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 7 working days prior to the meeting date.

Dated: September 8, 2004.

**Alan D. Risenhoover,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. E4–2162 Filed 9–10–04; 8:45 am]

BILLING CODE 3510–22–S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 090704B]**

### Pacific Fishery Management Council; Public Meeting

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice of public meetings.

**SUMMARY:** The Pacific Fishery Management Council's (Council) Coastal Pelagic Species Advisory Subpanel (CPSAS) and Coastal Pelagic Species Management Team (CPSMT) will hold work sessions, which are open to the public.

**DATES:** The CPSAS will meet Tuesday, September 28, 2004 from 9 a.m. to 5 p.m. and Wednesday, September 29, 2004 from 9 a.m. until business for the day is completed. The CPSMT will meet Thursday, September 30, 2004 from 9 a.m. until business for the day is completed.

**ADDRESSES:** The meetings will be held at NMFS, Southwest Region, Glenn Anderson Federal Building, 501 West Ocean Blvd., Conference Room 3300, Long Beach, CA 90802; telephone: (562) 980–4000.

*Council address:* Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 200, Portland, OR 97220–1384.

**FOR FURTHER INFORMATION CONTACT:** Mr. Dan Waldeck, Pacific Fishery Management Council; telephone: (503) 820–2280.

**SUPPLEMENTARY INFORMATION:** The CPSAS will meet to continue to work on developing alternatives for annual allocation of the Pacific sardine harvest guideline. The CPSAS will also review the 2004 Pacific sardine stock assessment and harvest guideline recommendation for the 2005 season. The CPSMT will focus on review of the Pacific sardine stock assessment and harvest guideline recommendation, they will also be briefed on the allocation alternatives being developed by the CPSAS.

Although non-emergency issues not contained in the meeting agenda may come before the CPSAS or CPSMT for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document 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 CPSAS's or CPSMT's intent to take final action to address the emergency.

**Special Accommodations**

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Carolyn Porter at (503) 820–2280 at least 5 days prior to the meeting date.

Dated: September 8, 2004.

**Alan D. Risenhoover,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. E4–2161 Filed 9–10–04; 8:45 am]

BILLING CODE 3510–22–S

## COMMODITY FUTURES TRADING COMMISSION

### Sunshine Act Meetings

**TIME AND DATE:** 10:30 a.m., Thursday, September 16, 2004.

**PLACE:** 1155 21st St., NW., Washington, DC, Commission Conference Room.

**STATUS:** Closed.

**MATTERS TO BE CONSIDERED:** Rule Enforcement Reviews.

**FOR FURTHER INFORMATION CONTACT:** Jean A. Webb, (202) 418–5100 or *http://www.cftc.gov.*

**Jean A. Webb,**

*Secretary of the Commission.*

[FR Doc. 04–20691 Filed 9–9–04; 1:26 pm]

BILLING CODE 6351–01–M

## DEPARTMENT OF EDUCATION

### Office of Postsecondary Education; Overview Information; Fund for the Improvement of Postsecondary Education—The Comprehensive Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2005

*Catalog of Federal Domestic Assistance (CFDA) Number:* 84.116A (pre-application) and 84.116B (final application).

*Dates:* Applications Available: September 13, 2004.

*Deadline for Transmittal of Pre-Applications:* November 3, 2004.

*Deadline for Transmittal of Final Applications:* March 22, 2005.

*Deadline for Intergovernmental Review:* May 21, 2005.

*Eligible Applicants:* Institutions of higher education or combinations of those institutions and other public and private nonprofit institutions and agencies.

*Estimated Available Funds:* $12,700,000 for new awards.

The Administration has requested $32 million for this program for FY 2005 (approximately $12.7 million of which will be available for new Comprehensive Program awards). The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

*Estimated Range of Awards:* $50,000—$600,000 per year.

*Estimated Average Size of Awards:* $212,000 per year.

*Estimated Number of Awards:* 60.

**Note:** The Department is not bound by any estimates in this notice.

*Project Period:* Up to 36 months.

**Full Text of Announcement**

**I. Funding Opportunity Description**

*Purpose of Program:* The Comprehensive Program supports grants and cooperative agreements to improve postsecondary education opportunities. It encourages reforms, innovations, and improvements of postsecondary education that respond to problems of national significance and provide access to quality education for all.

*Invitational Priorities:* For FY 2005 these priorities are invitational priorities. Under 34 CFR 75.105(c)(1) we do not give an application that meets these invitational priorities a competitive or absolute preference over other applications.

These priorities are:

Projects to support new ways to ensure equal access to postsecondary education and to improve rates of retention and program completion, especially for underrepresented students whose retention and completion rates continue to lag behind those of other groups, and especially to encourage wider adoption of proven approaches to this problem.

Projects to promote innovative reforms in the curriculum and instruction of various subjects at the college preparation, undergraduate, and graduate/professional levels, especially through student-centered or technology-mediated strategies, and including the subject area of civic education.

Projects designing more cost-effective ways of improving postsecondary instruction and operations, i.e., to promote more student learning relative to institutional resources expended.

Projects to improve the quality of K–12 teaching through new models of teacher preparation and through new kinds of partnerships between schools and colleges and universities that enhance students' preparation for, access to, and success in college.

**Program Authority:** 20 U.S.C. 1138–1138d.

*Applicable Regulations:* (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 82, 84, 85, 86, 97, 98, and 99.

**Note:** The regulations in 34 CFR part 86 apply to institutions of higher education only.

**II. Award Information**

*Type of Award:* Discretionary grants or cooperative awards.

*Estimated Available Funds:* $12,700,000 for new awards.

The Administration has requested $32 million for this program for FY 2005 (approximately $12.7 million of which will be available for new Comprehensive Program awards). The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

*Estimated Range of Awards:* $50,000—$600,000 per year.

*Estimated Average Size of Awards:* $212,000 per year.

*Estimated Number of Awards:* 60.

**Note:** The Department is not bound by any estimates in this notice.

*Project Period:* Up to 36 months.

**III. Eligibility Information**

1. *Eligible Applicants:* Institutions of higher education or combinations of those institutions and other public and private nonprofit institutions and agencies.

2. *Cost Sharing or Matching:* This program does not involve cost sharing or matching.

3. *Other:* All applicants must submit a pre-application to be eligible to submit a final application.

**IV. Application and Submission Information**

1. *Address to Request Application Package:* Education Publications Center (ED Pubs), P.O. Box 1398, Jessup, MD 20794–1398. Telephone (toll free): 1–877–433–7827. FAX: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), you may call (toll free): 1–877–576–7734.

You may also contact ED Pubs at its Web site: *http://www.ed.gov/pubs/edpubs.html* or you may contact ED Pubs at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA number 84.116A.

Individuals with disabilities may obtain a copy of the application package in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) by contacting the program contact person listed in this section.

**FOR FURTHER INFORMATION CONTACT:** Fund for the Improvement of Postsecondary Education (FIPSE), U.S. Department of Education, 1990 K Street, NW., 6th Floor, Washington, DC 20006–8544. Telephone: (202) 502–7500. The application text and forms may be obtained from the Internet address: *http://www.ed.gov/FIPSE.*

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

*Pre-Application:* Letters of support, references, and other appendices and attachments are discouraged for the pre-application.

*Page Limit:* The application narrative is where the applicant addresses the selection criteria that reviewers use to evaluate the application. You must limit the pre-application narrative to the equivalent of no more than 5 pages or approximately 1,250 words and the final application narrative to the equivalent of no more than 25 pages or approximately 6,250 words, using the following standards:

- A "page" is 8.5" x 11", on one side only, with 1" margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, except footnotes, quotations, references, and text in charts, tables, figures, and graphs.
- Use a font size that is 11 point or larger and no smaller than 10 pitch (characters per inch).

The page limits for the pre-application and final application do not apply to the title page; the assurances and certifications; the budget section, including the narrative budget justification for the final application; or the one-page abstract, resumes, letters of support, or bibliography for the final application.

3. *Submission Dates and Times:*

*Applications Available:* September 13, 2004.

*Deadline for Transmittal of Pre-Applications:* November 3, 2004.

*Deadline for Transmittal of Final Applications:* March 22, 2005.

We do not consider an application that does not comply with the deadline requirements.

Applications for grants under this program may be submitted electronically using the Electronic Grant Application System (e-Application) accessible through the Department's e-Grants system, or in paper format by mail or hand delivery. For information (including dates and times) about how to submit your application electronically, or by mail or hand delivery, please refer to *Section IV. 6. Other Submission Requirements* in this notice.

*Deadline for Intergovernmental Review:* May 21, 2005.

4. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:* Applications for grants under this Comprehensive Program may be submitted electronically or in paper format by mail or hand delivery.

a. *Electronic Submission of Applications.*

If you submit your application to us electronically, you must use e-Application available through the Department's e-Grants system, accessible through the e-Grants portal page at: *http://e-grants.ed.gov.*

While completing your electronic application, you will be entering data online that will be saved into a database. You may not e-mail an electronic copy of a grant application to us.

Please note the following:

- Your participation in e-Application is voluntary.
- You must complete the electronic submission of your grant application by 4:30 p.m., Washington, DC time, on the application deadline date. The e-Application system will not accept an application for this program [competition] after 4:30 p.m., Washington, DC time, on the application deadline date. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the application process.
- The regular hours of operation of the e-Grants Web site are 6 a.m. Monday until 7 p.m. Wednesday; and 6 a.m. Thursday until midnight Saturday, Washington, DC time. Please note that the system is unavailable on Sundays, and between 7 p.m. on Wednesdays and 6 a.m. on Thursdays, Washington, DC time, for maintenance. Any modifications to these hours are posted on the e-Grants Web site.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you submit your application in paper format.
- You must submit all documents electronically, including the application for the Comprehensive Program (ED 40–514), the Comprehensive Program Budget Summary form, and all necessary assurances and certifications.
- Your electronic application must comply with any page limit requirements described in this notice.
- Prior to submitting your electronic application, you may wish to download it and print a copy of it for your records.
- After you electronically submit your application, you will receive an automatic acknowledgement that will include a PR/Award number (an identifying number unique to your application).
- Within three working days after submitting your electronic application, fax a signed copy of the Comprehensive Program Title Page (Form No. ED 40–514) to the Application Control Center after following these steps:

1. Print ED 40–514 from e-Application.

2. The applicant's Authorizing Representative must sign this form.

3. Place the PR/Award number in the upper right hand corner (Item #1) of the hard-copy signature page of the ED 40–514.

4. Fax the signed ED 40–514 to the Application Control Center at (202) 245–6272.

- We may request that you provide us original signatures on other forms at a later date.

*Application Deadline Date Extension in Case of System Unavailability*: If you are prevented from electronically submitting your application on the application deadline date because the e-Application system is unavailable, we will grant you an extension of one business day in order to transmit your application electronically, by mail, or by hand delivery. We will grant this extension if—

1. You are a registered user of e-Application and you have initiated an electronic application for this competition; and

2. (a) The e-Application system is unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30 p.m., Washington, DC time, on the application deadline date; or

(b) The e-Application system is unavailable for any period of time between 3:30 p.m. and 4:30 p.m., Washington, DC time, on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting you an extension. To request this extension or to confirm our acknowledgement of any system unavailability, you may contact either (1) the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT** (see VII. *Agency Contact*) or (2) the e-Grants help desk at 1–888–336–8930.

Extensions referred to in this section apply only to the unavailability of the Department's e-Application system. If the e-Application system is available, and, for any reason, you are unable to submit your application electronically or you do not receive an automatic acknowledgement of your submission, you may submit your application in paper format by mail or hand delivery in accordance with the instructions in this notice.

b. *Submission of Paper Applications by Mail.*

If you submit your application in paper format by mail (through the U.S. Postal Service or a commercial carrier), you must send the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84116A and 84.116B), 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

1. A legibly dated U.S. Postal Service postmark;

2. A legible mail receipt with the date of mailing stamped by the U.S. Postal Service;

3. A dated shipping label, invoice, or receipt from a commercial carrier; or

4. Any other proof of mailing acceptable to the U.S. Secretary of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

1. A private metered postmark, or

2. A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

**Note:** Applicants should note that the U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you submit your application in paper format by hand delivery, you (or a courier service) must hand deliver the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.116A or 84.116B), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30 p.m., Washington, DC time, except Saturdays, Sundays and Federal holidays. A person delivering an application must show photo identification to enter the building.

*Note for Mail or Hand Delivery of Paper Applications*: If you mail or hand deliver your application to the Department:

1. You must indicate on the envelope the CFDA number and suffix letter, if any, of the competition under which you are submitting your application.

2. The Application Control Center will mail a Grant Application Receipt Acknowledgment to you. If you do not receive the notification of application receipt within 15 days from the mailing of your application, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

**V. Application Review Information**

*Selection Criteria*: The selection criteria for this competition are as follows:

In evaluating pre-applications and final applications for grants under this competition, the Secretary uses the following selection criteria chosen from those listed in 34 CFR 75.210. The Secretary gives equal weight to each of the selection criteria, and within each of these criteria, the Secretary gives equal weight to each of the factors.

*Pre-applications.* In evaluating pre-applications, the Secretary uses the following four selection criteria:

(a) *Need for project.* The Secretary considers the need for the proposed project. In determining need, the Secretary considers each of the following factors:

(1) The magnitude or severity of the problem to be addressed by the proposed project.

(2) The magnitude of the need for the services to be provided or the activities to be carried out by the proposed project.

(b) *Significance.* The Secretary considers the significance of the proposed project. In determining the significance, the Secretary considers each of the following factors:

(1) The potential contribution of the proposed project to increased knowledge or understanding of educational problems, issues, or effective strategies.

(2) The extent to which the proposed project involves the development or demonstration of promising new strategies that build on, or are alternatives to, existing strategies.

(3) The importance or magnitude of the results or outcomes likely to be attained by the proposed project.

(4) The potential replicability of the proposed project or strategies, including, as appropriate, the potential for implementation in a variety of settings.

(c) *Quality of the project design.* The Secretary considers the quality of the design of the proposed project. In determining the quality of the design, the Secretary considers each of the following factors:

(1) The extent to which the design of the proposed project is appropriate to, and will successfully address, the needs of the target population or other identified needs.

(2) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable.

(3) The extent to which the design for implementing and evaluating the proposed project will result in information to guide possible replication of project activities or strategies, including information about the effectiveness of the approach or strategies employed by the project.

(4) The extent to which the proposed project is designed to build capacity and yield results that will extend beyond the period of Federal financial assistance.

(d) *Quality of the project evaluation.* The Secretary considers the quality of the project evaluation to be conducted of the proposed project. In determining the quality of the evaluation, the Secretary considers each of the following factors:

(1) The extent to which the evaluation will provide guidance about effective strategies suitable for replication or testing in other settings.

(2) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project.

(3) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible.

*Final Applications.* In evaluating final applications, the Secretary uses the following seven selection criteria:

(a) *Need for project.* The Secretary considers the need for the proposed project. In determining need, the Secretary considers each of the following factors:

(1) The magnitude or severity of the problem to be addressed by the proposed project.

(2) The magnitude of the need for the services to be provided or the activities to be carried out by the proposed project.

(b) *Significance.* The Secretary considers the significance of the proposed project. In determining significance, the Secretary considers each of the following factors:

(1) The potential contribution of the proposed project to increased knowledge or understanding of educational problems, issues, or effective strategies.

(2) The extent to which the proposed project involves the development or demonstration of promising new strategies that build on, or are alternatives to, existing strategies.

(3) The importance or magnitude of the results or outcomes likely to be attained by the proposed project.

(4) The potential replicability of the proposed project or strategies, including, as appropriate, the potential for implementation in a variety of settings.

(c) *Quality of the project design.* The Secretary considers the quality of the design of the proposed project. In determining the quality of the design, the Secretary considers each of the following factors:

(1) The extent to which the design of the proposed project is appropriate to, and will successfully address, the needs of the target population or other identified needs.

(2) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable.

(3) The extent to which the design for implementing and evaluating the proposed project will result in information to guide possible replication of project activities or

strategies, including information about the effectiveness of the approach or strategies employed by the project.

(4) The extent to which the proposed project is designed to build capacity and yield results that will extend beyond the period of Federal financial assistance.

(d) *Quality of the project evaluation.* The Secretary considers the quality of the evaluation to be conducted of the proposed project. In determining the quality of evaluation to be conducted, the Secretary considers each of the following factors:

(1) The extent to which the evaluation will provide guidance about effective strategies suitable for replication or testing in other settings.

(2) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project.

(3) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible.

(e) *Quality of the management plan.* The Secretary considers the quality of the management plan for the proposed project. In determining the quality of the management plan, the Secretary considers the adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

(f) *Quality of project personnel.* The Secretary considers the quality of the personnel who will carry out the proposed project. In determining the quality of project personnel the Secretary considers each of the following factors:

(1) The extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(2) The qualifications, including relevant training and experience, of key project personnel.

(g) *Adequacy of resources.* The Secretary considers the adequacy of resources for the proposed project. In determining the adequacy of resources, the Secretary considers each of the following factors:

(1) The extent to which the costs are reasonable in relation to the objectives, design, and potential significance of the proposed project.

(2) The relevance and demonstrated commitment of each partner in the proposed project to the implementation and success of the project.

(3) The potential for continued support of the project after Federal funding ends, including, as appropriate, the demonstrated commitment of appropriate entities to such support.

## VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may also notify you informally.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as specified by the Secretary in 34 CFR 75.118.

4. *Performance Measures:* The success of FIPSE's Comprehensive Program depends upon (1) the extent to which funded projects are being replicated, *i.e.*, adopted or adapted by others; and (2) the manner in which projects are being institutionalized and continued after grant funding. These two results constitute FIPSE's indicators of the success of our program.

If funded, you will be asked to collect and report data in your project's annual performance report (EDGAR, 34 CFR 75.590) on steps taken toward these goals. Consequently, applicants to FIPSE's Comprehensive Program are advised to include these two outcomes in conceptualizing the design, implementation and evaluation of the proposed project. Consideration of FIPSE's two performance outcomes is an important part of many of the review criteria discussed below. Thus, it is important to the success of your application that you include these objectives. Their measure should be a part of the project evaluation plan, along with measures of objectives specific to your project.

## VII. Agency Contact

**FOR FURTHER INFORMATION CONTACT:** Levenia Ishmell, Fund for the Improvement of Postsecondary Education, U.S. Department of Education, 1990 K Street, NW., suite 6147, Washington, DC 20006–8544. Telephone: (202) 502–7668 or by e-mail *Levenia.Ishmell@ed.gov*.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the program contact person listed in this section.

For additional program information call the FIPSE office (202–502–7500) between the hours of 8 a.m. and 5 p.m. Washington, DC time, Monday through Friday.

## VIII. Other Information

*Electronic Access to This Document:* You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister*.

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

**Note:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html*.

Dated: September 8, 2004.

**Sally L. Stroup,**

*Assistant Secretary for Postsecondary Education.*

[FR Doc. E4–2165 Filed 9–10–04; 8:45 am]

BILLING CODE 4000–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP04–556–000]**

### Colorado Interstate Gas Company; Notice of Proposed Changes in FERC Gas Tariff

September 3, 2004.

Take notice that on August 31, 2004, Colorado Interstate Gas Company (CIG) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No 1, Thirty-Third Revised Sheet No. 11A, to become effective October 1, 2004.

CIG states that the tariff sheet is being filed to revise the fuel reimbursement percentages applicable to lost, unaccounted-for and other fuel gas, transportation fuel gas, and storage fuel gas.

CIG states that copies of its filing have been sent to all firm customers, interruptible customers, and affected state commissions.

Any person desiring to intervene or to protest this filing must file 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of § 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E4–2154 Filed 9–10–04; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket Nos. RP04–97–005, RP04–203–002]**

### Equitrans, L.P.; Notice of Compliance Filing

September 3, 2004.

Take notice that on August 31, 2004, Equitrans, L.P. (Equitrans) filed a motion to place into effect certain tariff sheets that have been accepted, but suspended, in Docket Nos. RP04–97–000 and RP04–203–000. Equitrans states that the revised tariff sheets listed in Attachment A are proposed to become effective September 1, 2004.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing 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. Such protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E4–2158 Filed 9–10–04; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP04–564–000]**

### Northwest Pipeline Corporation; Notice of Proposed Changes in FERC Gas Tariff

September 3, 2004.

Take notice that on August 31, 2004, Northwest Pipeline Corporation (Northwest) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, the tariff sheets listed in Appendix A of its filing, to be effective October 1, 2004.

Northwest states that the purpose of this filing is to redesign its Forms of Service Agreement for service under Rate Schedules SGS–2F, SGS–2I, LS–1, LS2F, LS–2I, DEX–1 and PAL and to implement related conforming changes to such rate schedules and the applicable general terms and conditions in order to facilitate: (i) More accurate and complete compliance with the Commission's transactional reporting requirements and non-conforming contract filing requirements; and (ii) more efficient contract administration.

Any person desiring to intervene or to protest this filing must file 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of § 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*.

Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E4–2155 Filed 9–10–04; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP04–565–000]**

### Northwest Pipeline Corporation; Notice of Proposed Changes in FERC Gas Tariff

September 3, 2004.

Take notice that on August 31, 2004, Northwest Pipeline Corporation (Northwest) tendered for filing as part of its FERC Gas Tariff the following tariff sheets, to be effective October 1, 2004.

Third Revised Volume No. 1
Thirty-Eighth Revised Sheet No. 2.1
Original Volume No. 2
Twenty-Third Revised Sheet No. 14

Northwest states that a copy of this filing has been served upon Northwest's customers and interested state regulatory commissions.

Any person desiring to intervene or to protest this filing must file 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E4–2156 Filed 9–10–04; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP04–573–000]**

### Williston Basin Interstate Pipeline Company; Notice of Proposed Changes in FERC Gas Tariff

September 3, 2004.

Take notice that on August 31, 2004, Williston Basin Interstate Pipeline Company (Williston Basin), tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1 and Original Volume No. 2 the tariff sheets listed on Appendix A to the filing, to become effective October 1, 2004.

Any person desiring to intervene or to protest this filing must file 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of § 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, D.C. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E4–2157 Filed 9–10–04; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 2145]**

### Rocky Reach; Notice of Site Visit

September 3, 2004.

The staff of the Division of Hydropower Licensing in the Office of Energy Projects at the Federal Energy Regulatory Commission is scheduled to have a site visit at the Rocky Reach Hydroelectric Project (FERC No. 2145). The site visit will be conducted at various sites of the project including the dam, the powerhouse, the tailrace area, and others.

The Commission staff will meet representative(s) of the applicant (Public Utility District No. 1 of Chelan County) on Wednesday, September 15, 2004 at 10 a.m. (PST) at the Rocky Reach Visitor Center located on the west end of the forebay wall on the Chelan County side

of the project on Highway 97A in Wenatchee, Washington.

Members of the public and intervenors in the referenced proceedings may attend this site visit. For more information, contact Kim Nguyen, at the Federal Energy Regulatory Commission, 202–502–6105 or *kim.nguyen@ferc.gov*.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E4–2159 Filed 9–10–04; 8:45 am]

**BILLING CODE 6717–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[OECA–2003–0145; FRL–7811–9]**

### Agency Information Collection Activities; Submission for OMB Review and Approval; Comment Request; NSPS for VOC Emissions From Petroleum Refinery Wastewater Systems (40 CFR Part 60, Subpart QQQ) (Renewal), ICR Number 1136.07, OMB Number 2060–0172

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act, this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. This ICR is scheduled to expire on September 30, 2004. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. This ICR describes the nature of the information collection and its estimated burden and cost.

**DATES:** Additional comments may be submitted on or before October 13, 2004.

**ADDRESSES:** Submit your comments, referencing docket ID number OECA–2003–0145, to (1) EPA online using EDOCKET (our preferred method), by email to *docket.oeca@epa.gov*, or by mail to: Environmental Protection Agency, EPA Docket Center (EPA/DC), Enforcement and Compliance Docket and Information Center, EPA West, Mail Code 2201T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Dan Chadwick, Compliance Assessment and Media Programs Division, Office of Compliance, Mail Code 2223A, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 564–7054; fax number: (202) 564–0050; email address: *chadwick.dan@epa.gov*.

**SUPPLEMENTARY INFORMATION:** EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On November 3, 2003 (68 FR 62289), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments.

EPA has established a public docket for this ICR under Docket ID No. OECA–2003–0145, which is available for public viewing at the Enforcement and Compliance Docket and Information Center in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket and Information Center is (202) 566–1752. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket*. Use EDOCKET to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. When in the system, select "search," then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA and OMB within 30 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, see EPA's **Federal Register** notice describing the electronic docket at 67 FR 38102 (May 31, 2002), or go to *http://www.epa.gov/edocket*.

*Title:* NSPS for VOC Emissions From Petroleum Refinery Wastewater Systems (40 CFR part 60, subpart QQQ) (Renewal).

*Abstract:* The New Source Performance Standards (NSPS) for petroleum refinery wastewater systems were proposed on May 4, 1987 and promulgated on November 23, 1988. These standards apply to the following facilities in petroleum refinery wastewater systems: individual drain systems, oil-water separators, and aggregate facilities commencing construction, modification or reconstruction after the date of proposal. An individual drain system consists of all process drains connected to the first downstream junction box. An oil-water separator is the wastewater treatment equipment used to separate oil from water. An aggregate facility is an individual drain system together with ancillary downstream sewer lines and oil-water separators, down to and including the secondary oil-water separator, as applicable. Aggregate facilities are intended to capture any potential volatile organic compound (VOC) emissions within the petroleum refinery wastewater system during expansions of and additions to the system. There are no additional recordkeeping or reporting requirements for aggregate facilities. This information is being collected to determine compliance with 40 CFR part 60, subpart QQQ.

In general, all NSPS standards require initial notifications, performance tests, and periodic reports. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. These notifications, reports, and records are essential in determining compliance, and are required of all sources subject to NSPS.

Any owner or operator subject to the provisions of this part shall maintain a file of these measurements and retain the file for at least two years following the date of such measurements, maintenance reports, and records. All reports are sent to the delegated state or local authority. In the event that there

is no such delegated authority, the reports are sent directly to the United States Environmental Protection Agency (EPA) regional office. Once received by the authority, reports are reviewed and the data is entered, analyzed, and maintained in the Air Facility System (AFS). Information from these reports can be used by any regions, states, agencies and offices with access to AFS and may be used in determining where inspections and enforcement actions may be necessary.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB Control Number. The OMB Control Numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15, and are identified on the form and/or instrument, if applicable.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average 34.2 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

*Respondents/Affected Entities:* Owners or operators of petroleum refinery wastewater systems that commenced construction, modification, or reconstruction after May 4, 1987.

*Estimated Number of Respondents:* 135.

*Frequency of Response:* On occasion, Semi-annually.

*Estimated Total Annual Hour Burden:* 9,237 hours.

*Estimated Total Annual Costs:* $606,985, which includes $0 annualized capital/startup costs, $17,600 annual O&M costs, and $589,385 annual labor costs.

*Changes in the Estimates:* There is a decrease of 27,629 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This decrease is primarily due to a decrease in the number of sources and a more accurate estimate of the number of anticipated new sources.

Dated: August 31, 2004.

**Oscar Morales,**

*Director, Collection Strategies Division.*

[FR Doc. 04–20599 Filed 9–10–04; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[OAR–2004–0016, FRL–7811–8]**

## Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Federal Operating Permit Regulations (40 CFR Part 71) (Renewal), ICR Number 1713.05, OMB Number 2060–0336

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. This ICR is scheduled to expire on October 31, 2004. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. This ICR describes the nature of the information collection and its estimated burden and cost.

**DATES:** Additional comments may be submitted on or before October 13, 2004.

**ADDRESSES:** Submit your comments, referencing docket ID number OAR–2004–0016, to (1) EPA online using EDOCKET (our preferred method), by e-mail to *a-and-r-docket@epa.gov*, or by mail to: Environmental Protection Agency, EPA Docket Center (EPA/DC), Air and Radiation Docket and Information Center, Mail Code 6102T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** A. Scott Voorhees, Ph.D., Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Mail Code C304–04, Research Triangle Park, NC 27711; telephone number: (919) 541–5348; fax number: (919) 541–5509; e-mail address: *voorhees.scott@epa.gov*.

**SUPPLEMENTARY INFORMATION:** EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On March 23, 2004 (69 FR 13522), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments.

EPA has established a public docket for this ICR under Docket ID number OAR–2004–0016, which is available for public viewing at the Air and Radiation Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Air and Radiation Docket is (202) 566–1742. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket*. Use EDOCKET to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA and OMB within 30 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, see EPA's **Federal Register** notice describing the electronic docket at 67 FR 38102 (May 31, 2002), or go to *http://www.epa.gov/edocket*.

*Title:* Federal Operating Permit Regulations (40 CFR part 71) (Renewal).

*Abstract:* The part 71 program is a Federal operating permits program that is being implemented for sources

located in Indian Country, Outer Continental Shelf sources, and also in those areas without acceptable part 70 programs. Title V of the Clean Air Act imposes on States the duty to develop, administer and enforce operating permit programs which comply with title V and requires EPA to stand ready to issue Federal operating permits when States fail to perform this duty. Section 502(b) of the Act requires EPA to promulgate regulations setting forth provisions under which States will develop operating permit programs and submit them to EPA for approval. Pursuant to this section, EPA promulgated 40 CFR part 70 on July 21, 1992 (57 FR 32250) which specifies the minimum elements of State operating permit programs.

Pursuant to regulations promulgated by EPA on February 19, 1999 (64 FR 8247) EPA has authority to establish part 71 programs within Indian Country and EPA began administering the program in Indian country on March 22, 1999. Since many Indian tribes lack the resources and capacity to develop operating permit programs, EPA is currently administering and enforcing part 71 programs in the areas that comprise Indian Country in order to protect the air quality of areas under tribal jurisdiction.

The EPA intends to protect tribal air quality through the development of implementation plans, permits programs and other means, including direct assistance to tribes in developing comprehensive and effective air quality management programs. The EPA will consult with tribes to identify their particular needs for air program development assistance and will provide ongoing assistance as necessary.

The EPA will also issue permits to "outer continental shelf" (OCS) sources (sources located in offshore waters of the United States) pursuant to the requirements of section 328(a) of the Act. For sources beyond 25 miles (40 km) of the States' seaward boundaries, EPA is the permitting authority, and the provisions of part 71 will apply to the permitting of those OCS sources. Permits for sources located within 25 miles of a State's seaward boundaries are issued by the Administrator (or a State or local agency which has been delegated the OCS program in accordance with 40 CFR part 55 of this chapter) pursuant to the part 70 or part 71 program which is effective in the corresponding onshore area.

Investigation of the OCS ICR indicates currently there are only two OCS sources which fall under the jurisdiction of the Federal program. There are approximately 95 sources in Indian Country that require part 71 permits.

The EPA has the authority to establish a partial part 71 program in limited geographical areas of a state if EPA has approved a part 70 program (or combination of part 70 programs) for the remaining areas of the State. The EPA will promulgate a part 71 program for a permitting authority if EPA finds that a permitting authority is not adequately administering or enforcing its approved program and it fails to correct the deficiencies that precipitated EPA's finding. The EPA may use part 71 in its entirety or any portion of the regulations, as needed. Similarly, EPA may use only portions of the regulations to correct and issue a State permit without, for example, requiring an entirely new application. Section 71.4(f) also authorizes EPA to exercise its discretion in designing a part 71 program. The EPA may promulgate a part 71 program based on the national template described in part 71 or may modify the national template by adopting appropriate portions of a State's program as part of the Federal program for that State, provided the resulting program is consistent with the requirements of title V.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15, and are identified on the form and/or instrument, if applicable.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average 14 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

*Respondents/Affected Entities:* Major air pollution sources subject to part 71 programs.

*Estimated Number of Respondents:* 105.

*Frequency of Response:* Semi-annually, annually, and on occasion.

*Estimated Total Annual Hour Burden:* 24,077 hours.

*Estimated Total Annual Costs:* $1,165,475, which includes $0 annualized capital/startup costs, $0 annual O&M costs, and $1,165,475 annual labor costs.

*Changes in the Estimates:* There is an increase of 8,754 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This increase results from all 95 Indian country sources having been already permitted compared to just 30 sources in the previous burden estimate three years ago. Consequently, permit revisions will occur for a larger subset of sources and renewal activities will occur for the first time. This increase thus results from adjustments to the estimates.

Dated: August 31, 2004.

**Oscar Morales,**

*Director, Collection Strategies Division.*

[FR Doc. 04–20600 Filed 9–10–04; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[SFUND–2004–0002, FRL–7811–7]**

## National Oil and Hazardous Substance Pollution Contingency Plan (NCP) (Renewal), EPA ICR Number 1463.06, OMB Control Number 2050–0096

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection, 1463.05. This ICR is scheduled to expire on October 31, 2004. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. This ICR describes the nature of the information collection and its estimated burden and cost.

**DATES:** Additional comments may be submitted on or before October 13, 2004.

**ADDRESSES:** Submit your comments, referencing docket ID number SFUND–2004–0002 to (1) EPA online using

EDOCKET (our preferred method), by email to *superfund.docket@epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, Superfund Docket, Mail Code 5202T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Marisa Guarinello, OSRTI, Mail Code 5204G, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 703–603–9028; fax number: 703–603–9100; email address: *guarinello.marisa@epa.gov*.

**SUPPLEMENTARY INFORMATION:** EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On April 30, 2004 (69 *FR* 23745), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments.

EPA has established a public docket for this ICR under Docket ID No. SFUND–2004–0002, which is available for public viewing at the Superfund Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Superfund Docket is (202) 566–0276. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket*. Use EDOCKET to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA and OMB within 30 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, see EPA's **Federal Register** notice describing the electronic docket at 67 *FR* 38102 (May 31, 2002), or go to *http://www.epa.gov/edocket*.

**Title: National Oil and Hazardous Substance Pollution Contingency Plan (NCP) (Renewal)**

*Abstract:* This Information Collection Request is a renewal ICR that covers the remedial portion of the Superfund Program, as specified in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 as amended (CERCLA) and the National Oil and Hazardous Substance Pollution Contingency Plan (NCP). All remedial actions covered by this ICR (*e.g.*, Remedial Investigations/Feasibility Studies) are stipulated in the statute (CERCLA) and are instrumental in the process of cleaning up National Priority List (NPL) sites to be protective of human health and the environment. Some community involvement activities covered by this ICR are not required at every site (*e.g.*, Technical Assistance Grants) and depend very much on the community and the nature of the site and cleanup. All community activities seek to involve the public in the cleanup of the sites, gain the input of community members, and include the community's perspective on the potential future reuse of Superfund NPL sites. Community involvement activities can enhance the remedial process and increase community acceptance and the potential for productive and useful reuse of the sites.

The respondents on whom a burden is placed include State (and Tribal) governments and communities. Potential Responsible Parties (PRPs) are not addressed in this ICR because the Paperwork Reduction Act [5 CFR part 1320 (Controlling Paperwork Burdens on the Public, FRN 8/29/1995) Sect. 1320.4 (a)] does not require the inclusion of those entities that are the subject of administrative or civil action by the Agency. The ICR reports the estimated reporting and record-keeping burden hours and costs expected to be incurred by these entities and by the Federal government in its oversight capacities of State action and administration of community activities at Fund-lead NPL sites. Remedial activities undertaken by States at NPL sites are those required and recommended by CERCLA and the NCP and the cost of many of these activities may be reimbursed by the Federal government. All community involvement in the remedial process of Superfund is voluntary. Therefore, all cost estimates for community members is theoretical and does not represent expenditure of actual dollars.

States have responsibilities at new and on-going State-lead sites and at all State-lead, Federal-lead, and Federal Facility sites entering the remedial phase of Superfund. All other remedial activities taken by the State are done so at sites at which the State voluntarily assumes the lead agency role. Over each year of this ICR the State will be completing remedial activities at sites that entered the remedial phase of Superfund at different times.

Community members' participation in remedial activities at Superfund sites is purely voluntary and the level of involvement varies greatly depending on the complexity of the site, its location (urban vs. rural, industrial vs. residential, etc.), and the level of interest.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9 and are identified on the form and/or instrument, if applicable.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average 8.4 hours per response.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

*Respondents/Affected Entities:* State, Tribal, or local governments, and individuals or households.

*Estimated Number of Respondents:* 7,970.

*Frequency of Response:* As required.

*Estimated Total Annual Hour Burden:* 71,165.

*Estimated Total Annual Cost:* $4,158,759, which includes $0 annualized capital, $849,624 O&M costs, and $3,309,135 for Respondent Labor costs.

*Changes in the Estimates:* There is a decrease of 114,745 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. There were two avenues for change in the renewal of the ICR: (1) Omission of items the Paperwork Reduction Act does not require, (2) programmatic changes. Programmatic changes include the rate at which the Superfund program is able to address NPL sites and the timeline of the cleanup program as a whole as to the remedial stages of many of the sites. Other changes in burden hours and costs to respondents reflect the fact that the assumptions and resources used to obtain the numbers were not included in the previous renewal of the ICR. Assumptions and resources have been well documented in this Supporting Statement, and O&M costs have been broken out of the previously unseparated "other" costs.

Dated: September 1, 2004.

**Oscar Morales,**

*Director, Collection Strategies Division.*

[FR Doc. 04–20601 Filed 9–10–04; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[OPPT–2003–0065; FRL –7811–6]**

## Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Pre-Manufacture Review Reporting and Exemption Requirements for New Chemical Substances and Significant New Use Reporting Requirements for Chemical Substances, EPA ICR No. 0574.12, OMB No. 2070–0012

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that the following Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. This ICR is scheduled to expire on October 31, 2004. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. This ICR describes the nature of the information collection and its estimated cost.

**DATES:** Additional comments may be submitted on or before October 13, 2004.

**ADDRESSES:** Submit your comments to both (1) EPA, referencing docket ID number OPPT–2003–0065, online at *http://www.epa.gov/edocket* (our preferred method), by e-mail to: *oppt.ncic@epa.govmail*, or by U.S. Mail to: Document Control Office (DCO), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, Mailcode: 7407T, 1200 Pennsylvania Ave., NW., Washington, DC 20460; and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503 (reference OMB Control No. 2070–0012).

**FOR FURTHER INFORMATION CONTACT:** Barbara Cunningham, Acting Director, Environmental Assistance Division, Office of Pollution Prevention and Toxics, Environmental Protection Agency, Mailcode: 7408, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–554–1404; e-mail address: *TSCA-Hotline@epa.gov.*

**SUPPLEMENTARY INFORMATION:** EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On December 15, 2003, EPA sought comments on this renewal ICR (68 FR 69677). EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments during the comment period.

EPA has established a public docket for this ICR under Docket ID No. OPPT–2003–0065, which is available for public viewing at the OPPT Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Pollution Prevention and Toxics Docket is 202–566–0280. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket.* Use EDOCKET to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA and OMB within 30 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, see EPA's **Federal Register** notice describing the electronic docket at 67 FR 38102 (May 31, 2002), or go to *http://www.epa.gov/edocket.*

*ICR Title:* Pre-Manufacture Review Reporting and Exemption Requirements for New Chemical Substances and Significant New Use Reporting Requirements for Chemical Substances.

*Abstract:* Section 5 of the Toxic Substances Control Act (TSCA) requires manufacturers and importers of new chemical substances to submit to EPA notice of intent to manufacture or import a new chemical substance 90 days before manufacture or import begins. EPA reviews the information contained in the notice to evaluate the health and environmental effects of the new chemical substance. On the basis of the review, EPA may take further regulatory action under TSCA, if warranted. If EPA takes no action within 90 days, the submitter is free to manufacture or import the new chemical substance without restriction.

TSCA section 5 also authorizes EPA to issue Significant New Use Rules (SNURs). EPA uses this authority to take follow-up action on new or existing chemicals that may present an unreasonable risk to human health or the environment if used in a manner that may result in different and/or higher exposures of a chemical to

humans or the environment. Once a use is determined to be a significant new use, persons must submit a notice to EPA 90 days before beginning manufacture, processing or importation of a chemical substance for that use. Such a notice allows EPA to receive and review information on such a use and, if necessary, regulate the use before it occurs.

Finally, TSCA section 5 also permits applications for exemption from section 5 review under certain circumstances. An applicant must provide information sufficient for EPA to make a determination that the circumstances in question qualify for an exemption. In granting an exemption, EPA may impose appropriate restrictions.

Responses to the collection of information are mandatory (see 40 CFR parts 700, 720, 721, 723 and 725). Respondents may claim all or part of a notice as CBI. EPA will disclose information that is covered by a CBI claim only to the extent permitted by, and in accordance with, the procedures in 40 CFR part 2.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register**, are listed in 40 CFR part 9 and included on the related collection instrument or form, if applicable.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average 102.1 hour per response. Burden means the total time, effort or financial resources expended by persons to generate, maintain, retain or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install and utilize technology and systems for the purposes of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

*Respondents/Affected Entities:* Companies that manufacture, process or import chemical substances.

*Frequency of Collection:* On occasion.

*Estimated No. of Respondents:* 443.

*Estimated Total Annual Burden on Respondents:* 163,791 hours.

*Estimated Total Annual Costs:* $34,348,733.

*Changes in Burden Estimates:* This request reflects a decrease in the total estimated burden of 20,817 hours (from 184,608 hours to 163,791 hours) in the total estimated respondent burden from that currently in the OMB inventory. This decrease represents an adjustment in the number of annual submissions to reflect EPA's experiences since the most recent ICR. The decrease in the number of submissions per year is largely associated with the polymer and other exemptions implemented under the 1995 amendments.

Dated: September 1, 2004.

**Oscar Morales,**

*Director, Collection Strategies Division.*

[FR Doc. 04–20602 Filed 9–10–04; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[OECA–2004–0007; FRL–7811–5]**

## Agency Information Collection Activities; Submission for OMB Review and Approval; Comment Request; NESHAP for Pesticide Active Ingredient Production (40 CFR Part 63, Subpart MMM) (Renewal), ICR Number 1807.03, OMB Number 2060–0370

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act, this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. This ICR is scheduled to expire on October 31, 2004. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. This ICR describes the nature of the information collection and its estimated burden and cost.

**DATES:** Additional comments may be submitted on or before October 13, 2004.

**ADDRESSES:** Submit your comments, referencing docket ID number OECA–2004–0007, to (1) EPA online using EDOCKET (our preferred method), by e-mail to *docket.oeca@epa.gov*, or by mail to: Environmental Protection Agency, EPA Docket Center (EPA/DC), Enforcement and Compliance Docket and Information Center, EPA West, Mail Code 2201T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Learia Williams, Compliance Assessment and Media Programs Division (Mail Code 2223A), Office of Compliance, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 564–4113; fax number: (202) 564–0050; e-mail address: *williams.learia@epa.gov*.

**SUPPLEMENTARY INFORMATION:** EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On May 25, 2004 (69 FR 29718), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments.

EPA has established a public docket for this ICR under Docket ID No. OECA–2004–0007, which is available for public viewing at the Enforcement and Compliance Docket and Information Center in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket and Information Center is: (202) 566–1752. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket*. Use EDOCKET to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. When in the system, select "search," then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA and OMB within 30 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide

a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, see EPA's **Federal Register** notice describing the electronic docket at 67 FR 38102 (May 31, 2002), or go to *http://www.epa.gov/edocket.*

*Title:* NESHAP for Pesticide Active Ingredient Production (40 CFR part 63, subpart MMM) (Renewal).

*Abstract:* The Administrator has judged that the pollutants emitted from pesticide active ingredient (PAI) production facilities cause or contribute significantly to air pollution that may reasonably be anticipated to endanger public health. Owners or operators of PAI production facilities to which this regulation applies must choose one of the compliance options that is described in the rule or install and monitor a specific control system that reduces hazardous air pollutant (HAP) emissions to the compliance level. The respondents are subject to sections of subpart A of 40 CFR part 63 relating to the National Emission Standards for Hazardous Air Pollutants (NESHAP). These requirements include those associated with the applicability determination; the notification that the facility is subject to the rule; and the notification of testing (control device performance test and continuous monitoring system [CMS] performance evaluation); the results of performance testing and CMS performance evaluations; startup, shutdown, and malfunction report; and semiannual or quarterly summary reports and/or excess emissions and CMS performance reports. In addition to the requirements of subpart A, many respondents are required to submit precompliance plan and leak detection and repair (LDAR) reports; and plants that wish to implement emissions averaging provisions must submit an emission averaging plan.

Respondents electing to comply with the emission limit or emission reduction requirements for process vents, storage tanks, or wastewater must record the values of equipment operating parameters as specified in 40 CFR 63.1367 of the rule. If the owner or operator identifies any deviation resulting from any known cause for which no federally approved or promulgated exemption from an emission limitation or standard applies, the compliance report will also include all records that the source is required to maintain that pertain to the periods during which such deviation occurred, as well as the following: the magnitude of each deviation; the reason for each deviation; a description of the corrective action taken for each deviation, including action taken to minimize each deviation and action taken to prevent recurrence; and a copy of all quality assurance activities performed on any element of the monitoring protocol.

Owners or operators of PAI production facilities subject to the rule must maintain a copy of all monitored equipment operating parameter values that demonstrate compliance with the standards. Records and reports must be retained for a total of 5 years (2 years at the site; the remaining 3-year records may be retained off-site). The files may be maintained on a computer or floppy disks, or on microfiche.

Since many of the facilities potentially affected by the NESHAP standards are currently subject to new source performance standards (NSPS), the standards include an exemption from the NSPS for those sources. That exemption eliminates a duplication of information collection requirements.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15, and are identified on the form and/or instrument, if applicable.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average 60 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

*Respondents/Affected Entities:* Owners and operators of pesticide active ingredient production facilities.

*Estimated Number of Respondents:* 88.

*Frequency of Response:* Initially, quarterly and semiannually.

*Estimated Total Annual Hour Burden:* 24,164 hours.

*Estimated Total Annual Costs:* $1,895,049, which includes $236,000 annualized capital/startup costs, $117,000 annual O&M costs, and $1,542,049 annual labor costs.

*Changes in the Estimates:* There is a decrease of 29,588 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. The change in burden for the existing facilities is due primarily to an assumption that all sources are in compliance with the initial requirements of the rule since the previous ICR covers the first three years prior to the compliance date of the rule. Additionally, there is a decrease of $1,915,000 in the total estimated annualized cost currently identified in the OMB Inventory of Approved ICR Burdens. This is because the purchase of CMS monitors, which is a one time cost, are assumed to be purchased during the period of the active ICR.

Dated: September 1, 2004.

**Oscar Morales,**

*Director, Collection Strategies Division.*

[FR Doc. 04–20603 Filed 9–10–04; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[OAR–2004–0015; FRL–7811–4]**

## Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; State Operating Permits Regulations (40 CFR Part 70) (Renewal), EPA ICR Number 1587.06, OMB Control Number 2060–0243

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. This ICR is scheduled to expire on October 31, 2004. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of

information while this submission is pending at OMB. This ICR describes the nature of the information collection and its estimated burden and cost.

**DATES:** Additional comments may be submitted on or before October 13, 2004.

**ADDRESSES:** Submit your comments, referencing docket ID number OAR–2004–0015, to (1) EPA online using EDOCKET (our preferred method), by e-mail to *a-and-r-docket@epa.gov*, or by mail to: Environmental Protection Agency, EPA Docket Center (EPA/DC), Air and Radiation Docket and Information Center, EPA West, Mail Code 6102T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Grecia A. Castro, Office of Air Quality Planning and Standards, C304–04, Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–1351; fax number: (919) 541–5509; e-mail address: *castro.grecia@epa.gov*.

**SUPPLEMENTARY INFORMATION:** EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On March 23, 2004 (69 FR 13524), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments.

EPA has established a public docket for this ICR under Docket ID No. OAR–2004–0015, which is available for public viewing at the Air and Radiation Docket and Information Center in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket*. Use EDOCKET to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA and OMB within 30 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, see EPA's **Federal Register** notice describing the electronic docket at 67 FR 38102 (May 31, 2002), or go to *http://www.epa.gov/edocket*.

*Title:* State Operating Permits Regulations (40 CFR part 70) (Renewal).

*Abstract:* In implementing sections 501 thru 507 of title V of the Clean Air Act and EPA's part 70 operating permits regulations, State and local permitting agencies must develop programs and submit them to EPA for approval and sources subject to the program must develop operating permit applications and submit them to the permitting authority within one-year after program approval. Permitting authorities will then issue permits and thereafter enforce, revise, and renew those permits at no more than 5-year intervals. Permit applications and proposed permits will be provided to, and are subject to review by, EPA. All information submitted by a source and the issued permit shall also be available for public review, except for confidential information, which will be protected from disclosure. The public shall be given public notice of, and an opportunity for comment on, permitting actions. Sources will submit monitoring reports semi-annually and compliance certifications annually to the permitting authorities. The EPA has the responsibility to oversee implementation of the program.

The activities in this ICR involve recordkeeping and information transmittal in the form of reports (deviations, monitoring or compliance certification), applications for permits or revisions and issued permits. Draft permits are made available for public review and comment. The activities to carry out these tasks are considered mandatory and necessary for implementation of title V and the proper performance of the operating permits program. The information will also be available for public inspection at any time in the offices of the permitting authorities. This notice provides updated burden estimates from a previously approved ICR.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15, and are identified on the form and/or instrument, if applicable.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average 288 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

*Respondents/Affected Entities:* Air pollution sources, state and local permitting authorities.

*Estimated Number of Respondents:* 17,738 sources, 112 permitting authorities.

*Frequency of Response:* Semi-annually, annually, on occasion, one time.

*Estimated Total Annual Hour Burden:* 5,109,548.

*Estimated Total Annual Cost:* $170,343,958, which includes $0 annualized capital costs, $0 O&M costs, and $170,343,958 annual labor costs.

*Changes in the Estimates:* There is an increase of 329,928 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This increase is an adjustment related to the nature of the activities associated with implementing the part 70 program. State and local permitting authorities first developed their programs and submitted them to EPA for approval, over a period of several years, during which approved programs

were beginning to be implemented by first having sources submit permit applications. As the later program submissions were being approved, some agencies were in the early stages of issuing permits. As of the beginning of this ICR, all programs are approved and the majority of sources initially subject to the program have been issued permits. All sources with permits will be performing collection activities. Some of the initial permits are expiring and sources are applying for renewal permits, other sources are making changes and applying for permit revisions.

Dated: September 2, 2004.

**Oscar Morales,**

*Director, Collection Strategies Division.*

[FR Doc. 04–20604 Filed 9–10–04; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[OECA–2004–0023; FRL–7811–3]**

### Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; ECOS Survey of State Performance Measures, EPA ICR Number 2143.01

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request for a new collection. This ICR describes the nature of the information collection and its estimated burden and cost.

**DATES:** Additional comments may be submitted on or before October 13, 2004.

**ADDRESSES:** Submit your comments, referencing docket ID number OECA–2004–0023, to (1) EPA online using EDOCKET (our preferred method), by e-mail to *docket.oeca@epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Lynn Vendinello, Office of Compliance, Mail Code 2222A, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 564–7066; fax number: (202) 564–0031; e-mail address: *vendinello.lynn@epa.gov*.

**SUPPLEMENTARY INFORMATION:** EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On April 30, 2004 (69 FR 23744), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA has addressed the comments received.

EPA has established a public docket for this ICR under Docket ID No. OECA–2004–0023, which is available for public viewing at the Enforcement and Compliance Docket and Information Center in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the OECA Docket is (202) 566–1752. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket*. Use EDOCKET to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA and OMB within 30 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, see EPA's **Federal Register** notice describing the electronic docket at 67 FR 38102 (May 31, 2002), or go to *http://www.epa.gov/edocket*.

*Title:* ECOS Survey of State Performance Measures.

*Abstract:* The survey in question asks state environmental commissioners to report on their contribution to enforcement and compliance assistance for 2000–2003. They are asked to refer to their own records and account for the number of inspections, reviews, complaints etc. that have taken shape during this time. They are also asked to give the number and type of mechanisms and fines applied and collected. It also questions if and how the states feel they have been effective using these methods. There is a section of the survey asking the states to rate how important and useful they feel the statistics and reports required by the EPA are in conveying the current conditions within their borders. Importantly, the survey also aims to capture information about state activity in outcome measurement. In particular, it asks states about their experiences with compliance rate measurement and with calculating the environmental benefits of enforcement actions and compliance assistance. The survey is designed to capture compliance rates and activities directly from state records. This will provide a means in which the states' efforts to promote the EPA's philosophy on enforcement and compliance can be more readily monitored. The responses to this collection of information are voluntary. The information obtained by this survey is completely confidential unless a state wants their information to be publicized.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9 and are identified on the form and/or instrument, if applicable.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average 2 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any

previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

*Respondents/Affected Entities:* States.

*Estimated Number of Respondents:* 49.

*Frequency of Response:* One time.

*Estimated Total Annual Hour Burden:* 98 hours.

*Estimated Total Annual Cost:* $4,500, includes $0 annualized capital or O&M costs and $4,500 annual labor costs.

Dated: August 31, 2004.

**Oscar Morales,**

*Director, Collection Strategies Division.*

[FR Doc. 04–20605 Filed 9–10–04; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–7812–1]**

### Example Exposure Scenarios

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice of availability of a final document.

**SUMMARY:** This notice announces the availability of a final report titled, *Example Exposure Scenarios* (EPA/600/R–03/036, April 2004), which was prepared by the U.S. Environmental Protection Agency's (EPA) National Center for Environmental Assessment (NCEA) of the Office of Research and Development (ORD).

**ADDRESSES:** The document will be made available electronically through the NCEA Web site (*http://www.epa.gov/ncea*). A limited number of paper copies will be available from the EPA's National Service Center for Environmental Publications (NSCEP), P.O. Box 42419, Cincinnati, OH 45242; telephone: 1–800–490–9198 or 513–489–8190; facsimile: 513–489–8695. Please provide your name, your mailing address, the title and the EPA number of the requested publication.

**FOR FURTHER INFORMATION CONTACT:** The Technical Information Staff, National Center for Environmental Assessment/Washington Office (8623D), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Telephone: 202–564–3261; fax: 202–565–0050; e-mail: *nceadc.comment@epa.gov*.

**SUPPLEMENTARY INFORMATION:** Exposure scenarios are a tool to help the assessor develop estimates of exposure, dose, and risk. An exposure scenario generally includes facts, data, assumptions, inferences, and sometimes professional judgment about how the exposure takes place. The human physiological and behavioral data necessary to construct exposure scenarios can be obtained from the *Exposure Factors Handbook* (EPA/600/P–95/002Fa–Fc, 1997). The *Exposure Factors Handbook* provides data on drinking water consumption, soil ingestion, inhalation rates, dermal factors including skin area and soil adherence factors, consumption of fruits and vegetables, fish, meats, dairy products, homegrown foods, breast milk, activity patterns, body weight, consumer products, and life expectancy.

The purpose of the *Example Exposure Scenarios* is to outline scenarios for various exposure pathways and to demonstrate how data from the *Exposure Factors Handbook* may be applied for estimating exposures. The example scenarios have been selected to best demonstrate the use of the various key data sets in the *Exposure Factors Handbook* and represent commonly encountered exposure pathways. An exhaustive review of every possible exposure scenario for every possible receptor population would not be feasible and is not provided. Instead, readers may use the representative examples provided here to formulate scenarios that are appropriate to the assessment of interest, and apply the same or similar data sets and approaches as shown in the examples.

Dated: August 11, 2004.

**P.W. Preuss,**

*Director, National Center for Environmental Assessment.*

[FR Doc. 04–20598 Filed 9–10–04; 8:45 am]

BILLING CODE 6560–50–P

## FARM CREDIT ADMINISTRATION

### Farm Credit Administration Board; Amendment to Sunshine Act Meeting

**AGENCY:** Farm Credit Administration.

**SUMMARY:** Pursuant to the Government in the Sunshine Act (5 U.S.C. 552b(e)(3)), the Farm Credit Administration gave notice on September 7, 2004 (69 FR 54148), of the regular meeting of the Farm Credit Administration Board (Board) scheduled for September 9, 2004. This notice is to amend the agenda by adding an item to the open session of that meeting.

**FOR FURTHER INFORMATION CONTACT:** Jeanette C. Brinkley, Secretary to the Farm Credit Administration Board, (703) 883–4009, TTY (703) 883–4056.

**ADDRESSES:** Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090.

**SUPPLEMENTARY INFORMATION:** Parts of this meeting of the Board were open to the public (limited space available), and parts were closed to the public. In order to increase the accessibility to Board meetings, persons requiring assistance should make arrangements in advance. The agenda for September 9, 2004, is amended by adding the following item to the open session as follows:

**Open Session**

*C. New Business—Other*

3. Fall 2004 Unified Agenda and FY 2005 Regulatory Performance Plan.

Dated: September 9, 2004.

**Jeanette C. Brinkley,**

*Secretary, Farm Credit Administration Board.*

[FR Doc. 04–20707 Filed 9–9–04; 2:57 pm]

BILLING CODE 6705–01–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 may obtain copies of agreements by contacting the Commission's Office of Agreements at (202) 523–5793 or via e-mail at *tradeanalysis@fmc.gov*. 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.:* 011695–007.

*Title:* CMA CGM/Norasia Reciprocal Space Charter, Sailing and Cooperative Working Agreement.

*Parties:* CMA CGM, S.A. and Norasia Container Lines Limited.

*Filing Party:* Paul M. Keane, Esq.; Cichanowicz, Callan, Keane, Vengrow & Textor, LLP; 61 Broadway, Suite 3000: New York, NY 10006–2802.

*Synopsis:* The amendment provides for the substitution of two larger vessels for smaller vessels currently deployed under the agreement. The parties request expedited review.

By Order of the Federal Maritime Commission.

Dated: September 8, 2004.

**Bryant L. VanBrakle,**

*Secretary.*

[FR Doc. 04–20613 Filed 9–10–04; 8:45 am]

BILLING CODE 6730–01–P

## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than September 27, 2004.

**A. Federal Reserve Bank of Cleveland** (Cindy C. West, Banking Supervisor) 1455 East Sixth Street, Cleveland, Ohio 44101–2566:

*1. Roger Lee Moler and Janet Lanore Moler*, both of Dayton, Ohio (collectively, the Moler Family Control Group); to retain voting shares of BNB Bancorp, Inc., Brookville, Ohio; and thereby indirectly retain voting shares of Brookville National Bank, Brookville, Ohio.

Board of Governors of the Federal Reserve System, September 7, 2004.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. 04–20557 Filed 9–10–04; 8:45 am]

BILLING CODE 6210–01–S

## FEDERAL RESERVE SYSTEM

### Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than October 7, 2004.

**A. Federal Reserve Bank of Boston** (Richard Walker, Community Affairs Officer) 600 Atlantic Avenue, Boston, Massachusetts 02106–2204:

*1. The Royal Bank of Scotland Group plc*, Edinburgh, Scotland, and its subsidiaries, RBSG International Holdings Ltd, Edinburgh, Scotland and Citizens Financial Group, Inc., Providence, Rhode Island; to acquire voting shares of RBS National Bank, Bridgeport, Connecticut, a de novo bank.

**B. Federal Reserve Bank of Kansas City** (Donna J. Ward, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198–0001:

*2. Lone Summit Bancorp, Inc.*, Lake Lotawana, Missouri; to become a bank holding company by acquiring 100 percent of the voting shares of Lone Summit Bank, Lake Lotawana, Missouri.

Board of Governors of the Federal Reserve System, September 7, 2004.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. 04–20558 Filed 9–10–04; 8:45 am]

BILLING CODE 6210–01–S

## FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

### Sunshine Act Notice

**TIME AND DATE:** 8 a.m. (e.d.t.), September 20, 2004.

**PLACE:** Second Floor Training Room, 1250 H Street, NW., Washington, DC.

**STATUS:** Parts will be open to the public and parts closed to the public.

**MATTERS TO BE CONSIDERED:**

**Parts Open to the Public**

1. Approval of the minutes of the August 23, 2004, Board member meeting.
2. Thrift Savings Plan activity report by the Executive Director.
3. FY 2004 expenditures, proposed FY 2005 budget, and FY 2006 estimate.

**Parts Closed to the Public**

4. Personnel matters.

**CONTACT PERSON FOR MORE INFORMATION:** Thomas J. Trabucco, Director, Office of External Affairs, (202) 942–1640.

Dated: September 9, 2004.

**Elizabeth S. Woodruff,**

*Secretary to the Board, Federal Retirement Thrift Investment Board.*

[FR Doc. 04–20690 Filed 9–9–04; 1:26 pm]

BILLING CODE 6760–01–P

## GENERAL SERVICES ADMINISTRATION

### Privacy Act of 1974; Proposed Revisions to a Privacy Act System of Records

**AGENCY:** General Services Administration

**ACTION:** Notice of proposed revision to an existing Privacy Act system of records

**SUMMARY:** The General Services Administration (GSA) proposes to revise the system of records, Emergency Notification Rosters and Files (GSA/HRO–9). The system is being renamed "Emergency Management Records" and is revised to include electronic files and databases containing personal information needed to contact GSA associates and other essential persons at work, at home, and out of the area in times of emergency. The purpose of the revised system is to ensure an up-to-date communication capability by GSA nationwide, and facilitate continuity of critical GSA missions and functions in emergency situations. The revision covers all GSA associates and contractor employees, as well as key governmental and non-governmental persons essential to carrying out emergency functions. The revision also updates the authorities for maintaining the system and updates the organizational location and title of the System Manager.

**DATES:** Interested persons may submit written comments on this proposal. The revision will become effective without further notice on October 13, 2004, unless comments received on or before that date require changes to the proposal.

**ADDRESSES:** Comments should be submitted to the GSA Privacy Act Officer (CI), Office of the Chief People Officer, General Services Administration, 1800 F Street NW, Washington DC 20405.

**FOR FURTHER INFORMATION CONTACT:** The GSA Privacy Act Officer at the above address, or call 202–501–1452.

Dated: August 27, 2004.

**June V. Huber,**

*Director, Office of Information Management, Office of the Chief People Officer.*

**GSA/HRO–9**

*System name:* Emergency Management Records (GSA/HRO–9).

*System location:* The system is the responsibility of the GSA Office of Emergency Management, located at 1800 F Street NW, Washington DC 20405. System records are located in the GSA Central Office and regional offices with assigned emergency management responsibilities.

*Categories of individuals covered by the system:* All GSA associates, contractor employees, and other key governmental and non-governmental persons essential to carrying out emergency activities or with a need to know of actions taken by GSA in an emergency.

*Categories of records in the system:* The records, composed of emergency notification rosters and files, may consist of paper records and/or electronic databases, including the Emergency Management Information Database (EMID), the Quick Notify database, and continuity of operations (COOP) files. The data may be consolidated into a centralized emergency contact database to expedite communication. Personal information in the system records includes name; office, cell, and home telephone numbers; out-of-area contact telephone numbers; home address: home e-mail address; and home fax number. System records also may include special needs information such as medical, mobility, and transportation requirements by individuals. Additional information may include official titles and emergency assignments for individuals in the system.

*Authority for maintaining the system:* The Federal Property and Administrative Services Act of 1949, as amended 40 U.S.C. §§ 101 *et seq.*; E.O. Order 12565, Assignment of Emergency Preparedness Responsibilities; and Presidential Decision Directive 67, Ensuring Constitutional Government and Continuity of Government Operations.

*Purpose:* To maintain current information on GSA associates and other persons covered by this system for use by persons with emergency management responsibilities to notify officials, employees, and other affected individuals of conditions that require their urgent attention during a public or personal emergency.

**Routine uses of records maintained in the system, including types of users and purposes of such uses:**

System information may be used by authorized individuals in the performance of duties associated with their emergency management responsibilities. Routine uses are:

a. To disclose needed information to a Federal, State, or local agency investigating, prosecuting, or enforcing a statute, rule, regulation, or order, where GSA becomes aware of a possible violation of civil or criminal law or regulation.

b. To disclose information to a Member of Congress or a congressional staff member at the request of the individual who is the subject of the record.

c. To disclose information to another Federal agency or to a court where the Government is a party to a judicial proceeding before the court.

d. To disclose information to a Federal agency, in response to its request, in connection with hiring or retaining an associate, issuing a security clearance, conducting a security or suitability investigation, classifying a job, letting a contract, or issuing a license, grant, or other benefit by the requesting agency, to the extent that the information is necessary to the agency's decision on the matter.

e. To disclose information to an appeal, grievance, or formal complaints examiner; equal employment opportunity investigator; arbitrator; exclusive representative; or other official engaged in investigating, or settling a grievance, complaint, or appeal filed by an employee.

f. To disclose information to the Office of Personnel Management (OPM) and the Government Accountability Office (GAO) when the information is required for evaluation of program activities.

g. To disclose information to the National Archives and Records Administration (NARA) for records management purposes.

h. To disclose information to an expert, consultant, or contractor in the performance of a Federal government duty to which the information is relevant.

**Policies and practices for storing, accessing, retrieving, retaining, and disposing of records in the system:**

*Storage:* System records may be stored on paper or electronically in secure locations or computer systems.

*Retrievability:* Records may be retrieved by name, organization, location, teleworking capability, or special medical or other health or safety need of an individual.

*Safeguards:* When not in use by an authorized person, the records are secured from unauthorized access. Paper records are placed in lockable file cabinets or in secured areas. Electronic records are protected by passwords, access codes, and other appropriate technical security measures.

*Retention and disposal:* Disposal of system records is according to the Handbook, GSA Records Maintenance and Disposition System (OAD P 1820.2A), and the requirements of the National Archives and Records Administration.

*System manager(s) and address:* The official with overall responsibility for the system of records is the Director, Office of Emergency Management (ACE), 1800 F Street NW, Washington DC 20405. GSA Services, Staff Offices, and regions are responsible for the integrity of data within their jurisdictions.

*Notification procedure:* Individuals may determine whether the system contains their records by submitting a request to the System Manager or the appropriate Service, Staff Office, or regional official.

*Record access procedures:* An individual may obtain information on the procedures for gaining access to their records from the System Manager or the appropriate Service, Staff Office, or regional official.

*Procedures for contesting records:* Individuals wishing to request amendment of their records should contact the System Manager or the appropriate Service, Staff Office, or regional official.

*Record sources:* The records contain information provided by the individuals themselves, their supervisors, or their Service, Staff Office, or region.

[FR Doc. 04–20563 Filed 9–10–04; 8:45 am]

**BILLING CODE 6820–34–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Chronic Fatigue Syndrome Advisory Committee

**AGENCY:** Office of the Secretary, HHS.

**ACTION:** Notice of meeting.

**SUMMARY:** As stipulated by the Federal Advisory Committee Act, the U.S. Department of Health and Human Services is hereby giving notice that the Chronic Fatigue Syndrome Advisory Committee (CFSAC) will hold a meeting. The meeting will be open to the public.

**DATES:** The meeting will be held on Monday, September 27, 2004, from 9 a.m. to 5 p.m.

**ADDRESSES:** Department of Health and Human Services, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Room 705A, Washington, DC 20201.

**FOR FURTHER INFORMATION, CONTACT:** Dr. Larry E. Fields, Executive Secretary, Chronic Fatigue Syndrome Advisory Committee, U.S. Department of Health and Human Services, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Room 719H, Washington, DC 20201; (202) 690–7694.

**SUPPLEMENTARY INFORMATION:** CFSAC was established on September 5, 2002, to replace the Chronic Fatigue Syndrome Coordinating Committee. CFSAC was established to advise, consult with, and make recommendations to the Secretary, through the Assistant Secretary for Health, on a broad range of topics including (1) the current state of knowledge and research about the epidemiology and risk factors relating to chronic fatigue syndrome, and identifying potential opportunities in these areas; (2) current and proposed diagnosis and treatment methods for chronic fatigue syndrome; and (3) development and implementation of programs to inform the public, health care professionals, and the biomedical, academic, and research communities about chronic fatigue syndrome advances.

The tentative agenda for this meeting is as follows:

9 a.m. Chairperson
Call to Order
Request for Roll Call
Introductions and Opening Remarks
Approval of the Minutes of June 21st, 2004
Discussion

9:20 a.m. Executive Secretary
Roll Call
Summary of Public Comments
Operational Matters
Discussion

9:30 a.m. Invited Organizational Updates
K. Kimberly McCleary
CFIDS Association of America
Research Funding
Discussion
Jill McLaughlin
National CFIDS Foundation, Inc.
Patient Issues
Discussion

10:30 a.m. Break

10:45 a.m. Ex Officio Members
Requested follow-ups
Other Updates
Discussion

11:30 a.m. Public Comment

12 noon Lunch Break

1 p.m. Subcommittee Updates
Disabilities: Lyle Lieberman, Chair
Education: Dr. Roberto Patarca, Chair
Research: Dr. Nahid Mohagheghpour, Chair

2:24 p.m. Break

3:15 p.m. Planning: Future Directions
Recommendations
Invited Organizational Updates
Other Matters
Discussion

4 p.m. Public Comment

4:30 p.m. Summary
Action Steps
Timelines

5 p.m. Adjournment

Public attendance at the meeting is limited to space available. Individuals must provide a photo ID for entry into the meeting. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the designated contact person. Members of the public will have the opportunity to provide comments at the meeting. Pre-registration is required for public comment by September 17, 2004. Any individual who wishes to participate in the public comment session should call the telephone number listed in the contact information to register. Public comment will be limited to five minutes per speaker. Any members of the public who wish to have printed material distributed to CFSAC members should submit materials to the Executive Secretary, CFSAC, whose contact information is listed above prior to close of business September 17, 2004.

Dated: September 8, 2004.

**Dr. Larry E. Fields,**

*Executive Secretary, Chronic Fatigue Syndrome Advisory Committee.*

[FR Doc. 04–20635 Filed 9–9–04; 10:03 am]

**BILLING CODE 4150–28–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. 2004D–0377]**

### International Conference on Harmonisation; Draft Guidance on E14 Clinical Evaluation of QT/QTc Interval Prolongation and Proarrhythmic Potential for Non-Antiarrhythmic Drugs; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of a draft guidance entitled "E14 Clinical Evaluation of QT/QTc Interval Prolongation and Proarrhythmic Potential for Non-Antiarrhythmic Drugs." The draft guidance was prepared under the auspices of the International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH). The draft guidance provides recommendations to sponsors concerning clinical studies to assess the potential of a new drug to cause cardiac arrhythmias, focusing on the assessment of changes in the QT/QTc interval on the electrocardiogram as a predictor of risk. The draft guidance is intended to encourage the assessment of drug effects on the QT/QTc interval as a standard part of drug development and to encourage the early discussion of this assessment with FDA.

**DATES:** Submit written or electronic comments on the draft guidance by December 13, 2004.

**ADDRESSES:** 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.* 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; or the Office of Communication, Training and Manufacturers Assistance (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448. The guidance may also be obtained by mail by calling the CBER Voice Information System at 1–800–835–4709 or 301–827–

1800. Send two self-addressed adhesive labels to assist the office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

**FOR FURTHER INFORMATION CONTACT:**

*Regarding the guidance*: Douglas C. Throckmorton, Center for Drug Evaluation and Research (HFD–1), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857.

*Regarding the ICH:* Michelle Limoli, Office of International Programs (HFG–1), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4480.

**SUPPLEMENTARY INFORMATION:**

## I. Background

In recent years, many important initiatives have been undertaken by regulatory authorities and industry associations to promote international harmonization of regulatory requirements. FDA has participated in many meetings designed to enhance harmonization and is committed to seeking scientifically based harmonized technical procedures for pharmaceutical development. One of the goals of harmonization is to identify and then reduce differences in technical requirements for drug development among regulatory agencies.

ICH was organized to provide an opportunity for tripartite harmonization initiatives to be developed with input from both regulatory and industry representatives. FDA also seeks input from consumer representatives and others. ICH is concerned with harmonization of technical requirements for the registration of pharmaceutical products among three regions: The European Union, Japan, and the United States. The six ICH sponsors are the European Commission, the European Federation of Pharmaceutical Industries Associations, the Japanese Ministry of Health, Labour, and Welfare, the Japanese Pharmaceutical Manufacturers Association, the Centers for Drug Evaluation and Research and Biologics Evaluation and Research, FDA, and the Pharmaceutical Research and Manufacturers of America. The ICH Secretariat, which coordinates the preparation of documentation, is provided by the International Federation of Pharmaceutical Manufacturers Associations (IFPMA).

The ICH Steering Committee includes representatives from each of the ICH sponsors and the IFPMA, as well as observers from the World Health Organization, Health Canada, and the European Free Trade Area.

In June 2004, the ICH Steering Committee agreed that a draft guidance entitled "E14 Clinical Evaluation of QT/QTc Interval Prolongation and Proarrhythmic Potential for Non-Antiarrhythmic Drugs" should be made available for public comment. The draft guidance is the product of the Efficacy Expert Working Group of the ICH. Comments about this draft will be considered by FDA and the the Efficacy Expert Working Group.

The draft guidance provides guidance on the design, conduct, analysis and interpretation of clinical studies to assess the potential of a new drug to cause cardiac arrhythmias, focusing on the assessment of changes in the QT/QTc interval on the electrocardiogram as a predictor of risk. The draft guidance is intended to encourage the assessment of drug effects on the QT/QTc interval, along with the collection of adverse cardiac events related to arrhythmias, as a standard part of drug development, and to encourage the early discussion of this assessment with the FDA. The goal of such discussions is to reach a common understanding of the effects as early in development as practical, with the goal of enhancing the efficiency of data collection later in drug development.

This draft guidance, when finalized, will represent the agency's current thinking on this 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 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 or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The 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 *http://www.fda.gov/ohrms/dockets/default.htm*, *http://www.fda.gov/cder/guidance/index.htm*, or *http://www.fda.gov/cber/publications.htm*.

Dated: September 3, 2004.

**William K. Hubbard,**

*Associate Commissioner for Policy and Planning.*

[FR Doc. 04–20565 Filed 9–10–04; 8:45 am]

BILLING CODE 4160–01–S

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. 2004D–0378]**

### International Conference on Harmonisation; Draft Guidance on S7B Nonclinical Evaluation of the Potential for Delayed Ventricular Repolarization (QT Interval Prolongation) by Human Pharmaceuticals; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of a revised draft guidance entitled "S7B Nonclinical Evaluation of the Potential for Delayed Ventricular Repolarization (QT Interval Prolongation) by Human Pharmaceuticals." The draft guidance was prepared under the auspices of the International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH). The draft guidance describes a nonclinical testing strategy for assessing the potential of a test substance to delay ventricular repolarization and includes information concerning nonclinical assays and an integrated risk assessment. The draft guidance is intended to facilitate the nonclinical assessment of the effects of pharmaceuticals on ventricular repolarization and proarrhythmic risk.

**DATES:** Submit written or electronic comments on the draft guidance by December 13, 2004.

**ADDRESSES:** 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*. 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; or the Office of Communication, Training and Manufacturers Assistance (HFM–40), Center for Biologics Evaluation and

Research (CBER), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448. The guidance may also be obtained by mail by calling the CBER Voice Information System at 1–800–835–4709 or 301–827–1800. Send two self-addressed adhesive labels to assist the office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the revised draft guidance document.

**FOR FURTHER INFORMATION CONTACT:**

*Regarding the guidance*: John Koerner, Center for Drug Evaluation and Research (HFD–110), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–594–5338.

*Regarding the ICH*: Michelle Limoli, Office of International Programs (HFG–1), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4480.

**SUPPLEMENTARY INFORMATION:**

## I. Background

In recent years, many important initiatives have been undertaken by regulatory authorities and industry associations to promote international harmonization of regulatory requirements. FDA has participated in many meetings designed to enhance harmonization and is committed to seeking scientifically based harmonized technical procedures for pharmaceutical development. One of the goals of harmonization is to identify and then reduce differences in technical requirements for drug development among regulatory agencies.

ICH was organized to provide an opportunity for tripartite harmonization initiatives to be developed with input from both regulatory and industry representatives. FDA also seeks input from consumer representatives and others. ICH is concerned with harmonization of technical requirements for the registration of pharmaceutical products among three regions: The European Union, Japan, and the United States. The six ICH sponsors are the European Commission; the European Federation of Pharmaceutical Industries Associations; the Japanese Ministry of Health and Welfare; the Japanese Pharmaceutical Manufacturers Association; the Centers for Drug Evaluation and Research and Biologics Evaluation and Research, FDA; and the Pharmaceutical Research and Manufacturers of America. The ICH Secretariat, which coordinates the preparation of documentation, is provided by the International Federation of Pharmaceutical Manufacturers Associations (IFPMA).

The ICH Steering Committee includes representatives from each of the ICH sponsors and the IFPMA, as well as observers from the World Health Organization, Health Canada, and the European Free Trade Area.

In the **Federal Register** of June 14, 2002 (67 FR 40950), the agency made available a draft guidance entitled "S7B Safety Pharmacology Studies for Assessing the Potential for Delayed Ventricular Repolarization (QT Interval Prolongation) by Human Pharmaceuticals" and invited public comment. After considering the comments, the Safety Expert Working Group of the ICH made extensive changes to the document, including changes to the title of the draft guidance, the testing strategy, and the timing of nonclinical studies relative to clinical development.

In June 2004, the ICH Steering Committee agreed that a revised draft guidance entitled "S7B Nonclinical Evaluation of the Potential for Delayed Ventricular Repolarization (QT Interval Prolongation) by Human Pharmaceuticals" should be made available for public comment. Comments about this draft will be considered by FDA and the Safety Expert Working Group.

The draft guidance provides guidance on nonclinical assessment of the effects of pharmaceuticals on ventricular repolarization and proarrhythmic risk. The draft guidance describes a nonclinical testing strategy for assessing the potential of a test substance to delay ventricular repolarization and includes information concerning nonclinical assays and an integrated risk assessment.

This draft guidance, when finalized, will represent the agency's current thinking on this 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 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 or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The 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 *http://www.fda.gov/ohrms/dockets/default.htm*, *http://www.fda.gov/cder/guidance/index.htm*, or *http://www.fda.gov/cber/publications.htm*.

Dated: September 3, 2004.

**William K. Hubbard,**

*Associate Commissioner for Policy and Planning.*

[FR Doc. 04–20564 Filed 9–10–04; 8:45 am]

BILLING CODE 4160–01–S

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Substance Abuse and Mental Health Services Administration

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (301) 443–7978.

*The National Community Anti-Drug Coalition Institute Registry and Annual Survey*—New—The Substance Abuse and Mental Health Services Administration's (SAMHSA) Center for Substance Abuse Prevention has established the National Community Anti-Drug Coalition Institute through a grant to the Community Anti-Drug Coalitions of America (CADCA). The purpose of the Registry and Annual Survey is to collect and report on data which identify and describe the types of community coalitions across our Nation, and the activities in which they are involved. This information will help SAMHSA encourage and assist in the development of effective community coalitions and strategies designed to prevent illicit drug and underage alcohol and tobacco use. These data will also permit SAMHSA to address its responsibilities and measure performance as delineated in the HP2010 objective 26–23: to increase the number of communities using partnerships or coalition models to conduct comprehensive substance abuse prevention efforts.

To track progress in achieving this objective, SAMHSA will use these data

to develop a national inventory of anti-drug coalitions and partnerships that can be updated annually in order to determine the number of community anti-drug coalitions in operation. Based on the coalition literature and input from the field, the inventory will include information on important characteristics, such as operational status, organizational type, target population served, funding sources, geographic location, and major community sector involvement. including faith, business, school, service, and law sectors. The "snowball" method will be employed to obtain lists of local anti-drug coalitions who will be asked to complete the Web-based survey. The proposed project will yield an electronic directory, developed by experts, to describe the range of operational definitions of "community anti-drug coalitions." The inventory will be based on a variety of typologies of coalitions and partnerships (including the coalitions who receive grants from the Drug Free Communities Support Program that will encompass the breadth of coalition activities. It is anticipated that the resulting electronic directory will be made available to the field through a Web-based database that will be managed, maintained, and updated by the Institute.

Once the data set is cleaned, a random sample of approximately ten percent of respondents will be selected to participate in a survey verification process. This verification will be conducted by telephone interview.

The annual burden associated with this survey is summarized in the following table.

| | Number of respondents | Responses/ respondent | Burden/ response (hrs.) | Total burden hours |
|---|---|---|---|---|
| Annual Survey Questionnaire | 7,500 | 1 | 1.0 | 7,500 |
| Survey Verification | 750 | 1 | 0.5 | 375 |
| Total | 7,500 | | | 7,875 |

Written comments and recommendations concerning the proposed information collection should be sent by October 13, 2004 to: SAMHSA Desk Officer, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, respondents are encouraged to submit comments by fax to: (202) 395–6974.

Dated: September 3, 2004.

**Anna Marsh,**

*Executive Officer, SAMHSA.*

[FR Doc. 04–20597 Filed 9–10–04; 8:45 am]

BILLING CODE 4162–20–P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

**[USCG–2004–19049]**

### Chemical Transportation Advisory Committee

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of meeting.

**SUMMARY:** The Chemical Transportation Advisory Committee (CTAC) and its subcommittees will meet to discuss various issues relating to the marine transportation of hazardous materials in bulk.

**DATES:** CTAC will meet on Thursday, September 30, 2004, from 9 a.m. to 3:30 p.m. The Subcommittee on National Fire Protection Association 472 will meet on Wednesday, September 29, 2004 from 8:30 a.m. to 3 p.m. The Subcommittee on Hazardous Cargo Transportation Security will meet on Wednesday, September 29, 2004, from 3 p.m. to 4 p.m. These meetings may close early if all business is finished. Written material and requests to make oral presentations should reach the Coast Guard on or before September 23, 2004. Requests to have a copy of your material distributed to each member of the Committee should reach the Coast Guard on or before September 23, 2004.

**ADDRESSES:** CTAC will meet at U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC, in room 2415. Both the Subcommittee on National Fire Protection Association 472 and Hazardous Cargo Transportation Security will meet at Department of Transportation Headquarters, Nassif Building, 400 7th Street, SW., Washington, DC, in room 4438/4440. Send written material and requests to make oral presentations to Commander Robert J. Hennessy, Executive Director of CTAC, Commandant (G–MSO–3), U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593–0001 or e-mail: *CTAC@comdt.uscg.mil*. This notice is available on the Internet at *http://dms.dot.gov*.

**FOR FURTHER INFORMATION CONTACT:** Commander Robert J. Hennessy, Executive Director of CTAC, or Ms. Sara Ju, Assistant to the Executive Director, telephone 202–267–1217, fax 202–267–4570.

**SUPPLEMENTARY INFORMATION:** Notice of these meetings is given under the Federal Advisory Committee Act, 5 U.S.C. App. 2.

*Agenda of the National Fire Protection Association 472 Subcommittee Meeting on September 29, 2004:*

(1) Introduce Subcommittee members and attendees.

(2) Discuss results of meeting with the Technical Committee on Hazardous Materials Response Personnel of the National Fire Protection Association.

(3) Prepare draft chapter for possible incorporation of marine specific competencies into the National Fire Protection Association (NFPA) 472 Standard.

*Agenda of the Hazardous Cargo Transportation Security Subcommittee Meeting on September 29, 2004:*

(1) Introduce Subcommittee members and attendees.

(2) Discuss status of CTAC recommendations to the Coast Guard.

(3) Discuss future efforts of the Subcommittee.

*Agenda of CTAC Meeting on Thursday, September 30, 2004:*

(1) Introduce Committee members and attendees.

(2) Status report from the CTAC National Fire Protection Association 472 Subcommittee.

(3) Status report from CTAC Hazardous Cargo Transportation Security Subcommittee.

(4) Discussion of responsibilities and limitations of CTAC liaison to other advisory committees.

(5) Discussion of CTAC charter review workgroup.

(6) Presentation by CTAC reviewing recent marine casualties.

(7) Discussion of possible establishment of a new subcommittee on reviewing marine casualties.

(8) Presentation on security initiatives developed by the Deep Draft Facilitation Subcommittee of the Houston/Galveston Navigation Safety Advisory Committee.

(9) Presentation by the Coast Guard's Office of Port, Vessel, and Facility Security (G–MPS) on the status of the Maritime Transportation Security Act implementation.

(10) Presentation by the Coast Guard's Office of Hazardous Materials Standards (G–MSO–3) on the status of the benzene rulemaking.

**Procedural**

These meetings are open to the public. Please note that the meetings may close early if all business is finished. At the discretion of the Chair, members of the public may make oral presentations during the meetings. If you would like to make an oral presentation at a meeting, please notify the Executive Director and submit written material on or before September 23, 2004. If you would like a copy of your material distributed to each member of the Committee in advance of a meeting, please submit 25 copies to the Executive Director (see **ADDRESSES**) no later than September 23, 2004.

**Information on Services for Individuals With Disabilities**

For information on facilities or services for individuals with disabilities, or to request special assistance at the meeting, telephone the Executive Director as soon as possible.

Dated: September 1, 2004.

**Joseph J. Angelo,**

*Director of Standards, Marine Safety, Security and Environmental Protection.*

[FR Doc. 04–20546 Filed 9–10–04; 8:45 am]

**BILLING CODE 4910–15–P**

## DEPARTMENT OF HOMELAND SECURITY

### Bureau of Customs and Border Protection

### Automated Commercial Environment (ACE): Announcement of a National Customs Automation Program Test of Automated Truck Manifest for Truck Carrier Accounts

**AGENCY:** Bureau of Customs and Border Protection.

**ACTION:** General notice.

**SUMMARY:** This document announces that the Bureau of Customs and Border Protection (CBP), in conjunction with the Department of Transportation, Federal Motor Carrier Safety Administration (FMCSA), plans to conduct a National Customs Automation Program (NCAP) test concerning the transmission of automated truck manifest data. This notice provides a description of the test process, outlines the development and evaluation methodology to be used, sets forth eligibility requirements for participation, and invites public comment on any aspect of the planned test.

**DATES:** The test will commence no earlier than November 29, 2004. Comments concerning this notice and all aspects of the announced test may be submitted at any time during the test period.

**ADDRESSES:** Written comments concerning program, policy and technical issues should be submitted to Mr. Thomas Fitzpatrick via e-mail at *Thomas.Fitzpatrick@dhs.gov*.

**FOR FURTHER INFORMATION CONTACT:** Mr. Thomas Fitzpatrick via e-mail at *Thomas.Fitzpatrick@dhs.gov*.

**SUPPLEMENTARY INFORMATION:**

**Background**

The CBP Modernization Program has been created to improve efficiency and security, increase effectiveness, and reduce costs for the Bureau of Customs and Border Protection (CBP) and all of its communities of interest. The ability to meet these objectives depends heavily on successfully modernizing CBP business functions and the information technology that supports those functions.

The initial thrust of the Customs and Border Protection Modernization Program (*see* North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2170 (December 8, 1993)) focuses on Trade Compliance and the development of the Automated Commercial Environment (ACE) through the National Customs Automation Program (NCAP). The purposes of ACE, successor to the Automated Commercial System (ACS), are to streamline business processes, to facilitate growth in trade, to ensure cargo security, and to foster participation in global commerce, while ensuring compliance with U.S. laws and regulations. Development of ACE will consist of many releases. Each release, while individually achieving critical business needs, will also set forth the foundation for the subsequent releases.

The component for which this document is announcing a test involves allowing participating Truck Carrier Accounts to transmit electronic manifest data in ACE (including advance cargo information as required by section 343 of the Trade Act of 2002, as amended by the Maritime Transportation Act of 2002 (*see* 68 FR 68140, December 5, 2003)). Truck Carrier Accounts who participate in this test will have the ability to electronically transmit the truck manifest data and obtain release of their cargo, crew, conveyances, and equipment via the ACE Portal or electronic data interchange (EDI) messaging. The Federal Motor Carrier Safety Administration (FMCSA) will participate in this test.

**Authorization for the Test**

The Customs Modernization provisions in the North American Free Trade Agreement Implementation Act provide the Commissioner of CBP with authority to conduct limited test programs or procedures designed to evaluate planned components of the NCAP. This test is authorized pursuant to § 101.9(b) of the CBP Regulations (19 CFR 101.9(b)) which provides for the testing of NCAP programs or procedures. *See* T.D. 95–21. *See also* 67 FR 77128, dated December 16, 2002, which re-designated the NCAP program test of the account-based declaration prototype as the Free and Secure Trade (FAST) prototype and modified and expanded the prototype; and 68 FR 55405, dated September 25, 2003, which further modified the FAST prototype.

**Implementation of the Test**

This test of the Automated Truck Manifest will be conducted in a phased approach, with primary deployment scheduled for no earlier than November 29, 2004. At the initial stages of the test, truck manifest data will be transmitted for conveyances crossing at the ports of Blaine, Washington, and Buffalo, New York. Subsequent deployment will occur at Champlain, New York; Detroit, Michigan; Laredo, Texas; Otay Mesa, California; and Port Huron, Michigan, on dates to be announced. Implementation of the automated truck manifest functionality will not be immediate at all of the above referenced ports. CBP will announce the implementation and sequencing of truck manifest functionality at these ports as they occur. The test will eventually be expanded to include ACE Truck Carrier Account participants at all land border ports, and subsequent releases of ACE will include all modes of transportation. Additional participants and ports will be selected throughout the duration of the test. CBP will process additional Truck Carrier Account applications as

CBP expands the universe of participation for this test.

**Eligibility and Acceptance**

Eligibility criteria for truck carrier participation was set forth in the **Federal Register** notice published February 4, 2004 (69 FR 5360). All Truck Carrier Account applications meeting the eligibility criteria were accepted. To be eligible for participation in this test, a carrier must have:

1. Submitted an application (*i.e.*, statement of intent to establish an ACE Account and to participate in the testing of electronic truck manifest functionality) as set forth in the February 4, 2004, **Federal Register** notice (69 FR 5360);
2. Provided a Standard Carrier Alpha Code(s) (SCAC);
3. Provided the name, address, and e-mail of a point of contact to receive further information.

In addition, participants intending to use the ACE Secure Data Portal as the means to file the manifest must submit a statement of the ability to connect to the Internet. Participants intending to use an EDI interface will be required to first test their ability to send and receive electronic messages in either American National Standards Institute (ANSI) X12 or United Nations/Directories for Electronic Data Interchange for Administration, Commerce and Transport (UN/EDIFACT) format with CBP.

It is anticipated that future applications meeting the eligibility criteria will be accepted. Acceptance into this test does not guarantee eligibility for, or acceptance into, future technical tests.

**Expansion of Participation**

Participation in the automated truck manifest test will be expanded in the future as funding allows; however the eligibility criteria may differ from the criteria listed in this notice. Additionally, expansion of this test to allow future applicants to participate may be delayed due to funding or technological constraints. CBP will accept, hold, or reject additional Truck Carrier Account applications throughout the duration of the test. New applicants interested in participating in this test must submit an application, per the Account Application Process section of the February 4, 2004, **Federal Register** notice (69 FR 5360), to CBP, and will be notified of the status of their application (*i.e.*, whether CBP has accepted their application for participation upon an initial expansion, or, is holding their application pending a further expansion of the test). CBP will notify any applicant not meeting the eligibility criteria or providing an incomplete application, and allow such applicant an opportunity to resubmit its application.

Eligible Truck Carrier Accounts are further reminded that participation in the automated electronic truck manifest functionality is not confidential. Lists of approved participants will be made available to the public.

**Method of Transmission**

For purposes of this test, an interface to the trade will be established that will support both manual Internet filing via the ACE Secure Data Portal and EDI filing via either ANSI X12 or UN/EDIFACT messaging. CBP supports multiple communication interfaces for accessing ACE through EDI. Each potential ACE participant must evaluate the options and select the most appropriate interface based upon participant performance and business requirements. The list of options includes:

- CBP Internet Protocol (IP) Virtual Private Network (VPN)/Message Queuing (MQ) Series over the Internet (new option)
- CBP Frame Relay/MQ Series Network
- Value Added Networks (VANS)
- Service Centers.

**Description of the Test**

*Transmission of Data Prior to Arrival*

Participants in the test of automated truck manifest functionality (Release 4 of ACE) are required to submit truck manifest data including advance cargo information at least one hour in advance of the arrival of the conveyance at the first U.S. port of crossing. If, however, a participant is filing data via the FAST prototype, information must be submitted at least 30 minutes prior to the arrival of the conveyance at the first U.S. port of crossing. This 30-minute or one-hour period will be measured from the time that CBP receives the final manifest submission. Use of the ACE truck manifest system in this test will satisfy required electronic presentation of cargo information for truck carriers as mandated by section 343(a) of the Trade Act of 2002, as amended.

*Manifest Data*

For purposes of this notice, a standard manifest consists of all of the CBP required data (listed below in a later section of this notice) for the establishment of a truck manifest. This data includes advance cargo information as required by the Trade Act of 2002, as amended by the Maritime Transportation Act of 2002. The data must be submitted either with each manifest submission or portions of this data can be drawn from data stored in the carrier's ACE account. Shipment information can be established in the ACE truck manifest system prior to its association with a specific trip, conveyance, equipment and crew. Conversely, information consisting of trip, conveyance, crew and equipment details can be submitted to ACE truck manifest prior to the submission of shipment details. In all cases, it is required that shipments match the trip to which they are associated.

A truck carrier will transmit manifest/cargo information and is responsible for the accuracy and completeness of the data filed on the electronic manifest. An electronic truck manifest will list the applicable combination of trip, conveyance, equipment and shipment details. The Truck Carrier Account owner will also have the option of delegating the right to transmit the manifest data to a Portal User on its Account.

For purposes of the initial stages of the test, the ACE truck manifest system will accept information regarding the splitting of shipments covered by house bills or master bills. It will not support the splitting of shipments when part is covered by a house bill and part by a master bill. Also, if a transmitting party uses the ACE truck manifest for a conveyance arrival, it must be used for all shipments arriving on that conveyance.

*Test Processes Supported*

The test will support the following processes: Free And Secure Trade (FAST), Pre-Arrival Processing System (PAPS), Border Release Advance Screening and Selectivity (BRASS), Section 321, and In-bond. Automated release processes include transponder and proximity card technology that are utilized in conjunction with the automated truck manifest to facilitate timely releases while maintaining a high level of border security. Transponder and proximity cards must be used in the FAST process and are recommended, but not required, for all other processes (*i.e.*, PAPS, BRASS, Section 321, and In-bond).

The test processes are as follows:

PAPS

PAPS is the process for the electronic transmission of immediate delivery, entry, and entry summary data to CBP prior to conveyance arrival through ACS, using the Automated Broker Interface (ABI) module as indicated in 19 CFR 143.32(b). The PAPS system

requires the designated entry filer to transmit the entry information via ABI to CBP for validation and risk assessment prior to arrival. For PAPS, the carrier will provide a Shipment Control Number (SCN), which is the Master Bill of Lading, Airway Bill or ProBill Number. If the carrier is transporting consolidated cargo it will provide both the SCN and its associated Bill Control Number (BCN), which is the House Bill of Lading, Airway Bill or ProBill Number issued by a transportation intermediary (*e.g.*, freight forwarder, Non-Vessel Operating Common Carrier (NVOCC), or freight consolidator). The SCN number provided by the carrier must match the number supplied by the entry filer on the entry. A bar code used to report the Bill number will no longer be needed.

BRASS

BRASS provides for the tracking and releasing of highly repetitive shipments at land border locations. Parties currently on BRASS received a unique alphanumeric identifier known as a C–4 code when the BRASS application was received and approved by CBP. The C–4 code will be entered by the carrier into the manifest shipment records. In addition, the shipment records must contain the information set forth below (*see Data Elements Required To Be Reported on the Electronic Manifest*). It should be noted that new BRASS applications will not be entertained; only current BRASS users may use BRASS for the Automated Truck Manifest test.

Section 321

The Section 321 process provides for an electronic method to manifest and enter merchandise not exceeding $200 in value (which meets the regulatory requirements defined in 19 CFR 10.151 and 10.152) pursuant to 19 U.S.C. 1321. In order to file a Section 321 entry, in addition to the required shipment details listed below (*see Data Elements Required To Be Reported on the Electronic Manifest*), the following information is required: country of origin of the merchandise and value.

In-bond

In-bond transmissions may be made by the carrier when it knows that the shipment being transported is not to be released for consumption at the port of arrival and is destined for a port beyond that initial port. The in-bond process will support entries for Immediate Transportation (IT), Transportation and Exportation (T&E), and Immediate Exportation (IE). A declaration can be made on the manifest transmission to provide the necessary in-bond data for the shipment destined for another port. Alternatively, the in-bond request can be made via the ACS electronic in-bond transaction QP/WP or presentation of Customs Automated Forms Entry System (CAFES) bar code. Export of in-bond shipments may be reported via ABI (QP/WP).

FAST

Participants choosing to use FAST may use only FAST with regard to any particular trip. FAST transmissions will remain unchanged in the initial stages of the test. Truck carriers must submit advance electronic cargo information at least one half hour prior to the arrival of the conveyance at the first U.S. port following the requirements for FAST. The driver must be a registered FAST participant with a proximity card. The truck must be equipped with a transponder. The carrier and importer must be Customs Trade Partnership Against Terrorism (C–TPAT) participants. For participation on the southern border, the manufacturer also must be a C–TPAT participant and the equipment must be sealed.

**CBP Return Messages**

CBP trip, conveyance, crew, and shipment status messages will be generated and sent to the carrier, after the conveyance has arrived and is processed at the first U.S. port of arrival.

**Data Elements Required To Be Reported on the Electronic Manifest**

On December 5, 2003, CBP published in the **Federal Register** (68 FR 68140) the Final Rule regarding the Required Advance Electronic Presentation of Cargo Information. The following cargo information is required for all processes in the initial stage of the test (except FAST), with some noted modifications:

(1) Conveyance number, and (if applicable) equipment number (the number of the conveyance is its Vehicle Identification Number (VIN) or its license plate number and State of issuance; the equipment number, if applicable, refers to the identification number of any trailing equipment or container attached to the power unit. For purposes of this test, both the VIN and the license plate number are required);

(2) Carrier identification (*i.e.*, the truck carrier identification SCAC code (the unique Standard Carrier Alpha Code) assigned for each carrier by the National Motor Freight Traffic Association);

(3) Trip number and, if applicable, the transportation reference number for each shipment (The transportation reference number is the freight bill number, or Pro Number, if such a number has been generated by the carrier. For purposes of this test the SCN and, if applicable, the associated BCNs are required);

(4) Container number(s) (for any containerized shipment, if different from the equipment number), and the seal numbers for all seals affixed to the equipment or container(s) (For purposes of this test, seal numbers will be enforced in FAST on the southern border);

(5) The foreign location where the truck carrier takes possession of the cargo destined for the U.S.;

(6) The scheduled date and time of arrival of the truck at the first port of entry in the U.S.;

(7) The numbers and quantities for the cargo laden aboard the truck as contained in the bill(s) of lading (this means the quantity of the lowest external packaging unit; numbers referencing only containers and pallets do not constitute acceptable information; for example, a container holding 10 pallets with 200 cartons should be described as 200 cartons);

(8) The weight of the cargo, or, for a sealed container, the shipper's declared weight of the cargo;

(9) A precise description of the cargo and/or the Harmonized Tariff Schedule (HTS) numbers to the 6-digit level under which the cargo will be classified. (Generic descriptions, specifically those such as freight of all kinds (FAK), general cargo, and cargo said to contain (STC) are not acceptable.);

(10) Internationally recognized hazardous material code when such cargo is being shipped by truck;

(11) The shipper's complete name and address, or identification number. (The identity of the foreign vendor, supplier, manufacturer, or other similar party is acceptable and the address of the foreign vendor, etc., must be a foreign address. By contrast, the identity of the carrier, freight forwarder, consolidator, or broker, is not acceptable. The identification number will be a unique number to be assigned by CBP upon the implementation of the Automated Commercial Environment; and

(12) The complete name and address of the consignee, or identification number. (The consignee is the party to whom the cargo will be delivered in the U.S., with the exception of Foreign Cargo Remaining on Board (FROB).) The identification number will be a unique number assigned by CBP upon implementation of the Automated Commercial Environment.

Additionally, for purposes of this test, the following information is requested

(although not required pursuant to the December 5, 2003 final rule):

(13) DOT number;
(14) Person on arriving conveyance who is in charge;
(15) Names of all crew members;
(16) Date of birth of each crew member;
(17) Commercial driver's license (CDL)/drivers license number for each crew member;
(18) CDL/driver's license State/province of issuance for each crew member;
(19) CDL country of issuance for each crew member;
(20) Travel document number for each crew member;
(21) Travel document country of issuance for each crew member;
(22) Travel document State/province of issuance for each crew member;
(23) Travel document type for each crew member;
(24) Address for each crew member. (For purposes of this test, this is defined as the physical location, in the U.S., where a crew member will actually be on this particular trip. This could include a consignee's location, a hotel, a truck stop, or a family or friend's location. Those individuals possessing a FAST ID are exempt from the U.S. address requirement.);
(25) Gender of each crew member;
(26) Nationality/citizenship of each crew member;
(27) Method of transport (defined as the mode by which the merchandise crosses the international border);
(28) Conveyance type;
(29) Conveyance State/province of registration; and
(30) Equipment State/province of registration.

The submission of the following information is considered conditional and must be submitted only where applicable:

(31) Hazmat endorsement for each crew member;
(32) Names of all passengers;
(33) Date of birth of each passenger;
(34) Travel document number for each passenger;
(35) Travel document country of issuance for each passenger;
(36) Travel document State/province of issuance for each passenger;
(37) Travel document type for each passenger;
(38) Gender of each passenger;
(39) Nationality of each passenger;
(40) Import/export/in-transit indicator;
(41) Conveyance country of registration;
(42) Conveyance insurance company name;
(43) Conveyance insurance policy number;
(44) Year of issuance;
(45) Insurance amount;
(46) Transponder number;
(47) Shipment release type;
(48) Equipment type;
(49) Equipment country of registration;
(50) Conveyance or equipment instrument of international traffic indicator;
(51) Estimated date of U.S. departure (for use with T&E or IE);
(52) In-bond destination;
(53) Onward carrier (the SCAC code of the carrier to whom the In-bond goods are being transferred);
(54) Foreign port of unloading;
(55) Place of receipt;
(56) Service type (the type of shipping contract);
(57) Party, ID number, and type (for any other party to the transaction listed on the trucker's bill of lading);
(58) C–4 code;
(59) Shipment identifier (any number that the carrier may wish to pass on to the broker, *i.e.*, purchase order, commercial invoice, etc.);
(60) Paperless in-bond number;
(61) In-bond CF–7512 number;
(62) Bonded carrier ID number;
(63) Transfer carrier (intended to be the cartman, local carrier);
(64) Transfer destination firms code;
(65) Hazmat contact;
(66) FDA freight indicator (identifies FDA jurisdiction over the shipment; this is not the prior notice requirement as set forth in the Bio-Terrorism Act);
(67) Country of origin of the cargo;
(68) Value; and
(69) Entry type code.

The submission of the following information is considered optional upon the discretion of the submitting party:

(70) Marks and numbers (on packaging to be distinguished from numbers required by advance cargo information).

**Misconduct Under the Test**

If a test participant fails to follow the terms and conditions of this test, fails to exercise reasonable care in the execution of participant obligations, fails to abide by applicable laws and regulations, misuses the ACE Portal, engages in any unauthorized disclosure or access to the ACE Portal, or engages in any activity which interferes with the successful evaluation of the new technology, the participant may be subject to civil and criminal penalties, administrative sanctions, liquidated damages, and/or suspension from this test.

Suspensions for misconduct will be administered by the Executive Director, Trade Compliance and Facilitation. A notice proposing suspension will be provided in writing to the participant. Such notice will apprise the participant of the facts or conduct warranting suspension and will inform the participant of the date that the suspension will begin. Any decision proposing suspension of a participant may be appealed in writing to the Assistant Commissioner, Office of Field Operations, within 15 calendar days of the notification date. Should the participant appeal the notice of proposed suspension, the participant must address the facts or conduct charges contained in the notice and state how compliance will be achieved. However, in the case of willful misconduct, or where public health, interest or safety is concerned, the suspension may be effective immediately.

**Test Evaluation Criteria**

To ensure adequate feedback, participants are required to participate in an evaluation of this test. CBP also invites all interested parties to comment on the design, conduct and implementation of the test at any time during the test period. CBP will publish the final results in the **Federal Register** and the CBP Bulletin as required by section 101.9(b) of the CBP Regulations (19 CFR 101.9(b)).

The following evaluation methods and criteria have been suggested:

1. Baseline measurements to be established through data analysis;

2. Questionnaire from both trade participants and CBP addressing such issues as:

- Workload impact (workload shifts/volume, cycle times, etc.);
- Cost savings (staff, interest, reduction in mailing costs, etc.);
- Policy and procedure accommodation;
- Trade compliance impact;
- Problem resolution;
- System efficiency;
- Operational efficiency;
- Other issues identified by the participant group.

Dated: September 8, 2004.

**William S. Heffelfinger III,**

*Acting Assistant Commissioner, Office of Field Operations.*

[FR Doc. 04–20585 Filed 9–10–04; 8:45 am]

BILLING CODE 4820–02–P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

[FEMA–1545–DR]

### Florida; Amendment No. 1 to Notice of a Major Disaster Declaration

**AGENCY:** Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Notice.

**SUMMARY:** This notice amends the notice of a major disaster declaration for the State of Florida (FEMA–1545–DR), dated September 4, 2004, and related determinations.

**EFFECTIVE DATE:** September 5, 2004.

**FOR FURTHER INFORMATION CONTACT:** Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

**SUPPLEMENTARY INFORMATION:** The notice of a major disaster declaration for the State of Florida is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of September 4, 2004:

Broward, Citrus, Glades, Hernando, Highlands, Lake, Miami-Dade, Okeechobee, Orange, Osceola, Pasco, Polk, and Sumter Counties for Individual Assistance (already designated for debris removal and emergency protective measures (Categories A and B) and direct Federal assistance at 100 percent Federal funding of the total eligible costs for the first 72 hours.)

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individual and Household Housing; 97.049, Individual and Household Disaster Housing Operations; 97.050 Individual and Household Program-Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

**Michael D. Brown,**

*Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.*

[FR Doc. 04–20572 Filed 9–10–04; 8:45 am]

BILLING CODE 9110–10–P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

[FEMA–1545–DR]

### Florida; Major Disaster and Related Determinations

**AGENCY:** Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Notice.

**SUMMARY:** This is a notice of the Presidential declaration of a major disaster for the State of Florida (FEMA–1545–DR), dated September 4, 2004, and related determinations.

**EFFECTIVE DATE:** September 4, 2004.

**FOR FURTHER INFORMATION CONTACT:** Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that, in a letter dated September 4, 2004, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the damage in certain areas of the State of Florida resulting from Hurricane Frances beginning on September 3, 2004, and continuing is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). I, therefore, declare that such a major disaster exists in the State of Florida.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes, such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance in the designated areas, assistance for debris removal and emergency protective measures (Categories A and B) under the Public Assistance program in all counties in the State, and Hazard Mitigation statewide, and any other forms of assistance under the Stafford Act you may deem appropriate subject to completion of Preliminary Damage Assessments. Direct Federal assistance is authorized.

Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance, Hazard Mitigation, and the Other Needs Assistance under Section 408 of the Stafford Act will be limited to 75 percent of the total eligible costs. For the first 72 hours, you are authorized to fund direct Federal assistance and assistance for debris removal and emergency protective measures at 100 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, William L. Carwile III, of FEMA is appointed to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following areas of the State of Florida to have been affected adversely by this declared major disaster:

Brevard, Indian River, Martin, Palm Beach, and St. Lucie Counties for Individual Assistance.

Debris removal and emergency protective measures (Categories A and B) and direct Federal assistance for all counties in the State of Florida at 100 percent Federal funding of the total eligible costs for the first 72 hours.

All counties within the State of Florida are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individual and Household Housing; 97.049, Individual and Household Disaster Housing Operations; 97.050 Individual and Household Program—Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

**Michael D. Brown,**

*Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.*

[FR Doc. 04–20574 Filed 9–10–04; 8:45 am]

BILLING CODE 9110–10–P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

[FEMA–1542–DR]

### Indiana; Major Disaster and Related Determinations

**AGENCY:** Federal Emergency Management Agency, Emergency

Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Notice.

**SUMMARY:** This is a notice of the Presidential declaration of a major disaster for the State of Indiana (FEMA–1542–DR), dated September 1, 2004, and related determinations.

**EFFECTIVE DATE:** September 1, 2004.

**FOR FURTHER INFORMATION CONTACT:** Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that, in a letter dated September 1, 2004, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the damage in certain areas of the State of Indiana, resulting from severe storms, tornadoes and flooding on July 3–18, 2004, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). I, therefore, declare that such a major disaster exists in the State of Indiana.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes, such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act you may deem appropriate. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance, Hazard Mitigation, and the Other Needs Assistance under Section 408 of the Stafford Act will be limited to 75 percent of the total eligible costs. If Other Needs Assistance under Section 408 of the Stafford Act is later requested and warranted, Federal funding under that program will also be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Thomas J. Costello, of FEMA is appointed to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following areas of the State of Indiana to have been affected adversely by this declared major disaster:

Clark, Clay, Crawford, Daviess, Dubois, Gibson, Greene, Harrison, Martin, Orange, Owen, Parke, Perry, Pike, Putnam, Scott, Spencer, Sullivan, Vermillion, and Warren Counties for Public Assistance.

All counties within the State of Indiana are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individual and Household Housing; 97.049, Individual and Household Disaster Housing Operations; 97.050 Individual and Household Program—Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

**Michael D. Brown,**

*Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.*

[FR Doc. 04–20569 Filed 9–10–04; 8:45 am]

**BILLING CODE 9110–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[FEMA–1535–DR]**

### Kansas; Amendment No. 4 to Notice of a Major Disaster Declaration

**AGENCY:** Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Notice.

**SUMMARY:** This notice amends the notice of a major disaster declaration for the State of Kansas (FEMA–1535–DR), dated August 3, 2004, and related determinations.

**EFFECTIVE DATE:** September 1, 2004.

**FOR FURTHER INFORMATION CONTACT:** Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

**SUPPLEMENTARY INFORMATION:** The notice of a major disaster declaration for the State of Kansas is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of August 3, 2004:

Barton, Decatur, Marion, Morris, Ness, Pawnee, Sheridan, Thomas, Wabaunsee and Wallace Counties for Public Assistance.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individual and Household Housing; 97.049, Individual and Household Disaster Housing Operations; 97.050 Individual and Household Program—Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

**Michael D. Brown,**

*Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.*

[FR Doc. 04–20573 Filed 9–10–04; 8:45 am]

**BILLING CODE 9110–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[FEMA–1541–DR]**

### Northern Mariana Islands; Amendment No. 2 to Notice of a Major Disaster Declaration

**AGENCY:** Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Notice.

**SUMMARY:** This notice amends the notice of a major disaster for the Commonwealth of the Northern Mariana Islands (FEMA–1541–DR), dated August 26, 2004, and related determinations.

**DATES:** Effective: August 26, 2004.

**FOR FURTHER INFORMATION CONTACT:** Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that the incident period for this disaster is closed effective August 26, 2004.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individual and Household Housing; 97.049, Individual and Household Disaster Housing Operations; 97.050 Individual and Household Program—Other Needs, 97.036, Public Assistance

Grants; 97.039, Hazard Mitigation Grant Program.)

Michael D. Brown,

*Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.*

[FR Doc. 04–20567 Filed 9–10–04; 8:45 am]

BILLING CODE 9110–10–P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[FEMA–1543–DR]**

### South Carolina; Major Disaster and Related Determinations

**AGENCY:** Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Notice.

**SUMMARY:** This is a notice of the Presidential declaration of a major disaster for the State of South Carolina (FEMA–1543–DR), dated September 1, 2004, and related determinations.

**EFFECTIVE DATE:** September 1, 2004.

**FOR FURTHER INFORMATION CONTACT:** Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that, in a letter dated September 1, 2004, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5206 (the Stafford Act), as follows:

I have determined that the damage in certain areas of the State of South Carolina, resulting from Hurricane Charley on August 14–15, 2004, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5206 (the Stafford Act). I, therefore, declare that such a major disaster exists in the State of South Carolina.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes, such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas, Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act you may deem appropriate. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance, Hazard Mitigation, and the Other Needs Assistance under Section 408 of the Stafford Act will be limited to 75 percent of the total eligible costs. If Other Needs Assistance under Section 408 of the Stafford Act is later requested and warranted, Federal funding under that program will also be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Michael E. Bolch, of FEMA is appointed to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following areas of the State of South Carolina to have been affected adversely by this declared major disaster:

Georgetown and Horry Counties for Public Assistance.

All counties within the State of South Carolina are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individual and Household Housing; 97.049, Individual and Household Disaster Housing Operations; 97.050, Individual and Household Program—Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

Michael D. Brown,

*Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.*

[FR Doc. 04–20568 Filed 9–10–04; 8:45 am]

BILLING CODE 9110–10–P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[FEMA–1544–DR]**

### Virginia; Amendment No. 1 to Notice of a Major Disaster Declaration

**AGENCY:** Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Notice.

**SUMMARY:** This notice amends the notice of a major disaster declaration for the Commonwealth of Virginia (FEMA–1544–DR), dated September 3, 2004, and related determinations.

**EFFECTIVE DATE:** September 6, 2004.

**FOR FURTHER INFORMATION CONTACT:** Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

**SUPPLEMENTARY INFORMATION:** The notice of a major disaster declaration for the Commonwealth of Virginia is hereby amended to include Public Assistance for the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of September 3, 2004:

The independent cities of Colonial Heights and Richmond and the counties of Chesterfield, Hanover and Henrico for Public Assistance (already designated for Individual Assistance.)

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individual and Household Housing; 97.049, Individual and Household Disaster Housing Operations; 97.050, Individual and Household Program—Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program)

Michael D. Brown,

*Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.*

[FR Doc. 04–20570 Filed 9–10–04; 8:45 am]

BILLING CODE 9110–10–P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[FEMA–1544–DR]**

### Virginia; Major Disaster and Related Determinations

**AGENCY:** Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Notice.

**SUMMARY:** This is a notice of the Presidential declaration of a major disaster for the Commonwealth of Virginia (FEMA–1544–DR), dated September 3, 2004, and related determinations.

**EFFECTIVE DATE:** September 3, 2004.

**FOR FURTHER INFORMATION CONTACT:** Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that, in a letter dated September 3, 2004, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the damage in certain areas of the Commonwealth of Virginia, resulting from severe storms, flooding and tornadoes associated with Tropical Depression Gaston beginning on August 30, 2004, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). I, therefore, declare that such a major disaster exists in the Commonwealth of Virginia.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes, such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance in the designated areas, Hazard Mitigation throughout the Commonwealth, and any other forms of assistance under the Stafford Act you may deem appropriate subject to completion of Preliminary Damage Assessments. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Hazard Mitigation and the Other Needs Assistance under Section 408 of the Stafford Act will be limited to 75 percent of the total eligible costs. If Public Assistance is later warranted, Federal funds provided under that program will also be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Marianne Jackson, of FEMA is appointed to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following areas of the Commonwealth of Virginia to have been affected adversely by this declared major disaster:

The independent cities of Colonial Heights, Hopewell, Petersburg, and Richmond, and the counties of Chesterfield, Dinwiddie, Hanover, Henrico, and Prince George for Individual Assistance.

All jurisdictions within the Commonwealth of Virginia are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individual and Household Housing; 97.049, Individual and Household Disaster Housing Operations; 97.050 Individual and Household Program—Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

**Michael D. Brown,**

*Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.*

[FR Doc. 04–20571 Filed 9–10–04; 8:45 am]

**BILLING CODE 9110–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[FEMA–1536–DR]**

### West Virginia; Amendment No. 2 to Notice of a Major Disaster Declaration

**AGENCY:** Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Notice.

**SUMMARY:** This notice amends the notice of a major disaster for the State of West Virginia (FEMA–1536–DR), dated August 6, 2004, and related determinations.

**EFFECTIVE DATE:** September 1, 2004.

**FOR FURTHER INFORMATION CONTACT:** Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that the incident period for this disaster is closed effective September 1, 2004.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individual and Household Housing; 97.049, Individual and Household Disaster Housing Operations; 97.050, Individual and Household Program—Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

**Michael D. Brown,**

*Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.*

[FR Doc. 04–20566 Filed 9–10–04; 8:45 am]

**BILLING CODE 9110–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

### Federal Radiological Preparedness Coordinating Committee Meeting

**AGENCY:** Federal Emergency Management Agency (FEMA), Emergency Preparedness and Response Directorate, Department of Homeland Security (DHS).

**ACTION:** Announcement of meeting.

**SUMMARY:** The Federal Radiological Preparedness Coordinating Committee (FRPCC) advises the public that the FRPCC will meet on October 20, 2004, in Washington, DC.

**DATES:** The meeting will be held on October 20, 2004, at 9 a.m.

**ADDRESSES:** The meeting will be held at DHS/FEMA Lobby Conference Center, 500 C Street, SW., DC.

**FOR FURTHER INFORMATION CONTACT:** Pat Tenorio, DHS/FEMA, 500 C Street, SW., Washington, DC 20472, telephone (202) 646–2870; fax (202) 646–4321; or e-mail *pat.tenorio@dhs.gov.*

**SUPPLEMENTARY INFORMATION:** The role and functions of the FRPCC are described in 44 CFR 351.10(a) and 351.11(a). The Agenda for the upcoming FRPCC meeting is expected to include: (1) Introductions, (2) Federal agencies' updates, (3) old business, (4) new business, and (5) business from the floor.

The meeting is open to the public, subject to the availability of space. Reasonable provision will be made, if time permits, for oral statements from the public of not more than five minutes in length. Any member of the public who wishes to make an oral statement at the October 20, 2004, FRPCC meeting should request time, in writing, from W. Craig Conklin, FRPCC Chair, DHS/FEMA, 500 C Street, SW., Washington, DC 20472. The request should be received at least five business days before the meeting. Any member of the public who wishes to file a written statement with the FRPCC should mail the statement to: Federal Radiological Preparedness Coordinating Committee,

c/o Pat Tenorio, DHS/FEMA, 500 C Street, SW., Washington, DC 20472.

Dated: September 8, 2004.

**W. Craig Conklin,**

*Chief, Nuclear and Chemical Hazards Branch, Preparedness Division, Department of Homeland Security.*

[FR Doc. 04–20610 Filed 9–10–04; 8:45 am]

BILLING CODE 9110–21–P

## DEPARTMENT OF HOMELAND SECURITY

### Transportation Security Administration

### Reports, Forms, and Recordkeeping Requirements: Agency Information Collection Activity Under OMB Review; Passengers With Disabilities Customer Satisfaction Survey

**AGENCY:** Transportation Security Administration (TSA), DHS.

**ACTION:** Notice.

**SUMMARY:** This notice announces that TSA has forwarded the Information Collection Request (ICR) abstracted below to the Office of Management and Budget (OMB) for review and clearance of an extension of the currently approved collection under the Paperwork Reduction Act. The ICR describes the nature of the information collection and its expected burden. TSA published **Federal Register** notice, with a 60-day comment period soliciting comments, of the following collection of information on May 18, 2004, 69 FR 28142.

**DATES:** Send your comments by October 13, 2004. A comment to OMB is most effective if OMB receives it within 30 days of publication.

**ADDRESSES:** Comments may be faxed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: DHS–TSA Desk Officer, at (202) 395–5806.

**FOR FURTHER INFORMATION CONTACT:** Kathleen Blank, Office of Transportation Security Policy, TSA–9, 601 South 12th Street, Arlington, VA 22202; or by telephone (571) 227–3254; facsimile (571) 227–1374.

**SUPPLEMENTARY INFORMATION:**

**Transportation Security Administration (TSA)**

*Title:* Passengers with Disabilities Customer Satisfaction Survey.

*Type of Request:* New collection of information.

*OMB Control Number:* Not yet assigned.

*Form(s):* Passengers with Disabilities Customer Satisfaction Survey.

*Affected Public:* Passengers with disabilities and disability advocates.

*Abstract:* TSA intends to conduct an anonymous, voluntary passenger satisfaction survey distributed by TSA screeners to passengers with disabilities at the conclusion of the screening process. The survey will be self-addressed and postage-paid so that the passenger can return it to TSA at their convenience. Alternatively, passengers may return the survey directly to a TSA screener, if they choose to complete it at the airport. TSA will also distribute surveys to advocacy groups that have worked with us to develop the standard operating procedures for screening passengers with disabilities. These groups will distribute surveys to their members to be returned to TSA. Passengers also will have the option of accessing a Web-based version of the survey and completing it online. Feedback from surveys completed online will be available at TSA. The survey will seek feedback on TSA's standard procedures for screening (1) Passengers with hearing, vision, mobility, and hidden disabilities, as well as other medical conditions, and (2) the assistive devices, equipment, aids, and supplies accompanying passengers in each category. TSA will use the results to evaluate and improve service to passengers with disabilities.

*Number of Respondents:* 30,000.

*Estimated Annual Burden Hours:* 5,000.

*Estimated Annual Cost Burden:* $0.00.

TSA is soliciting comments to:

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(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 are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Issued in Arlington, Virginia, on September 7, 2004.

**Susan T. Tracey,**

*Chief Administrative Officer.*

[FR Doc. 04–20553 Filed 9–10–04; 8:45 am]

BILLING CODE 4910–62–M

## DEPARTMENT OF HOMELAND SECURITY

### Transportation Security Administration

### Aviation Security Advisory Committee Meeting

**AGENCY:** Transportation Security Administration (TSA), DHS.

**ACTION:** Notice of meeting.

**SUMMARY:** This notice announces a public meeting of the Aviation Security Advisory Committee (ASAC).

**DATES:** The meeting will take place on September 30, 2004, from 9 a.m. to 3:30 p.m.

**ADDRESSES:** The meeting will be held in the Town Hall meeting room, first floor, Transportation Security Administration, 601 South 12th Street, Arlington, VA 22202.

**FOR FURTHER INFORMATION CONTACT:** Joseph Corrao, Office of Transportation Security Policy (TSA–9), Transportation Security Administration, 601 South 12th Street, Arlington, VA 22202; telephone (571) 227–2980, e-mail *joseph.corrao@dhs.gov*.

**SUPPLEMENTARY INFORMATION:** This meeting is announced pursuant to section 10(a)(2) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.). The agenda for the meeting will include—

- An update on TSA actions with regard to ASAC recommendations on air cargo security and general aviation airport security;
- A presentation on the status of new and emerging aviation security technologies; and
- A discussion of airport development issues related to new and emerging aviation security technologies; and other aviation security topics.

This meeting is open to the public but attendance is limited to space available. Please be aware that all members of the public should arrive at the TSA Headquarters Visitors Center, 601 South 12th Street, Arlington, Virginia, and allow time to complete the required building entry screening and obtain visitors' passes before being admitted to the meeting room.

Members of the public must make advanced arrangements to present oral statements at the open ASAC meeting. Written statements may be presented to the committee by providing copies of them to the Chair prior to or at the meeting. Anyone in need of assistance or a reasonable accommodation for the meeting should contact the person listed under the heading **FOR FURTHER INFORMATION CONTACT**. In addition, sign

and oral interpretation, as well as a listening device, can be made available at the meeting if requested 10 calendar days before the meeting. Arrangements may be made by contacting the person listed under the heading **FOR FURTHER INFORMATION CONTACT.**

Issued in Arlington, Virginia, on September 7, 2004.

**Chad Wolf,**

*Acting Assistant Administrator for Transportation Security Policy.*

[FR Doc. 04–20552 Filed 9–10–04; 8:45 am]

**BILLING CODE 4910–62–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### Sport Fishing and Boating Partnership Council

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, the Fish and Wildlife Service announces a meeting designed to foster partnerships to enhance public awareness of the importance of aquatic resources and the social and economic benefits of recreational fishing and boating in the United States. This meeting, sponsored by the Sport Fishing and Boating Partnership Council (Council), is open to the public, and interested persons may make oral statements to the Council or may file written statements for consideration.

**DATES:** The meeting will be held on Tuesday, September 28, 2004, and Wednesday, September 29, 2004, from 8 a.m. to 12 p.m.

**ADDRESSES:** The meeting will be held at the Trump Marina Hotel and Casino, Huron & Brigantine Boulevard, Atlantic City, New Jersey 08401; telephone (800) 777–1177.

Summary minutes of the conference will be maintained by the Council Coordinator, at 4401 N. Fairfax Drive, MS–3101–AEA, Arlington, VA 22203, and will be available for public inspection during regular business hours within 30 days following the meeting. Personal copies may be purchased for the cost of duplication.

**FOR FURTHER INFORMATION CONTACT:** Douglas Hobbs, Council Coordinator, at (703) 358–1711.

**SUPPLEMENTARY INFORMATION:** The Sport Fishing and Boating Partnership Council was formed in January 1993 to advise the Secretary of the Interior, through the Director, U.S. Fish and Wildlife Service, about sport fishing and boating issues. The Council represents the interests of the public and private sectors of the sport fishing and boating communities and is organized to enhance partnerships among industry, constituency groups, and government. The 18-member Council includes the Director of the Service and the president of the International Association of Fish and Wildlife Agencies, who both serve in ex-officio capacities. Other Council members are Directors from State agencies responsible for managing recreational fish and wildlife resources and individuals who represent the interests of saltwater and freshwater recreational fishing, recreational boating, the recreational fishing and boating industries, recreational fisheries resource conservation, aquatic resource outreach and education, and tourism. The Council will convene to discuss: (1) The Council's continuing role in providing input to the Fish and Wildlife Service on the Service's strategic vision for its Fisheries Program; (2) the Council's work in its role as a facilitator of discussions with Federal and State agencies and other sportfishing and boating interests concerning a variety of national boating and fisheries management issues; and (3) the Council's role in providing the Interior Secretary with information about the implementation of the Strategic Plan for the National Outreach and Communications Program. The Interior Secretary approved the Strategic Plan in February 1999, as well as the five-year, $36 million federally funded outreach campaign authorized by the 1998 Sportfishing and Boating Safety Act that is now being implemented by the Recreational Boating and Fishing Foundation, a private, nonprofit organization.

Dated: August 30, 2004.

**Matt Hogan,**

*Acting Director.*

[FR Doc. 04–20420 Filed 9–10–04; 8:45 am]

**BILLING CODE 4310–55–P**

## INTERNATIONAL TRADE COMMISSION

**[Inv. No. 337–TA–511]**

### In the Matter of Certain Pet Food Treats; Notice of Decision Not To Review an Initial Determination Granting Motion of United Pet Group, Inc. To Intervene in the Place of LLB Holdings, LLC

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (ID) issued by the presiding administrative law judge (ALJ) in the above-captioned investigation granting the motion of United Pet Group ("UPG") for leave to intervene in place of respondent LLB Holdings ("LLB").

**FOR FURTHER INFORMATION CONTACT:** Andrea Casson, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–3105. Copies of all nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation on June 8, 2004, based on a complaint filed by Thomas J. Baumgartner and Hillbilly Smokehouse, Inc., both of Rogers, Arkansas. 69 FR 32044. The complaint alleges violations of section 337 in the importation into the United States, sale for importation, or sale within the United States after importation of certain pet food treats that infringe U.S. Design Patent No. 383,886. The notice of investigation lists six companies as respondents, including LLB, which was formerly known as Dingo Brand LLC.

On June 23, 2004, UPG filed a motion to intervene in the investigation in place of named respondent LLB. UPG stated that, in January 2004, it purchased the Dingo product line and all assets associated with the accused LLB/Dingo products, and that therefore UPG is the real party in interest. No party responded to UPG's motion.

On August 12, 2004, the ALJ issued an ID (Order No. 4), granting UPG's motion. He terminated the investigation as to LLB, and added UPG as a respondent in this investigation. No petitions for review of the ID were filed.

This action is taken under the authority of section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, and sections 210.19 and 210.42(h) of the Commission Rules of Practice and Procedure, 19 CFR 210.19 and 210.42(h).

Issued: September 7, 2004.

By order of the Commission.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. 04–20556 Filed 9–10–04; 8:45 am]

BILLING CODE 7020–02–P

## INTERNATIONAL TRADE COMMISSION

### Government in the Sunshine Act Meeting Notice

**AGENCY HOLDING THE MEETING:** United States International Trade Commission.

**TIME AND DATE:** September 21, 2004, at 2 p.m.

**PLACE:** Room 101, 500 E Street, SW., Washington, DC 20436, telephone: (202) 205–2000.

**STATUS:** Open to the public.

**MATTERS TO BE CONSIDERED:**

1. Agenda for future meetings: None.
2. Minutes.
3. Ratification list.
4. Inv. No. 731–TA–244 (Second Review) (Natural Bristle Paintbrushes from China)—briefing and vote. (The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before September 30, 2004.)
5. Outstanding action jackets: None.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

Issued: September 9, 2004.

By order of the Commission.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. 04–20674 Filed 9–9–04; 12:21 pm]

BILLING CODE 7020–02–P

## JUDICIAL CONFERENCE OF THE UNITED STATES

### Hearings of the Judicial Conference Advisory Committees on Rules of Bankruptcy, Civil, and Criminal Procedure, and the Rules of Evidence

**AGENCY:** Judicial Conference of the United States, Advisory Committees on Rules of Bankruptcy, Civil, and Criminal Procedure, and the Rules of Evidence.

**ACTION:** Notice of proposed amendments and open hearings.

**SUMMARY:** The Advisory Committees on Rules of Bankruptcy, Civil, and Criminal Procedure, and the Rules of Evidence have proposed amendments to the following rules:

*Bankruptcy Rules:* 1009, 2002, 4002, 5005, 7004, 9001, 9036, and Official Form 6.

*Civil Rules:* 16, 26, 33, 34, 37, 45, 50, and Form 35.

*Admiralty Rules:* A, C, E, and new Rule G.

*Criminal Rules:* 5, 32.1, 40, 41, and 58.

*Evidence Rules:* 404, 408, 606, and 609.

**Notice of Proposed Amendments and Open Hearings**

The text of the proposed rules amendments and the accompanying Committee Notes can be found at the United States Federal Courts' Home page at *http://uscourts.gov/rules.*

The Judicial Conference Committee on Rules of Practice and Procedure submits these proposed rules amendments for public comment. All comments and suggestions with respect to them must be placed in the hands of the Secretary as soon as convenient and, in any event, not later than February 15, 2005. All written comments on the proposed rule amendments can be sent by one of the following three ways: by overnight mail to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Thurgood Marshall Federal Judiciary Building, Washington, DC 20544; by electronic mail at *http://www.uscourts.gov/rules*; or by facsimile to Peter G. McCabe at (202) 502–1766. In accordance with established procedures all comments submitted on the proposed amendments are available to public inspection.

Public hearings are scheduled to be held on the amendments to:

- Bankruptcy Rules in Washington, DC, on February 3, 2005; and in San Francisco, California, on February 7, 2005; and
- Civil Rules in San Francisco, California, on January 12, 2005; in Dallas, Texas, on January 28, 2005; and in Washington, DC on February 11, 2005.

**Notice of Proposed Amendments and Open Hearings**

- Criminal Rules in Tampa, Florida, on January 21, 2005; and in Washington, DC, on February 4, 2005; and
- Evidence Rules in San Francisco, California, on January 15, 2005, and in New Haven, Connecticut, on January 27, 2005.

Those wishing to testify should contact the Secretary at the address above in writing at least 30 days before the hearing.

**FOR FURTHER INFORMATION CONTACT:** John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, Washington, DC 20544, telephone (202) 502–1820.

Dated: September 3, 2004.

**John K. Rabiej,**

*Chief, Rules Committee Support Office.*

[FR Doc. 04–20575 Filed 9–10–04; 8:45 am]

BILLING CODE 2210–55–M

## JUDICIAL CONFERENCE OF THE UNITED STATES

### Meeting of the Judicial Conference Advisory Committee on Rules of Civil Procedure

**AGENCY:** Judicial Conference of the United States, Advisory Committee on Rules of Civil Procedure.

**ACTION:** Notice of open meeting.

**SUMMARY:** The Advisory Committee on Rules of Civil Procedure will hold a two-day meeting. The meeting will be open to public observation but not participation.

**DATES:** October 28–29, 2004.

**TIME:** 8:30 a.m. to 5 p.m.

**ADDRESSES:** La Fonda on the Plaza, 100 East San Francisco Street, Santa Fe, New Mexico.

**FOR FURTHER INFORMATION CONTACT:** John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, Washington, DC 20544, telephone (202) 502–1820.

Dated: September 3, 2004.

**John K. Rabiej,**

*Chief, Rules Committee Support Office.*

[FR Doc. 04–20576 Filed 9–10–04; 8:45 am]

BILLING CODE 2210–55–M

## JUDICIAL CONFERENCE OF THE UNITED STATES

### Meeting of the Judicial Conference Advisory Committee on Rules of Criminal Procedure

**AGENCY:** Judicial Conference of the United States.

**ACTION:** Notice of open meeting.

**SUMMARY:** The Advisory Committee on Rules of Criminal Procedure will hold a one-day meeting. The meeting will be open to public observation but not participation.

**DATES:** October 30, 2004.

**TIME:** 8:30 a.m. to 5 p.m.

**ADDRESSES:** La Fonda on the Plaza, 100 East San Francisco Street, Santa Fe, New Mexico.

**FOR FURTHER INFORMATION CONTACT:** John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, Washington, DC 20544, telephone (202) 502–1820.

Dated: September 3, 2004.

**John K. Rabiej,**

*Chief, Rules Committee Support Office.*

[FR Doc. 04–20577 Filed 9–10–04; 8:45 am]

**BILLING CODE 2210–55–M**

## JUDICIAL CONFERENCE OF THE UNITED STATES

### Meeting of the Judicial Conference Advisory Committee on Rules of Appellate Procedure

**AGENCY:** Judicial Conference of the United States; Advisory Committee on Rules of Appellate Procedure.

**ACTION:** Notice of open meeting.

**SUMMARY:** The Advisory Committee on Rules of Appellate Procedure will hold a one-day meeting. The meeting will be open to public observation but not participation.

**DATES:** November 9, 2004.

**TIME:** 8:30 a.m to 5 p.m.

**ADDRESSES:** Wyndham Grand Bay Coconut Grove Hotel, 2669 South Bay Shore Drive, Miami, Florida.

**FOR FURTHER INFORMATION CONTACT:** John K. Rabiej, Chief, Rule Committee Support Office, Administrative Office of the United States Courts, Washington, DC 20544, Telephone (202) 502–1820.

Dated: September 3, 2004.

**John K. Rabiej,**

*Chief, Rules Support Office.*

[FR Doc. 04–20578 Filed 9–10–04; 8:45 am]

**BILLING CODE 2210–55–M**

## JUDICIAL CONFERENCE OF THE UNITED STATES

### Meeting of the Judicial Conference Committee on Rules of Practice and Procedure

**AGENCY:** Judicial Conference of the United States, Committee on Rules of Practice and Procedure.

**ACTION:** Notice of open meeting.

**SUMMARY:** The Committee on Rules of Practice and Procedure will hold a two-day meeting. The meeting will be open to public observation but not participation.

**DATES:** January 13–14, 2005.

**TIME:** 8:30 a.m. to 5 p.m.

**ADDRESSES:** Clift Hotel, 495 Geary Street, San Francisco, California.

**FOR FURTHER INFORMATION CONTACT:** John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, Washington, DC 20544, telephone (202) 502–1820.

Dated: September 3, 2004.

**John K. Rabiej,**

*Chief, Rules Committee Support Office.*

[FR Doc. 04–20579 Filed 9–10–04; 8:45 am]

**BILLING CODE 2210–55–M**

## JUDICIAL CONFERENCE OF THE UNITED STATES

### Meeting of the Judicial Conference Advisory Committee on Rules of Bankruptcy Procedure

**AGENCY:** Judicial Conference of the United States, Advisory Committee on Rules of Bankruptcy Procedure.

**ACTION:** Notice of open meeting.

**SUMMARY:** The Advisory Committee on Rules of Bankruptcy Procedure will hold a two-day meeting. The meeting will be open to public observation but not participation.

**DATES:** March 10–11, 2005.

**TIME:** 8:30 a.m. to 5 p.m.

**ADDRESSES:** Hyatt—Sarasota, 1000 Boulevard of the Arts, Sarasota, Florida.

**FOR FURTHER INFORMATION CONTACT:** John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, Washington, DC 20544, telephone (202) 502–1820.

Dated: September 3, 2004.

**John K. Rabiej,**

*Chief, Rules Committee Support Office.*

[FR Doc. 04–20580 Filed 9–10–04; 8:45 am]

**BILLING CODE 2210–55–M**

## DEPARTMENT OF JUSTICE

### Office of Justice Programs

**[OJP(OJP)–1409]**

### Meeting of the Public Safety Officer Medal of Valor Review Board

**AGENCY:** Office of Justice Programs, Justice.

**ACTION:** Notice of meeting.

**SUMMARY:** This is an announcement of a meeting of the Public Safety Officer Medal of Valor Review Board to review applications for the 2004–2005 Medal of Valor Awards and to discuss upcoming activities.

**DATES:** The meeting will take place on Thursday, September 16, 2004 from 9 a.m. to 5 p.m. and Friday, September 17, 2004 from 9 a.m. to 5 p.m., e.d.t.

**ADDRESSES:** The meeting will take place at the Hilton, 10000 Beach Club Drive, Myrtle Beach, SC 29572; Tel: 1–843–449–5000; Fax: 1–843–497–0168.

**FOR FURTHER INFORMATION CONTACT:** Lizette Benedi, Deputy Assistant Attorney General. Office of Justice Programs, 810 7th Street NW., Sixth Floor, Washington, DC 20531; Phone: (202) 307–5933 (note: this is not a toll free number).

**SUPPLEMENTARY INFORMATION:**

**Authority:** The Public Safety Officer Medal of Valor Review Board is authorized to carry out its advisory function under 42 U.S.C. section 15202. (42 U.S.C. section 15201 authorizes the President to award the Public Safety Officer Medal of Valor, the highest national award for valor by a public safety officer.)

**Background**

This meeting will be open to the public and registrations will be accepted on a space available basis. Members of the public who wish to attend the meeting must register at least five (5) days in advance of the meeting by contacting Ms. Benedi at the above address. All attendees will be required to sign in at the meeting registration desk. Please bring photo identification and allow extra time prior to the meeting.

Access to the meeting will not be allowed without prior registration.

**Meeting Format**

This meeting will be held according to the following schedule:

*Dates:* Thursday, September 16, 2004, and Friday, September 17, 2004.

*Time:* 9 a.m.–5 p.m.; including breaks and working lunch.

Anyone requiring special accommodations should contact Ms. Benedi at least five (5) days in advance of the meeting.

Dated: September 7, 2004.

**Lizette Benedi,**

*Deputy Assistant Attorney General, Office of Justice Programs.*

[FR Doc. 04–20586 Filed 9–10–04; 8:45 am]

**BILLING CODE 4410–18–P**

## DEPARTMENT OF JUSTICE

### National Institute of Corrections

### Advisory Board Meeting

**TIMES AND DATES:** 8 a.m. to 4:30 p.m. on Monday, October 18, 2004; 8 a.m. to 4:30 p.m. on Tuesday, October 19, 2004.

**PLACE:** The Hilton Garden Inn, 815 14th Street, NW., Washington, DC 20005.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:** Welcome New Advisory Board Members; NIC Orientation; Briefing on NIC Strategic Plan; Public Health and Corrections briefing; Prison Rape Elimination Act; Board Business Issues.

**FOR FURTHER INFORMATION CONTACT:** Larry Solomon, Deputy Director, (202) 307–3106, ext. 44254.

**Morris L. Thigpen,**

*Director.*

[FR Doc. 04–20561 Filed 9–10–04; 8:45 am]

**BILLING CODE 4410–36–M**

## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

**[Application No. D–11220]**

### Notice of Proposed Individual Exemption Involving the ARINC Incorporated Retirement Income Plan (the Plan); Located in Annapolis, MD

**AGENCY:** Employee Benefits Security Administration, Department of Labor.

**ACTION:** Notice of proposed individual exemption.

**SUMMARY:** This document contains a notice of pendency before the Department of Labor (the Department) of a proposed 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). If granted, the proposed exemption would permit: (1) The in-kind contribution of the property described as the 27.5 acre headquarters of ARINC Incorporated (ARINC or the Applicant) situated in Annapolis, MD or the ownership interests of a special purpose entity (SPE) whose only asset is this property (collectively, the Property) to the Plan by ARINC, the plan sponsor and a party in interest with respect to the Plan (the Contribution); (2) the holding of the Property by the Plan; (3) the leaseback of the Property by the Plan to ARINC (the Lease or Leaseback); (4) the repurchase of the Property by ARINC (the Repurchase) pursuant to (a) a right of first offer to ARINC should the Plan wish to sell the Property to a third party or (b) a voluntary agreement under which the Plan agrees to sell the Property to ARINC at any time during the Lease; and (5) any payments to the Plan by ARINC made pursuant to a make whole obligation as specified below (the Make Whole Payment or Obligation) (collectively, the Exemption Transactions). If granted, the proposed exemption would affect participants and beneficiaries of, and fiduciaries with respect to, the Plan.

**DATES:** Written comments and requests for a public hearing should be received by the Department on or before October 20, 2004.

*Effective Date:* This proposed exemption, if granted, will be effective as of September 7, 2004.

**ADDRESSES:** All written comments and requests for a public hearing (preferably, three copies) should be sent to the Office of Exemption Determinations, Employee Benefits Security Administration, Room N–5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, (Attention: Exemption Application Number D–11220).

Interested persons are also invited to submit comments and/or hearing requests to the Department by the end of the scheduled comment period either by facsimile to (202) 219–0204 or by electronic mail to *moffitt.betty@dol.gov*. The application pertaining to the proposed exemption (Application) and the comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 20210.

**SUPPLEMENTARY INFORMATION:** This document contains a notice of pendency before the Department of a proposed individual 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(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code.

**FOR FURTHER INFORMATION CONTACT:** Wendy M. McColough of the Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, telephone (202) 693–8540. (This is not a toll-free number.)

### Summary of Facts and Representations

1. The Applicant. ARINC represents that it was founded in 1929 and provides transportation communications and systems engineering solutions to the defense industry and the airline industry. ARINC maintains 84 offices worldwide and serves more than 3,000 customers in more than 140 countries. ARINC confirms that its products and services generated approximately $636 million in annual revenues in 2003. Ninety-six percent of the voting shares of ARINC are owned by the six major United States airlines: American Airlines, Delta Airlines, Continental Airlines, Northwest Airlines, United Airlines, and U.S. Airways.

The Independent Fiduciary retained to represent the Plan in connection with the exemption request, Independent Fiduciary Services, Inc. (IFS), submitted a report to the Department on June 18, 2004 (the IFS Report). The IFS Report provides that ARINC is a leading provider of mission-critical communications and IT services to the global aviation industry (45% of revenues) and engineering services to the U.S. military and other government agencies (55%). The Federal Communications Commission has granted ARINC the exclusive right to manage and license the radio frequencies used by the airlines, and ARINC networks carry more than half of all air-ground messages in the world between commercial aircraft and airline operation centers. Other commercial transportation products include airport check-in and boarding systems, flight display and information systems, commuter rail control and information systems, and mobile private digital networks and ground communications systems. ARINC also provides engineering services such as systems engineering, acquisition and program management, operational support, and life-cycle support for defense aviation systems, with offices located at every U.S. Air Force base. ARINC also provides onsite technical and training support for complex electronic systems for all branches of the military, and provides integration of new navigational, communications, and command and control systems for defense and other government agencies.

2. The Property and the Qualified Independent Appraiser. ARINC has its headquarters in Annapolis, Maryland, where it occupies a six building office complex situated on 27.6 acres. The Applicant represents that this Property will be unencumbered at the time of the transaction and is a marketable and substantial asset appraised by Deloitte & Touche LLP (Deloitte) at $49,000,000 as of June 30, 2004 (The Appraisal). IFS appointed Deloitte, a nationally recognized, qualified, independent appraiser to appraise the Property. The Appraisal also estimated the prospective market value of the leased fee interest in the Property at the end of a 23-year lease to be $83,000,000. In a June 17, 2004 letter to IFS, Deloitte represents that, in accordance with the guidelines set out

by the Appraisal Institute, Deloitte is independent of IFS, ARINC and the Plan. Deloitte represents that it has no current or prospective financial interest in the appraised asset (the Property) and that the fee for the Appraisal is in no way dependent upon or influenced by the result of Deloitte's analysis.

Deloitte is an international accounting and consulting firm that provides, among other things, real estate financial advisory services, with personnel who have extensive experience providing valuation and appraisal services for real estate similar to the Property (office and industrial space) in the relevant geographic area (central Atlantic coastal region, including Maryland). Its personnel have earned professional designations from the organizations that accredit appraisers. For a more detailed description of the Property and the Appraisal, see the IFS Report paragraph below.

3. The Plan. ARINC sponsors and maintains a defined benefit pension plan. The formal name of the Plan is the "ARINC Incorporated Retirement Income Plan." The number of participants and beneficiaries in the Plan as of December 31, 2003, is 3,975. The plan administrator for the Plan is a Committee designated by the ARINC Board of Directors (the Committee or the Pension Committee). ARINC, through either its Board of Directors or through the Committee, has the power to appoint and remove Plan trustees, investment managers, and other service providers. Under the terms of the Plan, the Committee is the named fiduciary and has discretion with respect to the investment of the Plan's assets. Pursuant to its authority under the Plan, the Committee has appointed investment managers to manage plan assets. ARINC represents that with respect to the proposed transactions and the possible Monetization, the Committee will appoint an independent fiduciary to act as an investment manager with the authority and discretion to acquire, hold, lease, monetize, and dispose of the Property. No other Plan fiduciary will exercise investment discretion over the assets involved in the proposed transactions.

4. Plan Contributions. Contributions required to fund the Plan are made to and held under a single master trust, the ARINC Incorporated Defined Benefit Master Trust (the Master Trust). The Master Trust holds the assets of the Plan in separate sub-accounts, a non-union employee sub-account and a union employee sub-account. The Trustee of the Master Trust is Mellon Bank, N.A. The IFS Report states that as of December 31, 2003, the Plan was approximately 82% funded, with $252 million in assets and $308 million in liabilities measured on an accumulated benefit obligation basis (ABO) under Financial Accounting Standard (FAS) No. 87, *Employers' Accounting for Pensions*.[1] ARINC notes that, as recently as 2000, the Plan was overfunded and that the Plan has become underfunded due to three consecutive years of negative investment returns (2000 through 2002) and record low interest rates. Despite these conditions, ARINC states that it is committed to fully funding the Plan. Toward that goal, the company plans to make cash contributions for Plan Year 2003 totaling $18 million, well above its $8 million required contribution for Plan Year 2003. In addition, ARINC also plans to make a cash contribution in excess of the minimum requirement for Plan Year 2004. ARINC expects that, when combined with the contribution of the Property, its cash contribution for Plan Year 2004 will accomplish the goal of fully funding the Plan to the ABO level.

ARINC represents that the proposed contribution would be a voluntary contribution in excess of ARINC's minimum funding obligations under section 412 of the Code. Absent the contribution of the Property, ARINC will continue to make the required minimum contributions, but the Plan probably will not be fully funded in the near future. Thus, ARINC concludes that the contribution is very much in the interest of the Plan and its participants.

5. The Transfer Agreement and the Contribution. On March 25, 2004, ARINC submitted a draft transfer agreement dated March 24, 2004 (Draft Transfer Agreement). The Draft Transfer Agreement governs the terms upon which the Property will be contributed to and held by the Plan and is between ARINC (the Transferor), Aeronautical Radio, Inc. (ARI), a wholly-owned subsidiary of ARINC, and the Plan through its agent, IFS (the Transfer Agreement).

The Draft Transfer Agreement states that ARI is the owner of fee simple title in the Property. Subject to the terms and conditions set forth in the Draft Transfer Agreement, ARINC and ARI agree to transfer to the Plan, and the Plan agrees to acquire and assume, the Property. ARINC (and, to the extent applicable, ARI) shall retain all of its rights and obligations under and pursuant to any and all contracts (and amendments thereto) relating to the ownership, management, leasing, parking, operation, maintenance and/or repair of the Property (collectively, the Contracts). The Draft Transfer Agreement notes that consideration for the transfer of the Property by ARINC to the Plan, a voluntary contribution in excess of ARINC's minimum funding requirements under ERISA Section 302 and Code Section 412, is the improvement of the funded status of the Plan. As a result, ARINC's future required contributions will be reduced. Furthermore, the transfer of the Property by ARINC to the Plan will resolve or substantially resolve the underfunded status of the Plan.

The Plan shall have a period (the Review Period) commencing on the date of execution of the Transfer Agreement (Effective Date) and ending at 5 p.m. Eastern Standard Time on the date that is sixty (60) days after the Effective Date (the Review Period Expiration Date), to undertake a review and examination of all aspects of the Property, including the use and operation thereof. ARINC and ARI shall permit the Plan and IFS, and their respective agents, employees and contractors to enter upon the Property at any time and from time to time upon reasonable prior notice to Transferor to examine and/or test any aspect thereof.

If the Plan, in the Plan's sole discretion, is dissatisfied with the results of any examination of the Property or any studies or investigations as permitted herein or any matter set forth in the Property documents or for any other reason, the Plan shall have the right to terminate the Transfer Agreement at any time prior to the Review Period Expiration Date by providing written notice thereof to ARINC. Upon the giving of such notice, the Transfer Agreement shall terminate and all rights, obligations and liabilities of the parties hereunder shall be released and discharged, except under those provisions that expressly survive termination of the Transfer Agreement.

The Draft Transfer Agreement provides that all transactions involving the Plan in connection with the contribution of the Property to the Plan will be conducted and completed on terms no less favorable to the Plan than similar terms in arms length transactions involving unrelated parties. No commissions, fees, costs, charges or other expenses will be borne by the Plan in connection with the transfer of the Property to the Plan.

*The Form of Property Transfer*

Although the Application originally requested relief for the transfer of the fee interest in the Property directly from ARINC to the Plan, ARINC subsequently determined that a direct transfer of the fee interest to the Plan may subject

[1] The ABO is based on a 6.75% discount rate.

ARINC to a substantial Maryland state recordation tax. ARINC believes that this tax can be avoided if the fee interest is first transferred to a newly created single purpose entity (SPE) (which could be a Delaware corporation, an unincorporated business trust or a limited liability company), which would be a wholly owned subsidiary of ARINC or ARI, and then the interests in that SPE are transferred to the Plan. As a result, the Transfer Agreement provides that ARINC will cause ARI to either contribute the property directly to the Plan or first transfer the property to a newly created SPE one hundred percent (100%) owned by ARINC or ARI and then ARINC or ARI, as the case may be, will transfer one hundred percent (100%) of the interests in the SPE to the Plan.

ARINC asserts that the Exemption Transactions remain identical in economic substance to the transactions described in the Application, notwithstanding that it may take the form of a transfer of the ownership interests in the SPE. The Plan would hold one hundred percent (100%) of the ownership interest in the Property and the Plan would have the ordinary rights of the owner (subject to the terms of the Lease). ARINC adds that the Transfer Agreement includes specific provisions to protect the Plan's interests in connection with this change, including ARINC's representation that the SPE will have no obligations or liability unrelated to the property at the time of transfer. In addition, IFS, on behalf of the Plan, will review and approve the form of entity which is created and whose interests are transferred to the Plan. Finally, ARINC intends to establish the subsidiary entity just prior to closing so as to limit any possibility that the new entity would have any liability unrelated to the property.

*BearingPoint Lease*

ARINC informed the Department that on January 26, 2004, ARINC entered into a 1-year lease with BearingPoint Inc., a global business consulting firm (BearingPoint). The lease is renewable at BearingPoint's option for one subsequent 1-year term. Under the lease, BearingPoint leases 27,360 square feet, all of it on one floor of Building One on the Property. ARINC decided to lease this space since it is currently not needed by ARINC and it provides ARINC with a source of additional revenue. With the involvement and approval of IFS, the lease between ARINC and BearingPoint specifically provides that the BearingPoint lease will convert to a sublease if the Property is contributed to the Plan and leased back to ARINC. Thus, ARINC will lease all of the Property from the Plan and will sublease the current space occupied by BearingPoint to BearingPoint.

*Environmental Laws*

A Draft Transfer Agreement provision concerning ARINC's representations and warranties includes a paragraph on environmental laws and states that to ARINC's knowledge: (A) No portion of the Property is in violation of any applicable Environmental Law; (B) there is no presence or release of, nor has there been a release of, Hazardous Substances on or from the Property or Improvements, except as disclosed in writing to the Plan in the following reports: (i) Phase One Environmental Site Assessment for 2551 Riva Road, Annapolis, Maryland, prepared by Custer Environmental, Inc. (undated), and such presence or release, if any, has been fully remedied in accordance with all applicable Environmental Laws to the extent remediation is required; (C) no investigation, administrative order, consent order and agreement, litigation, or settlement with respect to any "Hazardous Substances" as defined by the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 *et seq.*), as amended (CERCLA) [2], is pending or threatened in writing with respect to the Property and Improvements; and (D) no aboveground or underground storage tanks on the Property are in violation of any applicable Environmental Law. Neither ARINC nor ARI have received any notice, and neither have knowledge, of any Hazardous Substances located on any property adjacent to the Property which could reasonably be expected to migrate to, or have a material adverse effect on, the Property.

6. The Lease Agreement. The Applicant submitted a draft lease term sheet, as revised on June 11, 2004, that provides the terms and conditions of the proposed lease agreement between ARINC and the Plan acting by and through IFS (Lease or Lease Agreement) to the Department (Draft Lease Term Sheet). On July 9, 2004, ARINC stated that this Draft Lease Term Sheet was agreed to by IFS and includes the material terms and conditions of the Lease Agreement. ARINC represents that these terms and conditions will be reflected in the final Lease Agreement.

According to the Draft Lease Term Sheet, the Plan may form a limited liability company (LLC) or other entity in which the Plan will be the sole member or owner and IFS will be the manager, which LLC or other entity will own the Property and be the lessor under the Lease. The term "Lessor" in the Draft Lease Term Sheet provisions discussed below refers to the Plan and the LLC or other entity in which the Plan is the member or owner and IFS is the manager. In an August 4, 2004 letter to the Department, ARINC notes that this is the typical way to hold interests in commercial real estate and this structure protects the Plan from potential liability associated with claims involving the Property. If ARINC, as expected, transfers the Property as interest in an SPE, the Plan, at its option, could elect to hold the stock in the SPE in a newly established LLC. Alternatively, the Plan may elect to convert the SPE to an LLC. Either way, ARINC asserts that prospective claims would lie against the LLC rather than the Plan.

*Transaction Description*

The Draft Lease Term Sheet states that ARINC will, or will cause its wholly owned subsidiary ARI, to contribute its right, title and interest in and to its headquarters property and all improvements thereon located at 2551 Riva Road in Annapolis, Maryland (the Property) to the Plan, acting by and through IFS as independent fiduciary. Simultaneously, "the Plan will lease the Property back to ARINC under a "true" tax, operating lease, the structure of which will be 'bondable' until the earlier of (i) the end of the first 10 years of the lease term or (ii) the date on which the Property is sold to a third party or transferred to a lender secured by the Property or the rental stream from the Property" (the Monetization), at which point the lease structure will convert to a traditional triple-net, "non-

[2] For purposes hereof, the term "Environmental Law" shall mean: (i) The Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 *et seq.*), as amended; (ii) the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*), as amended; (iii) the Emergency Planning and Community Right to Know Act (42 U.S.C. 11001 *et seq.*), as amended; (iv) the Clean Air Act (42 U.S.C. 7401 *et seq.*), as amended; (v) the Clean Water Act (33 U.S.C. 1251 *et seq.*), as amended; (vi) the Toxic Substances Control Act (15 U.S.C. 2601 *et seq.*), as amended; (vii) the Hazardous Materials Transportation Act (49 U.S.C. 1801 *et seq.*), as amended; (viii) the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. 136 *et seq.*), as amended; (ix) the Safe Drinking Water Act (42 U.S.C. 300f *et seq.*), as amended; (x) any state, county, municipal or local statutes, laws or ordinances similar or analogous to the federal statutes listed in parts (i)–(ix) of this definition; (xi) any amendments to the statutes, laws or ordinances listed in parts (i)–(x) of this definition in effect as of the Effective Date; (xii) any rules, regulations, guidelines, directives, orders or the like adopted pursuant to or to implement the statutes, laws, ordinances and amendments listed in parts (i)–(xi) of this definition; and (xiii) any other law, statute, ordinance, amendment, rule, regulation, or order relating to environmental, health or safety matters.

bondable" lease (the bondable and non-bondable structures are more particularly detailed below), with an initial term of 20 years and one 3-year extension option. If IFS desires to sell or convey the Property or any interest therein during the term of the Lease, ARINC shall have the right of first offer to purchase or otherwise acquire the Property or such interest therein (Right of First Offer or ROFO).

*Lease Term*

The Lease provides for an initial term of 20 years with one 3-year renewal period. ARINC asserts that the longer lease term is favorable to both parties, providing the Plan with a long-term favorable investment return (*i.e.*, the lease payments) on the Property and ARINC with stability and security for its headquarters location. The specific 23-year period was chosen to provide the longest lease term and still have the lease qualify as a true tax lease, which is necessary to ensure that the contribution is deductible by ARINC. The Draft Lease Term Sheet provides that all of the Plan's reasonable and actual out-of-pocket costs, as well as other reasonable fees and expenses, associated with the proposed transaction will be paid by ARINC whether or not the proposed transaction should close.

*Bondable/Triple Net Lease Structure*

The initial 10-year period of the Lease will be a "bondable" lease. ARINC believes that a "bondable" lease is even more favorable to the Plan than a traditional "triple net" lease. Under the bondable lease structure, the rent payable by ARINC to the Plan remains payable under all circumstances and all costs related to the Property, including taxes, insurance, utilities and non-capital maintenance, repair and capital improvements, are the responsibility of ARINC as lessee. Under a traditional triple-net lease, the Plan, not ARINC, would bear the responsibility to pay capital expenditures.

Additionally, the Draft Lease Term Sheet specifies that the Lease shall contain a commercially reasonable standard for determining whether capital improvements (repair or replacement) are required for the Property during the bondable period of the Lease. On August 19, 2004, ARINC informed the Department that the Lease Agreement will specify that in the event the parties disagree as to whether such capital improvements are required, the determination will be made by a neutral third-party arbitrator. ARINC asserts that it will not be able to preclude capital improvements from being made that the Plan desires if the arbitrator determines the same to be required. ARINC states that although the parties continue to work out the details in the Lease, the process and ultimate determination by a neutral third-party in connection with a dispute will remain in place.

ARINC notes that the purpose of the "bondable" lease structure is to facilitate the Plan's ability to "monetize" (sell) the stream of lease payments that ARINC will make during the first 10 years of the lease to a third party (as described below). The Lease will remain "bondable" until the earlier of (i) the end of the first 10 years of the lease, or (ii) the date on which the property is sold or transferred to a third party. The Lease will then convert to a traditional triple net lease under which ARINC will pay rent, taxes, insurance, utilities, non-capital maintenance and repair, but the Plan will be responsible for capital expenditures.

*Rental Rate*

The Draft Lease Term Sheet provides that the rental rate shall be fair market value determined in connection with the Appraisal of the Property. The Draft Lease Term Sheet further provides that the rental rate shall increase when the Lease shifts from bondable to a traditional triple net lease to reflect the Plan's obligation to make capital improvements at that time. ARINC represents that ARINC and IFS will agree to specific rental rates, including annual increases, for the entire 20-year period at the time the parties sign the full Lease Agreement. The rental rate during the 3-year renewal term will be the then-prevailing fair market rental rate as determined in accordance with the Lease. ARINC expects that the Lease will generate an estimated $4 million to $4.5 million in annual lease income for the Plan.

In a June 30, 2004 letter to the Department, ARINC noted that under the terms of the proposed Lease between the Plan and ARINC, the annual base rent for the Property as a whole for the first year of the Lease is expected to be $12.40 per square foot under the bondable structure and $14.65 per square foot under the non-bondable structure. Both rates will increase at 2.5% per year, compounded.[3]

Additionally, ARINC provided the Department a table showing the expected annual rental amounts for years 1 through 20 of the lease under both the bondable and non-bondable structure. On July 7, 2004, ARINC informed the Department that ARINC will pay $4,290,189 in lease payments to the Plan in year 1 of the lease. ARINC's lease payments will increase to $8,103,000 in year 20 (reflecting the 2.5% per year annual increase and the change from bondable to non-bondable after year 10). ARINC will make total lease payments during the 20-year term of the lease equal to $120,755,549.

*The Right of First Offer*

If the Plan desires to sell or convey the Property or its interest therein during the Lease term, the Draft Lease Term Sheet provides a Right of First Offer to ARINC. The Plan shall first offer ARINC the right to purchase or otherwise acquire the Property or such interest therein (a) on such terms and conditions as the Plan proposes to market the Property or such interest therein for sale (Soliciting Offer), which terms and conditions shall reflect the Plan's good faith determination of market conditions and the fair market value for the Property; provided, however, that with respect to any right of first offer hereunder triggered from and after the fifteenth (15th) anniversary of the commencement date of the Lease, the Plan's offer to ARINC shall reflect a fair market value (FMV) purchase price that is determined by a 3-appraiser method (if the parties are unable otherwise to so agree) or (b) on such terms and conditions as are contained within an unsolicited bona fide offer from an unaffiliated third party that the Plan desires to accept (Unsolicited Offer). The parties shall negotiate in good faith the terms and conditions of any purchase based on a Soliciting Offer for a period of thirty (30) days following (i) the Plan's notice to ARINC (if prior to the 15th anniversary of the Lease commencement date) or (ii) the establishment of the FMV purchase price (if from or after the 15th

[3] In an August 4, 2004 letter to the Department, ARINC stated that under a commercial lease, there generally are two ways to seek to ensure that rental payments remain fair market value rental payments over time. The first is by setting a fixed periodic rental adjustment, and the second is by tying the rental payments to periodic increases in the consumer price index (CPI). Setting a fixed periodic rental adjustment is a more customary way to ensure fair market value rental payments than is a method that ties rental payments to CPI. ARINC asserts that this is true even for long term leases, such as the 20-year lease contemplated in this transaction.

The independent appraiser, Deloitte, examined annual rent escalations used in conventional leases in the relevant market area. Deloitte concluded that annual rent escalations ranging from 2% to 3% are typical, and concluded on a 2.5% annual growth rate as representative of market terms. ARINC notes that IFS considered this conclusion in its assessing the prudence of the proposed transaction and that IFS expects that this adjustment will ensure that the rental payments to the Plan over the life of the Lease will account for a presumed rate of inflation.

anniversary of the Lease commencement date). In all events, ARINC shall exercise such right, if at all, upon notice to the Plan within the thirty (30) day period described above with respect to a Soliciting Offer or within thirty (30) days after notice to ARINC of an Unsolicited Offer. If ARINC fails to exercise such right to purchase, the Plan is free to sell the Property (*i.e.*, close on the transfer) to a third party on such terms for the next 360 days, however, the Plan shall not have the right to sell to a third party at a lower effective purchase price or on any other materially more favorable term than the effective purchase price and terms proposed by the Plan to ARINC without first re-offering the Property to ARINC at such lower effective purchase price or other more favorable term, nor to sell on any terms following the expiration of such 360-day period, without first re-offering the Property to ARINC. The right of first offer shall terminate upon the commencement of the exercise by the Plan of its remedies under the Lease as the result of a monetary event of default by ARINC that continues uncured following notice and the expiration of applicable cure periods (and a second notice and cure period provided fifteen (15) days before the loss of such right on account of such default).

The IFS Report and ARINC note that ARINC will lose the ROFO in the event of an uncured monetary default under the Lease. In the event that ARINC is in monetary default under the Lease and the Lease terminates, the ROFO will terminate and the Plan would be free to sell the Property without offering the Property to ARINC. In addition, the terms on which the Property is to be offered to ARINC under the ROFO are to be set by the value of an Unsolicited Offer that the Plan decides it wishes to accept or, in the absence of an Unsolicited Offer, at fair market value. For the first 14 years of the lease, the Plan is authorized to set that fair market value and beginning with year 15, that value will be set by agreement of the parties (using an alternate dispute resolution method if the parties cannot agree on that value). ARINC will have only 30 days to decide whether to accept the offer on those terms and, if ARINC declines, the Plan may sell to any third party on the offered terms or better without giving ARINC any further opportunity to purchase the Property.

In an August 4, 2004, letter to the Department, ARINC states that at no time during the Lease will the Soliciting Offer be established by ARINC. Rather, as described in the Draft Lease Term Sheet, during the first 14 years of the Lease, the Property will be offered to ARINC on such terms and conditions as the Independent Fiduciary on behalf of the Plan proposes to market the Property or the Plan's interests in the Property for sale. These terms and conditions are set exclusively by the Plan and will reflect the Independent Fiduciary's good faith determination of market conditions and the fair market value for the Property, subject to challenge by ARINC only for lack of good faith. Beginning in the 15th year of the Lease, the Independent Fiduciary on behalf of the Plan will propose terms and conditions for the soliciting offer to ARINC. If the parties do not agree to the terms proposed by the Independent Fiduciary, the fair market value price will be determined by a three appraisal method.

ARINC believes the ROFO is only a modest encumbrance on the Plan since the Plan will establish the fair market value price at which the Property is offered and ARINC must respond to the Plan's offer promptly, after which time the Plan can offer the Property to the public. While a modest restriction, it is important to ARINC to have this right since the Property is its headquarters campus. ARINC represents that Deloitte, the Plan's independent appraiser, believes that the right of first offer will have little, if any, impact on value. ARINC states that it understands that such rights are common in commercial, arm's-length sale-leaseback transactions.

*The Make Whole Obligation (MWO)*

The Draft Lease Term Sheet provides that, if on the earlier of the date of a sale of the Property by the Plan or the date that is five years from the date of the closing under the Transfer Agreement (the Make-Whole Date), the Actual Return to the Plan, as defined according to several specific situations, is less than the sum of the contribution value plus a return equal to an annual rate of five percent (5.00%) compounded on the contribution value of the Property (the Minimum Return), then ARINC will contribute to the Plan, within 180 days of the Make-Whole Date, a cash payment in the amount of any such difference (Make-Whole Payment). The Draft Lease Term Sheet provides various situations, whether the rental income is monetized and whether the Property is sold, that will determine the value of the Actual Return but in all cases, expenses applicable to the Lease and the sale shall not include any costs of monetization and prepayment of monetization.[4]

ARINC represents that as a result of the negotiations between ARINC and IFS, the Make Whole Payment provision safeguards the Plan's interests in significant ways. First, the provision has been modified such that it provides for a make whole determination not only

[4] If the Plan does not monetize any portion of the rental income and the Property is sold, the Actual Return to be compared to the Minimum Return shall be the sum of (i) the proceeds received from the fair market value sale net of selling costs plus (ii) the rental income received by the Plan under the Lease up to the Make-Whole Date, less expenses incurred by the Plan with respect to the Property and the Lease.

If the Plan does not monetize any portion of the rental income and the Property is not sold, the Actual Return to be compared to the Minimum Return shall be the sum of (i) the fair market value of the Property on the Make-Whole Date, as determined by a three appraiser method (if the parties are unable to otherwise agree) plus (ii) the rental income received by the Plan under the Lease up to the Make-Whole Date, less expenses incurred by the Plan with respect to the Property and the Lease.

If the Plan monetizes any portion of the rental income, the Property is sold, and the monetization is repaid or prepaid in full prior to or concurrent with the closing on that sale, then the Actual Return to be compared to the Minimum Return shall be the sum of (i) the proceeds received from the fair market value sale net of selling costs, plus (ii) the rental income that the Plan actually received prior to and/or after monetization, plus (iii) rental income the Plan would have received under the Lease had monetization not occurred (Deemed Rent) up to the Make-Whole Date, less expenses incurred by the Plan with respect to the Property and the Lease.

If the Plan monetizes any portion of the rental income, the Property is not sold, but the monetization is repaid prior to the Make-Whole Date, then the Actual Return to be compared to the Minimum Return shall be the sum of (i) the fair market value of the Property on the Make-Whole Date, as determined by a three appraiser method (if the parties are unable to otherwise agree) plus (ii) the rental income that the Plan actually received prior to and/or after monetization, plus (iii) Deemed Rent up to the Make-Whole Date, less expenses incurred by the Plan with respect to the Property and the Lease.

If the Plan monetizes any portion of the rental income, the Property is sold, and the monetization continues beyond the Make-Whole Date, then the Actual Return to be compared to the Minimum Return shall be the sum of (i) the proceeds received from the fair market value sale net of selling costs, plus (ii) the present value of the remaining monetization debt service payments discounted at the monetization implicit interest rate plus (iii) the rental income that the Plan actually received prior to monetization, plus (iv) Deemed Rent up to the Make-Whole Date, less expenses incurred by the Plan with respect to the Property and the Lease.

If the Plan monetizes any portion of the rental income, the Property is not sold, and the monetization continues beyond the Make-Whole Date, then the Actual Return to be compared to the Minimum Return shall be the sum of (i) the fair market value on the Make-Whole Date of the Property (giving full recognition to the effect of the remaining monetization obligation on future rental income), as determined by a three appraiser method (if the parties are unable to otherwise agree) subject to the monetization obligation, plus (ii) the present value of the remaining monetization debt service payments discounted at the monetization implicit interest rate, plus (iii) the rental income that the Plan actually received prior to monetization, plus (iv) Deemed Rent up to the Make-Whole Date, less expenses incurred by the Plan with respect to the Property and the Lease.

upon a sale of the Property by the Plan within the first five years, but also at the end of the first five years if the Plan does not sell during such period. The Plan is also guaranteed a minimum 5% rate of return on its investment in the Property. Thus, any Make Whole Payment triggered in the event of either a sale or at the end of the five-year period ensures a positive minimum annual return to the Plan of 5%. Finally, the provision will apply whether or not there is a Monetization.

The IFS Report describes the Make Whole Payment as a "make whole" obligation. ARINC will guarantee a minimum return of 5% to the Plan by agreeing that if (a) the combination of the proceeds from a sale of the Property (or the change in the value of the Property if the Plan continues holding it) plus the Plan's net income on the Property under the Lease prior to the sale (or over the full five years) is less than (b) the Property's value as of the date of the Contribution plus a 5% compounded rate of return on that value plus the costs of holding and maintaining the Property, then (c) ARINC will contribute to the Plan the difference necessary to provide the 5% return. The calculation of the Make Whole Payment will take into account the status of any Monetization of the lease payments as of the time of the sale or five-year anniversary of the Contribution. For the IFS opinion on the make whole obligation, see the IFS Report below.

The Draft Lease Term Sheet specifies further that, notwithstanding the above provision, if a Make-Whole Payment is due and if, for the taxable year of ARINC in which the Make-Whole Payment is to be made, such Make-Whole Payment (A) would not be deductible under section 404(a)(1) of the Code or (B) would result in the imposition of an excise tax under section 4972 of the Code, such Make-Whole Payment shall not be required to be made until the next taxable year of ARINC for which the Make-Whole Payment will be deductible under section 404(a)(1) of the Code and will not result in an excise tax under section 4972 of the Code.

ARINC represents that its tax adviser, PriceWaterhouseCoopers (PWC), has determined that the five-year time limitation on the Make Whole Payment provision is necessary to ensure the deductibility of the contribution of the property. PWC advises that in the event that the Internal Revenue Service (IRS) questions the deductibility of the contribution of the Property to the Plan (the deduction available to ARINC may also be subject to limitation under section 404 of the Code), one of the key elements they would likely review is whether there was an actual transfer of the Property.

In a June 3, 2004 memorandum from PWC to ARINC and submitted to the Department by ARINC, PWC concluded that "if the IRS were to question the deductibility of the contribution to the Plan, the inclusion of the 'Make-Whole' provision creates additional risk that the IRS would assert that no transfer of property had occurred." PWC notes that although a make-whole provision is generally evidence that an actual transfer has not occurred, all of the facts and circumstances must be considered before a determination can be made. In this regard, the longer the term of the make-whole provision, the more negatively it will be viewed and conversely, the shorter the term of the make-whole provision, the less detrimental. This consideration is another reason, PWC continues, that it recommends eliminating or alternatively making the term of the make-whole provision as short as possible.

The Applicant asserts that because it is an important economic aspect of the transaction from ARINC's perspective, there is a substantial likelihood that ARINC would not proceed with the transaction unless ARINC is assured that the contribution is deductible. ARINC represents that, if ARINC does not go forward, the Plan would be denied the benefit of a voluntary, excess contribution that is being made on top of its minimum funding requirement and is not in lieu of cash contributions. Moreover, the proposed transaction is the only means by which the Plan will likely become fully funded in the near term.

*Indemnification*

The Draft Lease Term Sheet provides that ARINC will indemnify, defend and hold harmless the Lessor and their respective officers, directors, principals, fiduciaries (including officers, directors and shareholders of such fiduciaries), shareholders, members, partners, employees, agents and attorneys (each, a Lessor Indemnified Person) from all losses, claims, liabilities and damages (other than those caused by the negligence or willful misconduct of any such Lessor Indemnified Person and other than consequential damages and indirect losses) related to (i) ARINC's renovation, use, repair, management, lease, sublease, maintenance, or operation of the Property, (ii) during the bondable period of the Lease, violation of any environmental laws, the Americans with Disabilities Act (ADA) and other health/safety laws applicable to the Property, and during the nonbondable period of the Lease, violation of the same only to the extent resulting from acts or omissions of ARINC or any sublessee or assignee during the Lease Term, and (iii) any default by ARINC under the Lease.

The Lessor will indemnify, defend and hold harmless ARINC and its officers, directors, principals, shareholders, members, partners, employees, agents and attorneys (each, a Lessee Indemnified Person) from all losses, claims, liabilities and damages (other than those caused by the negligence or willful misconduct of any such Lessee Indemnified Person and other than consequential damages and indirect losses) related to (a) the Lessor's acts or omissions in or about the Property, (b) violation of any environmental laws, the ADA, or other health/safety laws caused by an act or omission of the Lessor, and (c) any default by the Lessor under the Lease. The liability of the Lessor shall be limited to its interest in the Property (and any insurance proceeds or condemnation awards related thereto).

The foregoing indemnifications shall survive the expiration or earlier termination of the Lease Term. The Draft Lease Term Sheet notes that should any terms in these indemnifications conflict with terms in the IF Agreement (as described below), the terms in the IF Agreement will control.

*Events of Default*

The Draft Lease Term Sheet provides the following events of party default.

*ARINC Default*

(a) ARINC shall fail to pay any Rentals or other amounts due under the Lease within 5 business days of its receipt of written notice that the same is past due;

(b) ARINC shall fail to maintain the insurance specified in the Lease;

(c) ARINC shall fail to perform any other obligations or covenants under the Lease and such failure is not cured within 30 days following receipt of written notice thereof, or if the failure cannot reasonably be cured within such 30-day period, then such longer time as is reasonably necessary under the circumstances provided that ARINC commences the cure within such 30-day period and diligently and continuously pursues the cure; and

(d) Certain acts of bankruptcy or insolvency occur on the part of ARINC.

The Lease shall contain commercially reasonable provisions regarding late fees and default interest, to be reasonably agreed between the Plan and IFS and ARINC. The Lessor shall have the right,

following a default by ARINC that remains uncured following notice and the expiration of applicable cure periods, to cure such failure and charge ARINC the costs incurred in connection therewith as additional rent, in which event ARINC's timely payment of 110% of such amounts shall constitute cure of such failure provided, however, that with respect to the third (and any succeeding) default in any 12 month period that costs more than $250,000, as increased by any increases in the consumer price index from the date of transfer of the Property (or the ownership interests in the entity owning the Property) to the Plan and IFS to the date of the applicable default, to cure (singly, and not in the aggregate), such payment shall not constitute a cure of such failure, but shall prevent Lessor from terminating the Right of First Offer in connection with such failure and ARINC's failure to timely pay such amounts shall constitute a monetary default under the Lease. It is expressly agreed that disputes concerning the foregoing cure mechanism shall be subject to the dispute resolution provisions of the Lease.

*Lessor Default*

(a) Lessor shall fail to pay any amounts due under the Lease within 5 business days of its receipt of written notice that the same is past due;

(b) Lessor shall fail to perform any other obligations or covenants under the Lease and such failure is not cured within 30 days following receipt of written notice thereof, or if the failure cannot reasonably be cured within such 30-day period, then such longer time as is reasonably necessary under the circumstances provided that the Plan commences the cure within such 30-day period and diligently and continuously pursues the cure; and

(c) Certain acts of bankruptcy or insolvency occur on the part of the Lessor.

During the non-bondable period of the Lease, in the event of Lessor's default that continues uncured following notice and the expiration of applicable cure periods, ARINC shall have rights of self-help and, following Lessor's failure to pay ARINC therefor and a judgment against Lessor requiring payment of the same, the right to offset the costs incurred in connection therewith against the rent payable under the Lease.

7. The Monetization. In its Application, ARINC noted that if it is deemed more advantageous to the Plan by the qualified independent fiduciary and at the qualified independent fiduciary's discretion, ARINC proposes that the Plan may, at the time of the contribution and leaseback or soon thereafter, enter into an agreement to sell the stream of lease income for the initial ten years of the lease to a third party for cash (the Monetization).[5] ARINC believes that the Monetization would provide further protection to the Plan and participants by reducing the Plan's exposure to investment in a single parcel of employer real property and by providing the Plan with a large influx of cash, which may be reinvested immediately. The Monetization is not a transaction for which the Applicant seeks exemptive relief. Pursuant to the Monetization, ARINC believes that the Plan could agree to enter into a transaction to sell to the third party the initial ten-year stream of lease income, which the Applicant expects to be worth approximately $28 million to $32 million in cash. Following the Monetization, ARINC represents that the Plan, instead of holding employer real property worth approximately $49 million (or 15% of the Plan's total assets), would hold approximately $28 million to $32 million in cash related to the real estate transaction and employer real property with a residual value that is substantially less than 10% of total plan assets.

Since the Application was submitted, ARINC has informed the Department that IFS has conducted significant due diligence in determining the feasibility of monetizing the stream of lease payments the Plan will receive from the property. At this point, IFS believes it is unlikely that it will be able to obtain a monetization arrangement that is in the Plan's interests. Of chief concern is a significant unrelated business income tax (UBIT) issue that is created if the Plan enters into a secured loan arrangement (with the property as collateral) with a monetization lender. However, absent such a security interest, monetization is less attractive to potential lenders. Nevertheless, IFS does not want unnecessarily to constrain the possibility of achieving in the future a favorable monetization arrangement.

8. ARINC's Request for Exemptive Relief. ARINC requests exemptive relief for (a) the in-kind contribution to the Plan of the Property (the Contribution); (b) the holding of the Property by the Plan; (c) the Plan's Leaseback of the Property to ARINC (the initial ten-year period of the lease will be a "bondable" lease and will then convert to a traditional triple net lease); (d) the Repurchase of the Property; and (e) any payments to the Plan by ARINC made pursuant to the Make Whole Payment.

ARINC requests exemptive relief because of its belief that the contribution of the Property by ARINC to the Plan and the Plan's holding, leasing and potential future sale of the Property to ARINC would not meet the requirements for the acquisition, lease or sale of "qualifying employer property" under section 408(e) of the Act. Similarly, the Department notes that if the fee interest in the Property is first transferred to a newly created SPE and then the interests in that SPE are transferred to the Plan, this would also raise issues regarding the requirements for the acquisition or sale of "qualifying employer securities" under section 408(e).

ARINC believes that the contribution of ARINC's headquarters property may violate sections 406 and 407(a) because it would not constitute "qualifying employer real property" since the Property is a single parcel and since the fair market of the Property immediately after acquisition would constitute greater than 10% (percent) of the fair market value of the Plan's assets. ARINC expects that the fair market value of the Property immediately after the contribution will constitute approximately 16% of the Plan's assets, based upon the Plan's current assets. In this regard, the Department believes that for purposes of the proposed exemption, it would not be practical to develop a maximum percentage limitation that would continue to apply to the Contribution of the Property to the Plan over time in view of the potential changes in value of the real property and the other investment of the Plan's assets over the possible twenty-three year period of the Lease. 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. Accordingly, it is the responsibility of the Independent Fiduciary of the Plan to determine the continued appropriateness of the Plan's investment in the Property, based on the particular facts and circumstances, consistent with its responsibilities under section 404 of the Act.

If the proposed exemption is granted, ARINC requests that September 7, 2004

[5] ARINC provides that this transaction could be structured as a sale of the stream of lease payments to a third party or a loan from a third party to be repaid by the stream of lease payments.

be the effective date of the exemption since this will allow ARINC about a one-week period to close the Contribution of the Property prior to September 15, 2004. The Department agrees and has determined to propose a September 7, 2004 effective date. If this is done, a Pension Benefit Guaranty Corporation (PBGC) variable-rate premium payment of approximately $910,000 will be avoided since no payment is required under the Act if by September 15, 2004, ARINC contributes to the Plan the Property whose value is greater than the amount necessary for the Plan's full funding limit that is due for the 2003 plan year.

9. Reasons for Entering Into the Exemption Transactions. ARINC believes that the relief requested in its Application offers significant potential benefits both to the Plan and to ARINC. ARINC asserts that the Exemption Transactions are in the interest of the Plan and its participants and beneficiaries because: (a) The contributions represent a voluntary excess contribution which will be made in addition to all required cash contributions, (b) the Plan is expected to be fully funded after the planned cash contributions and the contribution of the Property, (c) the Plan will receive a valuable investment property that is likely to appreciate over time, and (d) the Plan will receive an estimated $4 million to $4.5 million a year in lease income for the ten years of the initial lease, or if the qualified independent fiduciary approves the Monetization, the Plan will immediately receive approximately $28 million to $32 million in cash and the Plan's exposure to a single parcel of employer real property will be reduced to less than 10% of the fair market value of the Plan's assets.

ARINC adds that the transactions will have additional benefits to ARINC's employees and the company. First, ARINC depends on a highly skilled workforce and knows that sound pension funding is important in attracting and retaining a quality workforce. Second, due to accounting disclosures of other comprehensive income (OCI) required by FAS No. 132, *Employers' Disclosures about Pensions and Other Retirement Benefits*, the underfunded status of the Plan lowers ARINC's reported net worth. Similarly, under the requirements of FAS No. 87, the underfunded status of the Plan creates a significant added annual expense. By fully funding the Plan, such FAS No. 132 and FAS No. 87 issues will be mitigated, and the Plan and its participants will benefit from ARINC's strengthened financial position.

ARINC believes the proposed exemption is administratively feasible because the transactions would be carried out under the supervision and direction of a qualified independent fiduciary and would be similar to other exemptions previously granted by the Department. ARINC asserts that the proposed transactions would be protective of the rights of the Plan and its participants and beneficiaries since they would be entered into at the discretion of a qualified independent fiduciary and the contribution value would be established with the assistance of a qualified independent appraiser.

10. The Independent Fiduciary.[6] For purposes of the proposed Exemption Transactions and the possible Monetization, IFS has been retained as the qualified independent fiduciary. ARINC represents that the Plan shall enter into each of the Exemption Transactions only at the discretion of the qualified independent fiduciary. The valuation of the Property as an asset of the Plan, if the contribution of the Property is accepted, will be determined by the qualified independent fiduciary based on an appraisal by a qualified independent appraiser. The qualified independent fiduciary will also be responsible for enforcing the Plan's rights and interests with respect to the Lease and any sale of the Property and performing other fiduciary functions on behalf of the Plan as owner of the Property.

The qualifications of IFS to serve as the Independent Fiduciary for these transactions are set forth in the IFS Proposal to ARINC for serving as independent fiduciary dated November 7, 2003 (IFS Proposal). The IFS Proposal states that from its formation in January 1987 until October 1, 1996, IFS was a wholly owned subsidiary of The Bear Sterns Companies Inc. and an affiliate of Bear, Sterns & Co. Inc. On that date, ownership transferred to officers of the firm and the name changed to Independent Fiduciary Services, Inc. IFS believes it is qualified to perform the evaluations and make the decisions involved with the ARINC transaction because of its staff's corporate, financial, investment management, analytical, and ERISA regulatory expertise. IFS states that it has acted as independent fiduciary on many transactions involving prohibited transaction applications, including several for real property transfers and it has longstanding expertise in leaseback transactions between companies and their pension plans. IFS also states that it has experience with employers and benefit plans involved in the aviation industry.

The IFS Report further state that IFS specializes in acting as an independent fiduciary to ERISA-covered plans. The firm is highly experienced as a fiduciary in making and evaluating investment decisions. IFS has served and continues to serve as an independent fiduciary in connection with numerous pension funds and investment transactions, involving substantial issues under the fiduciary responsibility provisions of ERISA. An SEC-registered investment adviser, IFS has acted in a variety of independent fiduciary roles, including independent fiduciary, named fiduciary, investment manager and adviser or special consultant.

IFS also serves as an ongoing investment consultant to ERISA plans with assets valued at approximately $15 billion. In that part of its business, IFS routinely evaluates matters of investment policy, diversification across asset classes and expected risk and return.

The staff of IFS includes professionals experienced with the management and disposition of portfolio assets, as well as ERISA lawyers sensitive to fiduciary responsibilities involving investment activities. With offices in Washington, DC and Newark, New Jersey, IFS has coordinated and deployed a wide variety of specialized professionals on prior projects involving real estate sale-leasebacks, mergers and acquisitions, ERISA assets managed by banks and insurance companies, publicly-traded securities and private assets, valuation and financial restructuring.

In a July 20, 2004 letter to the Department, IFS represents that it does not control ARINC and is not controlled by or under common control with ARINC. IFS represents that the fees it will receive from ARINC in connection with its engagement as Independent Fiduciary to the Plan for any year of its

[6] The Department notes that the Act's general standards of fiduciary conduct would apply to the transactions permitted by this proposed exemption, if granted. In this regard, section 404 of the Act requires, among other things, a fiduciary to discharge his duties respecting a plan solely in the interest of the plan's participants and beneficiaries and in a prudent manner. Accordingly, an independent plan fiduciary must act prudently with respect to: (1) The decision to enter into the transactions described herein; and (2) the negotiation of the terms of such a transaction, including, among other things, the specific terms by which the Plan will acquire, hold, lease and sell the Property. The Department further emphasizes that it expects the independent plan fiduciary, prior to authorizing the acquisition and leaseback of the Property and any sale of such Property, to fully understand the benefits and risks associated with such transactions. In addition, the Department notes that such plan fiduciary must periodically monitor, and have the ability to so monitor the Property.

engagement, when aggregated with any other fees or compensation it receives from ARINC or any affiliate of ARINC for that same year, will comprise less than 5% of its annual gross revenue from all sources for its prior tax year.

*The IF Agreement*

In a December 8, 2003 letter agreement between IFS, ARINC, and the Pension Committee of the Plan, the Committee, in its role as named fiduciary to the Plan, agreed to the engagement of IFS as the Independent Fiduciary (The IF Agreement). The IF Agreement describes the initial function of IFS to decide on behalf of the Plan whether and on what terms to agree on behalf of the Plan to the Contribution/Leaseback and, if applicable, the Monetization Transaction. In making such decisions, IFS will review the Plan's financial and actuarial condition, asset allocation, investment portfolio, investment policy statement and other material relevant to a determination as to the suitability of engaging in the transactions within the context of the Plan's overall assets.

The IF Agreement provides that, if IFS decides to agree to the Contribution/Leaseback, IFS will provide a written report (IFS Report) to the Department outlining its conclusions and summarizing the analysis and considerations it took into account in reaching such conclusions. The IFS Report's conclusions shall include IFS's views as to whether the Contribution/Leaseback satisfies the criteria set forth in sections 404 and 408(a) of ERISA.

The IF Agreement states that if the proposed exemption is granted and the transactions entered into, the IFS will negotiate the specific terms of and closing of the Contribution/Leaseback and, if applicable, the Monetization Transaction; and determine on behalf of the Plan the value of the assets obtained by the Plan by virtue of the consummation of the Contribution/Leaseback and, if applicable, the Monetization. The ongoing functions of IFS are to: (a) Monitor and enforce the Plan's rights and interests with respect to the Property and any lease or other agreements with ARINC regarding use of such Property; (b) propose, negotiate and decide whether to enter into any agreements to amend the Lease; (c) evaluate and decide whether to grant requests for waivers of lease terms; (d) arrange for such appraisals of the Property as may be necessary to satisfy the Plan's responsibilities under ERISA and the exemption to establish and report the Property's value; (e) report annually to the Committee concerning the physical and financial condition of the Property; (f) determine whether continued ownership of the Property is in the interests of the Plan's participants and beneficiaries and whether, when and on what terms to seek prudently to sell the Property in accordance with provisions of any contract between the Plan and ARINC; and (g) in the event IFS determines to sell or otherwise dispose of the Property, negotiating the terms and conditions of, and consummating the sale or disposition.

The IF Agreement notes that in performing these functions, IFS agrees that it shall act for the exclusive benefit and in the sole interest of the Plan and its participants and beneficiaries; with the care, skill, prudence and diligence that a prudent person acting in a like capacity and in similar circumstances and familiar with such matters would exercise; and otherwise in accordance with the applicable fiduciary responsibility provisions of ERISA. IFS represents that it will act as a qualified professional asset manager (QPAM) as defined in PTE 84–14 with respect to the Monetization or a sale of the Property to a third party if relief from ERISA section 406(a) is necessary.

*Amendment and Addendum to the IF Agreement*

On July 30, 2004, the Department was informed that the ARINC Pension Committee, ARINC and IFS agreed to an amendment and addendum to the IF Agreement that expands the role of IFS to include the ongoing review of the Plan for any diversification issue that may be presented by the Plan's investment in the Property. As part of IFS's ongoing duty to determine whether continued ownership of the Property is in the Plan's interest, IFS will specifically consider the nature and diversification of the Plan's overall investment portfolio, cash flow and liquidity needs and actuarial condition. ARINC will supply IFS with added information so that it can appropriately carry out this function. The purpose of these expanded duties will be to ensure that IFS determines on an ongoing basis that the Plan's holding of the Property does not pose an undue risk to the Plan of an over concentration of Plan assets in the Property. The following changes were added to the IF Agreement:

- In considering whether and on what terms to seek prudently to sell the Property, IFS shall consider the nature, value and other relevant aspects of the Property in isolation, as well as the nature and diversification of the Plan's overall investment portfolio. Insofar as IFS determines that continued ownership of the Property poses undue risk to the Plan of over concentration from an investment perspective, IFS shall determine and take appropriate action to seek prudently to reduce such risk.
- The initial and ongoing functions of IFS shall not include any Plan assets other than Property assets, provided that IFS shall consider the nature and diversification of the Plan's overall investment portfolio pursuant to its function to determine whether continued ownership of the Property is in the interests of the Plan's participants and beneficiaries and whether and on what terms to sell the Property.
- At the request of IFS, the Committee and/or ARINC shall specifically provide information regarding the nature and diversification of the Plan's overall investment portfolio, its cash flow and liquidity needs, and its actuarial condition.
- ARINC acknowledges that it is a party to the IF Agreement and is subject to the obligations imposed on ARINC therein.

*Termination of the IF Agreement*

The parties to the IF Agreement are ARINC, the Plan Committee and IFS. The IF Agreement provides that any party to the IF Agreement may terminate it at any time by giving written notice to that effect to the other parties, and such termination shall become effective no less than 30 days thereafter, provided, however, that ARINC pays IFS and its agents all of their respective fees and expenses through the effective date of termination. In the event of termination, IFS shall cooperate with any successor independent fiduciary and shall promptly deliver all relevant documents and information in connection with the transactions to such successor independent fiduciary. IFS will not assign its obligations to perform services hereunder to any other party without the prior written consent of the Committee.

The Department notes that if any party to the IF Agreement terminates the IF Agreement or if IFS decides to assign its obligations to perform services, the parties to the IF Agreement shall notify the Department within 15 days of any decision regarding the resignation, termination or change in control of the Independent Fiduciary. Any replacement or successor Independent Fiduciary must be acceptable to the Department and must assume its responsibility prior to the effective date of the removal of the predecessor Independent Fiduciary.

11. The IFS Report. IFS provided the IFS Report to the Department on June 18, 2004. The IFS Report states that ARINC has advised IFS that the

Contribution and Leaseback (the Proposed Transaction) is the only funding strategy under formal consideration by ARINC that would render the Plan fully funded on an ABO basis in the near term, and that if the Proposed Transaction proceeds, ARINC intends to make an additional cash contribution to the Plan in 2004 in an amount (estimated at $9 million) sufficient to achieve that objective, absent unexpected deterioration in the Plan's funded status due to unforeseen investment losses. Without the Proposed Transaction, minimum required contributions totaling more than $97 million would leave the Plan underfunded by between $52 million and $77 million on an ABO basis through 2008. With the Proposed Transaction and accompanying additional cash contribution in 2004, no minimum funding contributions would be required until 2008, and the underfunding would range from only $12 million to $41 million.

The IF Report summarizes that the Proposed Transaction includes the following features, which are protective of the interests of the Plan's participants and beneficiaries:

- The bondable nature of the triple net lease during its first ten years means that ARINC, not the Plan, will bear during that time not only the ordinary maintenance, tax and insurance expenses associated with a triple net lease but also all capital expenses associated with the Property. In addition, during the bondable portion of the lease, ARINC will not have a tenant's typical right to rent abatement in the event the Property suffers a casualty and cannot be occupied.
- ARINC relinquished its demand for an option to purchase the Property at the end of the lease, so the Plan will have an unencumbered right to sell or lease the Property to anyone when ARINC's lease expires.
- ARINC relinquished its demand for a right of first refusal during the term of the lease, and has now accepted a far less restrictive right of first offer (ROFO). That right is subject to forfeiture in the event of ARINC's uncured monetary default.
- ARINC relinquished its demand that the ROFO "run with the land," so it will be extinguished if ARINC declines to exercise the right and the Plan sells the Property to a third party
- ARINC has agreed to provide the Plan a minimum rate of return on the Property as of the fifth anniversary of the contribution or an earlier sale of the Property by the Plan. This will take the form of ARINC's payment of an additional "make-whole" contribution to the Plan in the amount of the shortfall, if any, in the Plan's actual return on the Property against a minimum return of five percent compounded. The calculation of the make-whole contribution will take into consideration any monetization of the lease payments.
- The Property the Plan would receive is an attractive, well-maintained corporate campus in the desirable real estate market of Annapolis, Maryland. The Property's configuration, combined with its location, renders it readily marketable to parties other than ARINC in the event the lease is terminated. Indeed, ARINC recently leased a portion of the Property to a third party (BearingPoint), which confirms the Property's attractiveness to users other than ARINC.
- In addition to improving the Plan's actuarial condition, both immediately and into the future, the Proposed Transaction will render the Plan less dependent on ARINC's cash flow in view of the substantial reduction in the Plan's minimum funding requirements if the Proposed Transaction occurs. Moreover, since the Plan does not currently own any real estate, the Proposed Transaction should improve the overall diversification of the Plan's portfolio in view of the low expected correlation of the investment returns on the Property with the publicly traded equity and fixed income securities in which the Plan's assets are currently invested. Applying its capital market assumptions to the Plan's portfolio both with and without the Property included, IFS has determined that the expected risk-adjusted return on the Plan's assets will increase significantly if the Proposed Transaction takes place.

The IFS report concludes that the Proposed Transaction is appropriate and in the interest of the Plan's participants and beneficiaries. IFS reaches this conclusion based upon the considerations summarized above and explained more thoroughly below, and its significant due diligence as also described more completely below. Based on IFS' experience and due diligence in reviewing the Proposed Transaction, IFS believes that the terms of the Proposed Transaction, taken as a whole, are consistent with an arm's length negotiation between a Seller and Buyer with the respective goals of ARINC and the Plan. This conclusion reflects, *inter alia*, IFS' consideration of the likely effect of the ROFO provisions in the context of the overall Proposed Transaction. ARINC has made it clear to IFS that, as a business judgment, ARINC simply will not contribute the Property to the Plan without the ROFO, which preserves for ARINC a limited right to buy its corporate headquarters back if the Plan were to decide to sell it during the term of the lease. Given the significant and beneficial impact of the Proposed Transaction on the Plan's funded status, the limitations on the ROFO that ARINC has accepted, its withdrawal of its earlier demands for far more restrictive right of first refusal and purchase option provisions, the "make-whole" obligation and the other aspects of the transaction, IFS concludes that the Plan would be in a better overall position with the Property on the terms of the Proposed Transaction than without it. The Proposed Transaction is designed to produce significant value for the Plan, even with a limited ROFO, so that proceeding with the Proposed Transaction is in the Plan's interest.

Although IFS has attorneys with extensive experience counseling ERISA-governed benefit plans in issues related to plan investments in general, and real estate and employer asset transactions in particular, IFS has engaged the firm of Reed Smith, at ARINC's expense, to advise it with respect to the legal issues raised by the Proposed Transaction. Reed Smith attorneys have participated actively in the negotiation of the terms of the Proposed Transaction and assisted in the analysis of the Proposed Transaction for purposes of the IFS report. IFS has also identified other independent professionals to assist it (also at ARINC's expense), including an engineering firm and an environmental testing firm, all as detailed below.

*The Property and Appraisal*

The IFS Report states that Deloitte was well qualified to conduct the appraisal, and that the firm's knowledge of the Property (by virtue of a preliminary appraisal of the Property for the Plan which Deloitte conducted at ARINC's request in the fall of 2003) would facilitate the process for completing the appraisal. IFS requested proposals from five other firms it considered likely also to have the qualifications and experience to conduct the appraisal, but only one of these responded; the others declined. IFS determined that Deloitte was in a better position to conduct the appraisal due to its equal or superior qualifications and its familiarity with the Property.

Although Deloitte had previously entered into a contract with ARINC to appraise the Property for the benefit of the Plan, IFS required that Deloitte enter into a new agreement with the Plan on significantly different terms. IFS obtained changes to the engagement letter document proposed by Deloitte

with regard to the scope of the engagement, specifying additional issues regarding the Property to address in the appraisal report that would be relevant to IFS' analysis of the Proposed Transaction. There were extensive negotiations over several other key points. First, IFS successfully demanded that the agreement with Deloitte contain no indemnification obligation on the part of the Plan. Next, IFS persuaded Deloitte to restrict the limitations on Deloitte's liability typically included in Deloitte's agreements with appraisal clients. Third, IFS required that Deloitte agree to an exception to Deloitte's standard confidentiality provisions to allow IFS to disclose and use the Deloitte appraisal report as necessary and appropriate in connection with the Application. A final engagement letter was executed in late March 2004. Under its terms, ARINC, not the Plan, is to pay the costs of the Deloitte appraisal.

The IFS Report states that the information about the Property is derived largely from Deloitte's Appraisal. In addition, two IFS employees (including IFS's Chief Financial Officer) visited the Property on May 5, 2004 and toured the grounds and the various buildings accompanied by two representatives from Deloitte's appraisal staff and three ARINC employees. The Property is located at 2551 Riva Road, Anne Arundel County, Maryland, just outside the city of Annapolis, the capital of Maryland and the county seat. The site, identified as Parcel 2000–9003–8018, consists of approximately 27.595 acres, between Riva Road and Spruill Road and divided by Admiral Cochrane Drive. It is zoned W–1, Parole Town Growth Management Area. This zoning allows a diverse mix of office, retail, hotel, services, R&D, light industrial and similar uses. The Property reportedly conforms to minimum zoning requirements.

Site improvements consist of six buildings, five configured for office use and one as office and light industrial, plus several small support structures. Total gross area is approximately 359,283 square feet, with 345,983 net rentable square feet. The oldest two buildings were constructed in 1964; the newest in 1989 and expanded in 2001. In addition, buildings were renovated between 1996 and 2002, with a capital plan in place for additional renovations over the next several years. Buildings on either side of Admiral Cochrane Drive are interconnected by covered surface passageways, permitting movement among sets of buildings in a weatherproof environment. There are currently 1,367 paved surface parking spaces. ARINC reported that the site is zoned and situated to permit the construction of an additional approximately 140,000 square feet.

The Property's overall arrangement and appearance presents a well-maintained office campus environment. The buildings are attractive and appear to be in good condition and well maintained. As Deloitte reported, grounds were well landscaped and maintained. Parking lots appeared in good condition and clearly marked. The public road (Admiral Cochrane Drive) bisecting the Property allows easy access, yet security at the buildings was thorough. Generally, the Property appeared to be fully occupied and actively used in ARINC's business.

One floor of Building One, consisting of 27,630 square feet, is currently leased on a short-term basis to BearingPoint. BearingPoint has its own separate access and security. BearingPoint's willingness to rent the Property supports the proposition that the Property is attractive and marketable to users other than ARINC.[7]

The neighborhood surrounding the Property consists of a mix of similar use structures, retail, and hotel properties. Many structures appear of recent construction or renovation, and at least one hotel is currently under construction. The Property is convenient to major highways providing connections to Annapolis, Baltimore and Washington; it is easily accessible from Route 50 and Aris T. Allen Boulevard (Route 665).

*Valuation of the Property*

Deloitte was engaged to determine the market value of the Property and its fair rental value using the definitions and methods generally accepted in such appraisals. Standard practice in appraising real estate similar to the Property is to establish value using each of three approaches (cost, sales comparison and income) to the extent that each approach is applicable, and to apply appropriate weightings to the three resulting values to reach a single conclusion. The cost approach estimates the market value of the land as if vacant and the cost to replace the improvements less depreciation to their current conditions. The sales comparison approach estimates the market value based on sales and listings of similar properties. The income approach estimates value by capitalizing the net income the property is capable of generating at market rates. Deloitte determined that all three approaches were applicable to the Property.

IFS reviewed a preliminary draft of the appraisal, which Deloitte delivered on April 19, 2004. The IFS team identified several key issues requiring further analysis and explanation. For example, IFS questioned the draft's assumptions regarding the capital expense reserves, the key element in calculating the differential in fair market rent as between the bondable and non-bondable structures. IFS also requested that Deloitte further review and explain the suitability of the comparable transactions relied upon in the draft, as well as the market and economic considerations underlying the capitalization rate and other variables. IFS also sought input from ARINC, which resulted in corrections of the draft's property measurements and descriptions of the equipment and facilities located on the Property. ARINC staff also contributed to the clarification of Deloitte's assumptions and inputs. These and other issues were discussed with Deloitte on May 5 at the conclusion of the tour of the Property described above.

Deloitte submitted a second draft dated May 25, 2004. This draft addressed a number of the issues IFS had raised in response to the first draft. The second draft also added a valuation using a modification of the income approach to reflect the evolving terms of the Proposed Transaction, including the ten-year bondable lease period and the parties' respective responsibilities and cash flow obligations under the proposed lease. The May 25 draft presented the following estimates of value:

| | |
|---|---|
| Cost Approach | $46,500,000 |
| Sales Comparison Approach | 46,000,000 |
| Income Approach, NNN Direct Cap | 45,300,000 |
| Income Approach, NNN DCF | 45,000,000 |
| Income Approach, Bondable DCF | 52,000,000 |
| Overall Conclusion | 52,000,000 |
| Initial Rent, NNN | 14.65 |
| Initial Rent, Bondable | 13.35 |

IFS evaluated the May 25 draft and discussed with Deloitte the cash flow and other assumptions and concluded that the differentials in value and fair rent between the NNN market rate and the bondable/NNN structure overstated the differentiating factors of responsibility for capital expenditures

[7] At IFS' insistence on behalf of the Plan, the lease between ARINC and BearingPoint explicitly provides that it will convert into a sublease if the Proposed Transaction occurs. In the event that ARINC defaults under the lease with the Plan while the BearingPoint sublease remains in effect, and the building occupied by BearingPoint requires capital repairs, the Plan can avoid that expense by relocating BearingPoint to a different building on the Property. The sublease contains other provisions protective of the Plan in contemplation of the Proposed Transaction.

and risk of casualty or other rent abatement.

Deloitte's final report sets forth the values listed below. IFS is satisfied that the Deloitte report satisfactorily addresses the concerns IFS raised in response to all of the earlier drafts and may be relied upon as the basis for IFS' conclusions regarding the Proposed Transaction as set forth in this Report. The values determined by Deloitte are:

| | |
|---|---|
| Cost Approach | $46,900,000 |
| Sales Comparison Approach | 46,000,000 |
| Income Approach—Capitalization | 46,600,000 |
| Income Approach—DCF | 46,800,000 |
| Reconciled Market Value | 46,500,000 |
| Bondable/NNN Lease Structure | 49.000,000 |
| Final Reconciled Value | 49,000,000 |

Deloitte concluded that the final reconciled value should be the fair value based on the actual terms of the proposed lease, including the actual distribution of responsibility and cost for capital maintenance, and not on a more generalized market value based on market standard lease terms. IFS agrees with this view.

As a component of determining value under the income approach, as well as a requirement of the engagement, Deloitte developed an estimate of the fair rent for the Property, given the substantive terms of the Lease, including the bondable and non-bondable character of the rent obligation, as described in II(C), above.

Deloitte determined the fair rent based on competitive gross rents for similar properties in the area, reduced for reasonable costs and allowances that a landlord would incur in managing such a property and renting it under a similar lease structure to an unrelated tenant. This resulted in a triple net lease fair rental rate of $14.65 per rentable square foot. Deloitte then estimated the cost reserve applicable to the capital maintenance of the Property, the vacancy risk and other factors in order to determine the difference between the triple net and the bondable lease rental rates, and arrived at a bondable fair rental value rate of $12.40 per rentable square foot. Finally, Deloitte determined that fair market leases contain annual escalation in base rent of 2.50 percent.

IFS concluded that the final values Deloitte has calculated benefit the Plan in several ways, relative to their earlier draft values. The reduction in value from $52 million to $49 million reduces the amount of the contribution to the Plan that the Property will constitute. This will be offset, however, by an increase in the additional cash contribution ARINC intends to make to fully fund the Plan on an ABO basis if the Proposed Transaction proceeds. The lower property value also reduces the extent to which the Plan's overall portfolio is concentrated in a single asset, the Property. Additionally, because the contribution value is closer to the value under more typical terms (*i.e.*, a non-bondable triple-net lease), the risk of a value reduction if the Property is sold or leased to a different tenant is reduced. IFS notes that although the rent on the Property per square foot and, therefore, the total annual rent the Plan will receive are lower in the final appraisal than in the earlier draft, the value of the Property and thus the value of the contribution, are also lower. Accordingly, the resulting cash on contribution yield (*i.e.*, rent divided by contribution value) in the final appraisal is essentially the same as in the draft appraisal since both the numerator and the denominator in the yield calculation are lower. In other words, the income yield on the property, measured by rental income as a percentage of property value, is essentially unchanged.

Deloitte also evaluated the marketability of the Property and its fitness for multiple uses within the overall area and market in which it is located. Factors affecting this include the strength and growth patterns of the region and the physical structure as well as the permitted uses of the Property.

*The Contribution*

IFS notes that the Transfer Agreement provides for a 60-day Review Period during which the Plan may conduct final due diligence concerning the Property. The Plan, by IFS as independent fiduciary, may terminate the Transfer Agreement at any time during the Review Period, in which event the Proposed Transaction will not be consummated and the Contribution will not take place. During the Review Period, IFS may, on behalf of the Plan, conduct such inspections and surveys as to title, zoning, insurance, engineering, environmental and other matters as it sees fit. ARINC is obligated to pay all of the costs, including attorneys' fees, which IFS incurs on behalf of the Plan in connection with the Proposed Transaction, including the fees of the consultants and experts IFS retains on behalf of the Plan to assist it in the due diligence process. IFS engaged Deloitte and is prepared to contract with environmental, engineering and insurance experts to advise it. ARINC, not the Plan, is paying their fees, as well as Reed Smith's fees.

The closing is contingent upon, in addition to standard conditions, the Department's issuance of a prohibited transaction exemption. In addition, ARINC and ARI are required under the Transfer Agreement to certify at closing that their representations and warranties concerning the Property and other matters made in the Transfer Agreement are still accurate. If the Contribution is consummated, IFS will determine the value of the Property to be recorded on the Plan's books, taking into account the results of the appraisal performed by Deloitte.

*The Lease*

The IFS Report states that upon the Contribution, the Plan will lease the Property back to ARINC; indeed, execution of a lease between the Plan (or the SPE) and ARINC is a condition to a closing of the Contribution. The terms of the proposed lease (the Lease) are set forth in a detailed term sheet (the Draft Lease Term Sheet). As explained below, the Lease will be a triple net lease (*i.e.*, the base rental shall not include real estate taxes, utilities and insurance, as well as certain costs for the operation, maintenance, management, repair and replacement of the Property, all of which costs shall be paid by ARINC as tenant) throughout its term, and will be "bondable" for the first ten years unless the Property is sold during that time.

The Lease shall start as a "bondable" lease, in which ARINC's obligation to pay rent to the Plan will be absolute and unconditional and the rental payments will be exclusive of all costs related to the Property, including real estate taxes, utilities and insurance, which ARINC will pay. ARINC will bear the costs of capital improvements and all other costs to operate, maintain, repair and replace in good condition the systems and structural and non-structural components of the buildings on the Property, all in a manner befitting office buildings in Annapolis, Maryland that are comparable to the buildings on the Property and in accordance with all applicable laws. The Lease shall contain a commercially reasonable standard for determining whether repair or replacement is necessitated. All such maintenance, repair and replacement work shall be performed by ARINC. This bondable character of the Lease remains in effect until the earlier of (i) the end of the first 10 years of the Lease Term or (ii) the date on which the Property is sold to a third party or transferred to a Lender, at which time the Lease shall convert to a "non-bondable" lease (as more particularly described immediately below).

During the "non-bondable" term of the Lease, ARINC will continue to be

responsible for real estate taxes, utilities and insurance, and all ordinary, commercially reasonable, non-capital costs of operating, repairing and maintaining the Property. (This type of arrangement is commonly called a "triple net" lease, or—in shorthand—"NNN"). The Plan shall be responsible only for all capital repairs and replacements and other costs incurred in connection with the Property that customarily are the responsibility of owners of real property leased under triple net, non-bondable leases, all in a manner befitting office buildings in Annapolis, Maryland that are comparable to the buildings on the Property, and in accordance with all applicable laws. The Lease will reallocate responsibility for various obligations effective upon the conversion to a non-bondable structure, including all such capital maintenance, repair and replacement work. ARINC shall continue to perform such work upon the Plan's approval, subject to reimbursement, as applicable, by the Plan. In addition, ARINC will have rights of abatement and termination for casualty, condemnation and failure of utilities and services, as described in the Draft Lease Term Sheet and to be defined more precisely in the Lease.

IFS states that the rental payments under the Lease are to be set at fair market rates. Subject to final due diligence and the approval of the Independent Fiduciary, the annual base rent for the Property as a whole is expected to be based on the current fair market rental value identified in the Appraisal, $14.65 per square foot under the non-bondable structure and $12.40 under the bondable structure. Both rates will increase at 2.50 percent per year, compounded. ARINC will pay the bondable rate as long as the Property is leased under the bondable conditions, after which the rent will increase to the non-bondable triple net rate then in effect (*i.e.*, reflecting the annual increases). Any subletting profits during the bondable period will be retained by ARINC, but the Plan will receive 50% of such profits during the non-bondable term.

If ARINC exercises the option to renew the Lease for three years, the rent for that additional term will be equal to the then prevailing fair market rental, and no lower than the rent paid during the last year before the renewal period starts, with disputes concerning the rent for the renewal period to be resolved by a three-appraiser method. During negotiations, IFS obtained ARINC's agreement that the renewal right cannot be exercised if there have occurred during the 18-month period preceding the election date more than three material monetary defaults that continued uncured following notice and the expiration of applicable cure periods.

*The Make Whole Obligation*

The IFS Report concludes that the fact that the Make Whole Obligation will not extend beyond the first five years will not adversely affect the Plan absent a catastrophic decline in the Property's value. This is because the rental income under the Lease significantly exceeds the 5% threshold. The IFS Report presents an analysis of the make whole provision on a break-even basis. The actual accumulated rental income is compared to the guaranteed value at the end of each year (*i.e.*, the initial contribution value of $49 million plus five percent minimum return). The difference is the minimum property value (sale price or appraised value) necessary for the actual return to equal the guaranteed 5% return. The value of the Property at the end of year five (when the make whole will be calculated assuming the Property has not been previously sold) can be as low as $39,987,251 to achieve the guaranteed five percent return. This value is 81.6 percent of the initial contribution value, meaning that the Property would have to lose at least 18.4 percent of its value over the first five years in order to trigger a make whole contribution at the end of the five years to provide the Plan with the guaranteed five percent return, and the loss would have to increase thereafter for the Plan to fail to achieve the 5%.

*The Monetization*

The IFS Report states that IFS has been exploring various proposals to monetize the stream of lease payments in order to convert them into an immediate cash payment and reduce the Plan's allocation of assets to the Property. IFS has held extensive discussions with several prospective counterparties and investment bankers about alternative proposals that would enable the Plan to receive a lump sum payment in exchange for a counterparty receiving the cash flow associated with the lease payment stream. IFS notes that in general, structuring the transaction as a financing creates the risk that the transaction will subject the Plan to unrelated business income taxes. Conversely, structuring the transaction as an outright sale raises more credit risk issues and costs with the counterparties, and effectively reduces the value to the Plan. At present, no counterparty appears willing to proceed with an outright purchase of the lease stream. IFS notes that while they continue to engage financial institutions in discussions of various proposals, they do not expect that a monetization transaction will occur.

*Analysis and Determination by IFS*

The Impact of the Proposed Transaction on the Plan's Funding Status

In order to evaluate the impact of the Proposed Transaction on the Plan's financial and actuarial condition over the next five years, IFS reviewed the Plan's asset allocation target, as well as actuarial projections provided by ARINC's actuary, Watson Wyatt. The IFS Report tables below compare the status of the Plan under two scenarios: (1) The Proposed Transaction proceeds and ARINC makes an additional $9 million cash contribution to the Plan in 2004 and minimum contributions after that; (2) the Proposed Transaction does not proceed and ARINC makes only the minimum required contributions.

| | 2004 | 2005 | 2006 | 2007 | 2008 |
|---|---|---|---|---|---|
| **Plan Assets at November 30 of prior year ($ millions)** | | | | | |
| With transaction and minimum future cash contributions | 243.6 | 305.8 | 307.4 | 308.5 | 309 |
| Without transaction (minimum cash contributions only) | 243.6 | 244.3 | 242.3 | 269.2 | 298.2 |
| **Funded Status[6] ($ millions) at November 30 of prior year** | | | | | |
| With transaction and minimum future contributions | (64) | 0.4 | (11.6) | (25.4) | (41) |
| Without transaction (minimum contributions only) | (64) | (61.1) | (76.7) | (64.7) | (51.8) |

| | 2004 | 2005 | 2006 | 2007 | 2008 |
|---|---|---|---|---|---|
| **Funding Standard Account credit balance at January 1 ($ millions)** | | | | | |
| With transaction and minimum future cash contributions | 19.5 | 56.1 | 33.9 | 3.0 | 0 |
| Without transaction (minimum cash contributions only) | 10.5 | 0 | 0 | 0 | 0 |
| **Plan Funding Contributions, Property and Cash ($ millions)** | | | | | |
| With transaction and minimum future cash contributions | 62.5 | 0 | 0 | 0 | 27.4 |
| Without transaction (minimum cash contributions only) | 4.5 | 2.5 | 30.4 | 31.1 | 29.1 |
| **Cash flow from ARINC to the Plan ($ millions)** | | | | | |
| With transaction (minimum contribution plus rent) | 11.1 | 4.3 | 4.5 | 4.6 | 32.1 |
| Without transaction (minimum cash contributions only) | 4.5 | 2.5 | 30.4 | 31.1 | 29.1 |

[8] Market value of plan assets less Accumulated Benefit Obligation.

Based on this analysis, IFS believes that the Proposed Transaction would place the Plan in a better actuarial and financial position over the five years, with a higher funding percentage and a larger funding standard account credit balance, with lower cash contributions from ARINC. The last chart shows that even when ARINC's rent is taken into account, the Plan will be less reliant on ARINC's ability to generate cash for payments to the Plan. IFS adds that more generally, since the Property is a marketable asset with value independent of ARINC as the lessee, the Proposed Transaction would reduce the Plan's reliance on ARINC's creditworthiness.

*The Plan's Investment Portfolio*

Investment Policy

IFS notes that the Plan's investment policy statement currently permits investments in equities (domestic and international), fixed income, real estate, immediate participation guarantee contracts issued by insurers and cash equivalents. The Plan's current target asset allocation is:

30% large cap domestic equity
30% small cap domestic equity
10% international equity
27.5% domestic fixed income
2.5% cash

The actual asset allocation as of March 31, 2004 was 64% U.S. stocks, 11% international stocks, 24% U.S. fixed income, and 1% cash. The Plan currently owns no real estate, and owns no employer securities.

*Asset Allocation Analysis/Expected Risk and Return*

The IFS Report states that if the Proposed Transaction proceeds and the Property becomes an asset of the Plan valued at $49 million, and if ARINC makes the additional cash contribution of $9 million to achieve ABO full funding, the Property will represent approximately 16% of the Plan's assets. Assuming no reallocation of the Plan's other assets after the Contribution, the Plan's target asset allocation would become:

25% large cap domestic equity
25% small cap domestic equity
16% real estate
9% international equity
23% domestic fixed income
2% cash

IFS expects that adding a real estate asset like the Property to a portfolio of publicly traded securities should enhance overall portfolio diversification. The expected correlation of returns of institutional quality real estate relative to public equities is only approximately 0.20, and relative to publicly traded fixed income, it is also only approximately 0.20.

*ERISA Section 404(a)(1)(C)*

In light of the diversification requirement set forth in ERISA Section 404, IFS has considered the fact that if the Proposed Transaction proceeds, approximately 15% of the Plan's assets would be invested in a single asset, the Property. As a preliminary matter, IFS's diversification analysis recognizes that the Plan currently holds no real estate assets—its other assets consist entirely of marketable equity and fixed income securities. Less than 25% of the current assets of the Plan are fixed income investments. IFS notes that it is well recognized that real estate leased to a creditworthy tenant enhances an institutional investor's portfolio diversification in view of the low correlation of returns (0.20 as discussed above) as between real estate and other asset classes such as the equity and fixed income securities in which the Plan's assets are currently invested and that diversification can be expected to improve the Plan's risk adjusted returns.

Attorneys from Reed Smith, led by Donald J. Myers and Michael B. Richman, experienced practitioners in matters requiring prohibited transaction exemptions, have assisted IFS in the analysis of this important issue. Based on the advice IFS received from Reed Smith, IFS is satisfied that the Proposed Transaction would not cause the Plan to fail to satisfy the statute's diversification requirement.

*Due Diligence Regarding the Property*

As indicated above, IFS representatives have physically inspected the Property. In addition, IFS represents that it intends to use the Review Period under the Transfer Agreement to analyze thoroughly the condition of the Property and the safeguards available to protect the Plan if the Proposed Transaction proceeds. In anticipation of the commencement of the Review Period, IFS has identified experts to assist in the due diligence process.

IFS sent requests for proposals to two consulting firms, URS Corp. and EBI Consulting, to perform a property condition assessment (PCA). The purpose of this PCA will be to assess the physical condition of the Property and to document any defects. The building components and systems evaluated will include site development; building structure and envelope; building exteriors; roofs and facades; building interiors; vertical transportation systems; mechanical, HVAC, electrical, plumbing, conveyance, and life safety

and fire protection systems; and accessibility for disabled persons. While both firms appeared qualified to perform the work, URS was selected because of favorable recommendations from firms active in the real estate business. IFS is finalizing a formal contract with URS. The firm has agreed to conduct its PCA in general conformance with the American Society of Testing and Materials (ASTM) guidelines for property condition assessments.

Separately, IFS will contract with Custer Environmental, a respected environmental consultant, to provide an environmental site assessment (ESA) of the Property. Custer was selected because the firm is well qualified for the work and familiar with the Property, having conducted a Phase I ESA in March 2002. The assessment to be performed will follow the ASTM standards and provide an update to the 2002 Phase I ESA. Custer will conduct follow-up interviews with various governmental agencies that have site-specific knowledge; review documentation pertaining to soil and groundwater contamination; conduct an investigation to determine the presence of hazardous materials, underground storage tanks, and other potential hazards related to ground water contamination; perform a background investigation of the site and adjacent property histories; and inspect the buildings for suspected asbestos-containing materials.

IFS also expects to contract with an expert in insurance issues pertinent to the ownership of real estate similar to the Property. We anticipate that this insurance expert will evaluate the adequacy of the insurance coverages ARINC currently maintains on the Property and, if appropriate, recommend changes in or additions to those coverages.

*ARINC's Creditworthiness and Financial Condition*

The IFS Report states that in mid-January 2004, Moody's and Standard & Poor's issued initial public ratings of ARINC's proposed $200 million senior secured credit facilities. Moody's assigned a rating of "Ba3" to the proposed credit facility and "B1" to ARINC as the issuer. S&P assigned its "BB" corporate credit rating to ARINC and the proposed credit facility. These ratings place the ARINC debt one level below what is considered investment-grade quality. IFS not only reviewed the ratings reports but also discussed them with the rating agencies' personnel.

IFS notes that a credit rating reflects the rating agency's opinion of the relative default risk over the life of a debt issue, incorporating an assessment of all future events to the extent they reasonably can be anticipated. Such ratings reflect both the likelihood of default and any financial loss that may reasonably be anticipated in the event of default. Investment grade obligations are rated Aaa, Aa, A, and Baa by Moody's and AAA, AA, A, and BAA by S&P. The next two levels of ratings, Ba and B (Moody's) and BB and B (S&P), imply that the rating agency believes the obligations to have speculative elements and are subject to substantial credit risk. Moody's Ba3 rating of the credit facility placed it at the lowest of three rankings within the "Ba" category, while S&P's B1 rating places ARINC at the highest ranking in the "B" category.

S&P also gave ARINC a rating "outlook" of "Stable." A rating outlook assesses potential for change and is assigned as an ongoing component of all long-term ratings. Outlooks have a long time horizon, and incorporate trends or risks with less certain implications for credit quality. Outlooks may be "positive," indicating a rating may be raised, or "negative," indicating a rating may be lowered. "Stable" is the outlook assigned when ratings are not likely to be changed. The time frame for an outlook generally is up to two years.

S&P's credit rating of ARINC is derived from ARINC's small equity base, limited financial flexibility, and the weak domestic commercial aviation market, offset somewhat by ARINC's leading positions in aviation communications markets and the positive outlook for defense spending. S&P believes ARINC's leading niche market positions, steady defense business, and, significantly, its efforts to address its underfunded pension plan should offset its exposure to the commercial aviation market and somewhat higher debt levels. Moody's ratings considered ARINC's relatively stable and diversified revenue base, with more than 65% represented by contractual revenue from governmental agencies, its dominant market position in air-to-ground communication services to airlines worldwide, and its solid track record of revenue growth and stable margins.

Since ARINC received ratings below investment grade and its outlook was deemed "Stable," IFS considered the impact on the Property's value to the Plan if ARINC were to default on its obligations under the Lease. That analysis is discussed immediately below.

*Value of the Property as a Marketable Asset*

IFS believes that a critical aspect of the process of determining whether the Proposed Transaction will be in the interest of the Plan and its participants and beneficiaries involves consideration of not just the abstract value of the Property as determined in the Appraisal but a realistic assessment of the marketability of the Property to parties other than ARINC in the event the Lease is terminated and ARINC no longer will occupy the Property, whether by choice or due to a default under the Lease (which would likely indicate that ARINC is experiencing financial difficulties). While the Property is currently occupied almost exclusively (except for ARINC's tenant BearingPoint) by a single tenant primarily as a corporate headquarters office complex, a number of factors indicate that it is suitable for use by potential occupants other than ARINC, so the value of the Property can be realized independent of ARINC's long range prospects and plans.

The site improvements consist of two sets of buildings, clearly divided by a public road. This physical separation would allow, at a minimum, the Property to be leased or sold in two parts. The individual buildings, although interconnected, can be easily separated for separate tenant occupancy. For example, IFS understands that BearingPoint, which occupies one floor of one of the buildings, has a separate entrance and separate access security. The Property, although primarily built out for general office use, is adaptable for other uses as well. One building is designed and currently used for light industrial purposes, primarily for prototype fabrication.

IFS concludes that, given the economic vibrancy of the Annapolis region, the attractiveness of the Property's location as described in the Appraisal, the physical condition and layout of the Property and its improvements, and the diverse legally permitted uses, there should be multiple opportunities for sale or rental of the Property to one or more unrelated users.

*The Terms of the Proposed Transaction*

The IFS Report represents that the provisions of the Transfer Agreement, including the Draft Lease Term Sheet setting forth in detail the key terms of the Lease, were the product of extensive negotiation between IFS and ARINC. IFS asserts that IFS senior personnel were directly and intensively active in the negotiations. IFS also was represented by counsel from Reed Smith

experienced in both real estate transactions in the Annapolis area and the representation of benefit plans subject to ERISA engaging in transactions requiring exemptive relief from the Department. IFS states that in light of IFS' experience and due diligence, they believe that the terms of the Proposed Transaction set forth in the documents are commercially reasonable and consistent with the terms that unrelated parties bargaining at arms length would agree to in a similar transaction.

The IFS Report notes that the economic terms of the Proposed Transaction provide fair value to the Plan. The rental payments are to be made at rates, including annual escalations, equal to fair market value as determined by the independent appraiser, Deloitte. IFS believes that the Proposed Transaction would not appear to place a financial burden on ARINC that would jeopardize its ability to satisfy its obligations to the Plan. The anticipated annual rent under the Lease, $4.3 million, represents only 8.1% of the cash generated by ARINC's operations in 2003 as reported in its financial statements. And as shown above, the total of minimum funding contributions and rent that ARINC will have to pay the Plan if the Proposed Transaction occurs is less than the contributions the Plan would require if it does not. IFS states that this reduction in ARINC's Plan-related costs improves ARINC's financial position, rendering it a more reliable source of future contributions to the Plan. IFS concludes that the bondable structure of the Lease's first ten (10) years provides additional assurance that the rent will be paid and also relieves the Plan during that period of any obligation to expend Plan assets on the Property for any purpose, including repairs, administration and capital improvements, absent a default by ARINC.

IFS asserts that it has carefully considered whether and to what extent the ROFO will materially impair the Plan's ability to sell the Property for fair value during the term of the Lease. As described above, the ROFO is the only restraint on sale that ARINC is requiring as a condition for contributing the Property to the Plan, despite IFS' extensive efforts to persuade ARINC to drop its demand for the provision. (By contrast, after considerable negotiations, ARINC withdrew its proposals for a purchase option and a right of first refusal.) As structured, IFS believes that the ROFO will not bar the Plan from marketing the Property for sale at fair market value since the ROFO is exercisable only at that value (or the value of an unsolicited offer), and the Plan may sell to a third party if ARINC declines to buy at that value. Accepting another of IFS' objections to the terms as originally proposed, ARINC has agreed that if it declines to exercise its ROFO and the Plan sells the Property, the purchaser will not have an ROFO obligation to ARINC because the ROFO will not run with the land. Moreover, since the ROFO is also extinguished in the event of an uncured monetary default of ARINC's obligations to the Plan as tenant, the ROFO serves as an inducement to ARINC to meet its financial obligations to the Plan under the Lease.

IFS believes that ARINC's Make Whole Obligation significantly mitigates the effect of the ROFO. If the Property is sold within the first five years, the Plan will achieve at least a 5% per annum compounded return on the Property's value as contributed. Even after the five year guarantee expires, the flow of rental payments at a yield of more than five percent generates a reduced minimum sale price that still results in a five percent compound return over the lease term except under conditions of catastrophic loss of value. IFS notes that for example, at the end of ten years, the Property could be sold at 65 percent of contribution value ($31.75 million) and still achieve the five percent minimum return; after 20 years, the minimum price to achieve the five percent return is below 19 percent of contribution value ($9.26 million).

*IF Report Conclusion*

IFS believes that the Proposed Transaction will immediately improve the Plan's funding, improve the Plan's overall portfolio of assets in terms of anticipated risk-adjusted return and reduce the Plan's reliance on future cash contributions from ARINC. The Plan will receive an attractive, marketable parcel of real estate, fully leased to a reasonably credit-worthy tenant obligated to pay rent at fair market value with regular annual increases. The terms of the Lease relieve the Plan of any exposure to the cost of capital improvements for the first ten years after the Property is contributed to the Plan, and are triple-net throughout its term. Accordingly, and for all the reasons set forth above, IFS concludes, as independent fiduciary to the Plan, that the Proposed Transaction is prudent and in the interest of the Plan's participants and beneficiaries.

12. Duties of the Independent Fiduciary. The Department notes that the appointment of an independent fiduciary to represent the interests of the Plan with respect to the transactions that are the subject of the exemption request is a material factor in its determination to propose exemptive relief. The Department believes that it would be helpful to provide its views on the responsibilities of an independent fiduciary in connection with the in-kind contribution, directly or indirectly, of property to an employee benefit plan.

As noted in the Department's Interpretive Bulletin, 29 CFR 2509.94–3(d) (59 FR 66736, December 28 1994), apart from consideration of the prohibited transaction provisions, plan fiduciaries must determine that acceptance of an in-kind contribution is consistent with ERISA's general standards of fiduciary conduct. It is the view of the Department that acceptance of an in-kind contribution is a fiduciary act subject to section 404 of ERISA. In this regard, section 404(a)(1)(A) and (B) of ERISA requires that fiduciaries discharge their duties to a plan solely in the interests of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable administrative expenses, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. In addition, section 404(a)(1)(C) requires that fiduciaries diversify plan investments so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so. Accordingly, the fiduciaries of a plan must act "prudently," "solely in the interest" of the plan's participants and beneficiaries, and with a view to the need to diversify plan assets when deciding whether to accept an in-kind contribution. If accepting an in-kind contribution is not "prudent," not "solely in the interest" of the participants and beneficiaries of the plan, or would result in an improper lack of diversification of plan assets, the responsible fiduciaries of the plan would be liable for any losses resulting from such a breach of fiduciary responsibility, even if a contribution in kind does not constitute a prohibited transaction under section 406 of ERISA.

The selection of an independent qualified appraiser to determine the value of an in-kind contribution and the acceptance of the resulting valuation are fiduciary decisions governed by the provisions of Part 4 of Title I ERISA. In discharging its obligations under section 404(a)(1), the independent fiduciary must take steps calculated to obtain the most accurate valuation available. In

addition, the fiduciary obligation to act prudently requires, at a minimum, that the independent fiduciary conduct an objective, thorough, and analytical critique of the valuation. In conducting such verification, the independent fiduciary must evaluate a number of factors relating to the accuracy and methodology of the valuation and the expertise of the independent qualified appraiser. Reliance solely on the valuation provided by the appraiser would not be sufficient to meet this prudence requirement.

In considering whether to accept the Contribution and to engage in transactions involving the Leaseback of the Property by the Plan to ARINC and any renewal of the Lease, the Repurchase of the Property, any Make Whole Payment or Monetization, the Independent Fiduciary's responsibilities include the following:

1. The Independent Fiduciary must prudently determine the fair market value of the Property as of the date it is contributed to the Plan. In determining the fair market value of the Property, the Independent Fiduciary must obtain an appraisal by a qualified independent appraiser, and must ensure that the appraisal is consistent with sound principles of valuation.

2. The Independent Fiduciary must ensure that the appraisal, at a minimum, includes the following elements:

(a) A summary of the appraiser's qualifications to evaluate the Property,

(b) A statement that the appraiser is independent of ARINC and that the appraiser has no interest in the Property.

(c) A statement that the appraisal is being conducted to determine the fair market value of the Property, which is defined as the price at which the Property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, and both parties are able, as well as willing, to trade and are well informed about the Property and the market for the Property,

(d) A statement of the Property's value, the methodologies used in determining the value, the reasons for the valuation in light of the methodologies, and the reasons that the appraiser chose to apply particular valuation methods rather than others,

(e) A statement that the appraisal is being conducted to determine the fair market rental value of the leased Property, which is defined as the price at which the Property would change hands between a willing lessee and a willing lessor when the parties are not under any compulsion to lease, and both parties are able, as well as willing, to transact and are well informed about the Property and the market for the leased Property,

(f) A statement of the Property's rental value, the methodologies used in determining the value, the reasons for the valuation in light of the methodologies, and the reasons that the appraiser chose to apply particular valuation methods rather than others,

(g) A statement of the relevance or significance accorded to the valuation methodologies taken into account,

(h) The effective date of the valuations,

(i) A description of the nature of ARINC's business and history,

(j) A description of the economic outlook in general, and of the condition and outlook of the local real property market and rental market in particular,

(k) An analysis of the Property's condition and future value,

(l) A description of all of the factors taken into account in making the valuation, including any restrictions, understandings, agreements or obligations limiting the Plan's ability to dispose of the Property,

(m) A statement of past transactions involving the Property, including dates, amounts, price, and whether the transactions were at arms-length, as well as a description of any attempts to buy or sell the Property over the last five years, including a description of any previous plans for such transactions as described in the Application,

(n) An analysis of the market price of similarly situated properties,

(o) An analysis of the marketability, or lack thereof of the Property, with specific reference to any restrictions, understandings, agreements, or obligations limiting the Plan's ability to dispose of the Property, and

(p) Any other factors necessary for a prudent determination of the market value of the Property.

3. The Independent Fiduciary must investigate the facts and assumptions underlying the appraisal to ensure that the Property contribution is not valued at more than fair market value. The Independent Fiduciary must not simply defer to the conclusions reached by the appraiser, but rather will take appropriate action to ensure:

(a) That the appraisal is based upon complete, accurate, and current data;

(b) That the appraiser is appropriately qualified to conduct the valuation;

(c) That the valuation methodologies are appropriate and adequately explained and that the appraiser has adequately justified its decision not to use alternative methodologies;

(d) That the property's value is calculated with appropriate discounts for any transfer restrictions;

(e) That the appraisal's reasoning and assumptions are consistent, logical, and supported by appropriate financial and economic data and that any calculations are accurate;

(f) That the valuation is based on complete and accurate appraisals, which have been properly analyzed;

(g) That the assumptions underpinning the valuation are properly identified, and a careful analysis is performed of the impact of changes in those assumptions on the value of the Property;

(h) That the valuation has appropriately considered ARINC's financial condition in valuing the Property, as well as the impact of an ARINC bankruptcy or a decision to move the headquarters to a different location on the value of the Property; and

(i) That the fair market value of the Property has been determined by way of a prudent investigation.

Lastly, the Department notes that the above described responsibilities to be undertaken by the Independent Fiduciary will be material factors in whether the Department determines to grant a final exemption.

13. Summary of Conditions. ARINC represents that the requested exemption would be subject to the following general terms and conditions:

- With respect to the Contribution, the Leaseback, the Repurchase, the sale of the Property, as well as any future Plan transactions involving the Property, the Plan will be represented by a qualified independent fiduciary who will determine that the Contribution, Leaseback (and any renewal of the Lease), and sale/Repurchase transactions are appropriate for and in the interests of the Plan and its participants;
- The contribution value of the Property is the fair market value of the Property as determined by a qualified independent fiduciary in conjunction with a qualified independent appraiser;
- The initial 10-year period of the twenty-year Lease with one 3-year renewal period is a bondable lease (ARINC pays for capital expenditure) with the remainder of the lease term as a triple net lease under which ARINC, as lessee, pays, in addition to the base rent, all normal operating expenses of the Property, including taxes, insurance, maintenance, repairs, and utilities;
- If approved by the qualified independent fiduciary upon its determination that it is in the interest of, and protective of, the Plan and its

participants, the Plan's agreement to enter into a transaction to sell the initial ten-year stream of lease income on the Property to a third party for cash (the Monetization);

• IFS has ongoing responsibilities with respect to the Plan's holding of the Property. As part of its ongoing duty to determine whether continued ownership of the Property is in the Plan's interest, IFS will specifically consider the nature and diversification of the Plan's overall investment portfolio, cash flow and liquidity needs and actuarial condition. ARINC will supply IFS with any necessary information so that it can appropriately carry out this function. The purpose of these ongoing duties will be to ensure that IFS determines on an ongoing basis that the Plan's holding of the Property does not pose an undue risk to the Plan of an overconcentration of Plan assets in the Property;

• All terms and conditions of the Contribution, Lease (and the one 3-year renewal period), and potential Repurchase or sale transactions involving the Plan will be at least as favorable to the Plan as those the Plan could obtain in an arm's-length transaction with an unrelated party;

• No commissions, fees, costs, charges or other expenses will be paid by the Plan in connection with the acquisition of the Property, including expenses associated with the contribution, leasing, or monetizing transactions. This condition does not preclude the Plan from paying the ongoing costs attributable to the holding of the Property once the Contribution has been approved and accepted;

• Subject to ARINC's Right of First Offer, the Plan retains the right to sell or assign, in whole or in part, any of its Property interests to any third party purchaser; and

• ARINC indemnifies the Plan with respect to all liability for hazardous substances released on the Property prior to the execution and closing of the Contribution.

**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 or her duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirements of section 401(a) of the Code that the plan operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interest of the plan and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the plan;

(3) This proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and the Code, including statutory or administrative exemptions. 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; and

(4) This proposed exemption, if granted, will be subject to the express condition that the material facts and representations set forth in the Application are true and complete, and that the Application accurately describes all material terms of the transactions that are the subject of the proposed exemption.

**Written Comments and Hearing Requests**

All interested persons are invited to submit written comments or requests for a hearing on the pending exemption to the address above, within the time frame set forth above, after the publication of this proposed exemption in the Federal Register. All comments will be made a part of the record. Comments received will be available for public inspection with the Application at the address set forth above.

**Notice to Interested Persons**

Within seven (7) calendar days of publication of the Notice of Proposed Exemption (the Notice) in the **Federal Register**, ARINC shall provide notice to all participants of the Plan (including active employees, separated vested participants and retirees) by mailing first class a photocopy of the Notice, plus a copy of the supplemental statement (Supplemental Statement), as required, pursuant to 29 CFR 2570.43(b)(2). ARINC shall also provide the same notice by first class mailing to the representatives of the unions that represent employees of ARINC who currently participate in the Plan.

**Proposed Exemption**

Based on the facts and representations set forth in the Application, the Department is considering granting an exemption 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*

If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2), and 407(a) of the Act, and the sanctions resulting from the application of 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:

(a) The transfer of the property described as the 27.5 acre headquarters of ARINC Incorporated (ARINC) situated in Annapolis, MD or the ownership interests of a special purpose entity (SPE) whose sole asset is this property (collectively, the Property) to the Plan through the in-kind contribution of such Property by ARINC, the plan sponsor and a party in interest with respect to the Plan (the Contribution);

(b) The holding of the Property by the Plan;

(c) The leaseback of the Property by the Plan to ARINC (the Lease or Leaseback);

(d) The repurchase of the Property, by ARINC (the Repurchase) pursuant to (1) a right of first offer as specified in the Lease should the Plan wish to sell the Property to a third party or (2) a voluntary agreement under which the Plan agrees to sell the Property to ARINC at any time during the Lease; and

(e) Any payments to the Plan by ARINC made pursuant to the make whole obligation as specified in the Lease (Make Whole Payment) (collectively, the Exemption Transactions).

*Section II. Conditions*

This proposed exemption is conditioned upon adherence to the material facts and representations described herein and upon satisfaction of the following requirements:

(a) A qualified independent fiduciary (the Independent Fiduciary) acting on behalf of the Plan, represents the Plan's interests for all purposes with respect to the Contribution and determines, prior to entering into any of the Exemption Transactions described herein, that each

such transaction is in the interests of the Plan;

(b) The Independent Fiduciary negotiates and approves the terms of any of the transactions between the Plan and ARINC that relate to the Property;

(c) The Independent Fiduciary manages the holding, leasing, and disposition of the Property and takes whatever actions it deems necessary to protect the rights of the Plan with respect to the Property;

(d) The terms and conditions of any transactions between the Plan and ARINC concerning the Property are no less favorable to the Plan than terms negotiated at arm's length under similar circumstances between unrelated third parties;

(e) The contribution value of the Property is the fair market value of the Property as determined by the Independent Fiduciary on the date the Property is contributed to the Plan. In determining the fair market value of the Property, the Independent Fiduciary obtains an updated appraisal from a qualified, independent appraiser selected by the Independent Fiduciary, and ensures that the appraisal is consistent with sound principles of valuation;

(f) The Lease has an initial term of twenty years, with a three-year renewal term. The Lease is a bondable lease for the first ten years of the Lease (or such earlier date specified in the Lease as agreed to between the Lessor and ARINC). During the bondable period ARINC, as lessee, pays, in addition to the base rent, all costs associated with the Property, including capital expenditures. After the bondable period expires, the Lease shall convert to a traditional triple net lease under which ARINC, as lessee, pays, in addition to the base rent, all normal operating expenses of the Property, including taxes, insurance, maintenance, repairs, and utilities, but does not pay capital expenditures;

(g) The Independent Fiduciary has sole authority to determine if it is in the interest of the Plan to enter into a transaction to sell the stream of lease income on the Property to a third party for cash (the Monetization);

(h) The Independent Fiduciary determines on an ongoing basis that the amount of plan assets invested in employer real property and employer securities, including its interests in the Property, complies with ERISA;

(i) At the earlier of: (i) The date the Plan sells the Property for fair market value or (ii) the date five years from the date of the Contribution, ARINC will transfer to the Plan a Make Whole Payment, as described below, in order to guarantee the Plan a minimum rate of return of 5% compounded per annum on the initial contributed value of the Property; provided that, if a Make Whole Payment is due and if, for the taxable year of ARINC in which the Make Whole Payment is to be made, such Make Whole Payment (i) would not be deductible under section 404(a)(1) of the Code or (ii) would result in the imposition of an excise tax under section 4972 of the Code, such Make Whole Payment would not be made until the next taxable year of ARINC for which the Make Whole Payment is deductible under section 404(a)(1) of the Code and does not result in an excise tax under section 4972 of the Code;

ARINC will guarantee a minimum return of 5% to the Plan by agreeing that if (i) the combination of the proceeds from a sale of the Property (or the change in the value of the Property if the Plan continues holding it over the full five years) plus the Plan's net income on the Property under the Lease prior to the sale (or over the full five years) is less than (ii) the Property's value as of the date of the Contribution plus a 5% compounded rate of return on that value plus the costs of holding and maintaining the Property, then (iii) ARINC will contribute to the Plan the difference necessary to provide the 5% return. The calculation of the Make Whole Payment will take into account the status of any Monetization of the lease payments as of the time of sale or five-year anniversary of the Contribution.

(j) If the Plan desires to sell or convey the Property or its interest therein during the Lease Term, the Plan must first offer ARINC the right to purchase or otherwise acquire the Property or such interest therein on such terms and conditions as the Plan proposes to market the Property or such interest therein for sale (the Right of First Offer). If ARINC fails to exercise such right to purchase, the Plan generally is free to sell the Property to a third party. The right of first offer shall terminate upon the commencement of the exercise by the Plan of its remedies under the Lease as the result of a monetary event of default by ARINC as described in the Lease that continues uncured following notice and the expiration of applicable cure periods (and a second notice and cure period provided fifteen (15) days before the loss of such right on account of such default);

(k) The Plan pays no commissions or fees in connection with the Contribution, the Lease, the Repurchase, or the Monetization of the Property. This condition does not preclude the Plan from paying the ongoing costs associated with the holding of the Property that are not the responsibility of ARINC under the Lease;

(l) Subject to ARINC's Right of First Offer, the Plan retains the right to sell or assign, in whole or in part, any of its Property interests to any third party purchaser; and

(m) ARINC indemnifies the Plan with respect to all liability for hazardous substances released on the Property prior to the execution and closing of the Contribution of the Property.

*Section III. Definitions*

(a) The term "Independent Fiduciary" means a fiduciary who is:

(1) Independent of and unrelated to ARINC or its affiliates, and

(2) Appointed to act on behalf of the Plan for all purposes related to, but not limited to (i) the in-kind contribution of the Property by ARINC to the Plan, and (ii) other transactions between the Plan and ARINC related to the Property.

For purposes of this proposed exemption, a fiduciary will not be deemed to be independent of and unrelated to ARINC if:

(1) Such fiduciary directly or indirectly controls, is controlled by or is under common control with ARINC,

(2) Such fiduciary directly or indirectly receives any compensation or other consideration in connection with any transaction described in this proposed exemption; except that an Independent Fiduciary may receive compensation for acting as an Independent Fiduciary from ARINC in connection with the transactions contemplated herein if the amount or payment of such compensation is not contingent upon or in any way affected by the Independent Fiduciary's ultimate decision, and

(3) The annual gross revenue received by such fiduciary, during any year of its engagement, from ARINC and its affiliates exceeds 5 percent (5%) of the fiduciary's annual gross revenue from all sources for its prior tax year.

(b) The term "affiliate" means:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee, relative, or partner of any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(c) The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

Signed at Washington, DC, this 7th day of September 2004.

**Ivan L. Strasfeld,**

*Director, Office of Exemption Determinations, Employee Benefits Security Administration, Department of Labor.*

[FR Doc. 04–20538 Filed 9–10–04; 8:45 am]

BILLING CODE 4510–29–P

## NATIONAL SCIENCE FOUNDATION

### Advisory Committee for Computer and Information Science and Engineering; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

*Name:* Advisory Committee for Computer and Information Science and Engineering—(1115).

*Date and Time:* October 22, 2004; 8 a.m. to 3:30 p.m.

*Place:* National Science Foundation, 4201 Wilson Blvd., Room 1235, Arlington, VA 22230.

*Type of Meeting:* Open.

*Contact Person:* Gwen Barber-Blount, Office of the Assistant Director, Directorate for Computer and Information Science and Engineering, National Science Foundation, 4201 Wilson Blvd., Suite 1105, Arlington, VA 22230. Telephone: (703) 292–8900.

*Minutes:* May be obtained from the contact person listed above.

*Purpose of Meeting:* To advise NSF on the impact of its policies, programs and activities on the CISE community. To provide advice to the Assistant Director/CISE on issues related to long-range planning, and to form ad hoc subcommittees to carry out needed studies and tasks.

*Agenda:* Report from the Assistant Director; discussion of education, diversity, workforce issues in IT; cyberinfrastructure; long-range funding outlook and proposal success rates.

Dated: September 7, 2004.

**Susanne Bolton,**

*Committee Management Officer.*

[FR Doc. 04–20562 Filed 9–3–04; 8:45 am]

BILLING CODE 7555–01–M

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 72–25]**

### Foster Wheeler Environmental Corporation; Issuance of Environmental Assessment and Finding of No Significant Impact Regarding a Proposed Exemption

The U.S. Nuclear Regulatory Commission (NRC or the Commission) is considering issuance of an exemption, pursuant to 10 CFR 72.7, from the provisions of 10 CFR 72.102(f)(1) to Foster Wheeler Environmental Corporation (FWENC or applicant). The requested exemption would allow FWENC to use a probabilistic approach along with considerations of risk to establish the design earthquake (DE) ground motion levels at the Idaho Spent Fuel (ISF) Facility, instead of the deterministic methodology of 10 CFR 100, Appendix A. FWENC submitted the exemption request as part of its November 19, 2001, license application for the ISF Facility, an independent spent fuel storage installation (ISFSI) to be located at the Idaho National Engineering and Environmental Laboratory (INEEL).

**Environmental Assessment (EA)**

*Identification of Proposed Action:* The applicant requested an exemption from the requirement in 10 CFR 72.102(f)(1) which states that, "The design earthquake (DE) for use in the design of structures must be determined as follows: (1) For sites that have been evaluated under the criteria of Appendix A of 10 CFR Part 100, the DE must be equivalent to the safe shutdown earthquake (SSE) for a nuclear power plant." The regulation at 10 CFR 72.102(b) requires that, for sites west of the Rocky Mountains, such as the ISF Facility site, seismicity must be evaluated using the techniques of 10 CFR Part 100, Appendix A. The requested exemption would allow the applicant to calculate the DE for the proposed facility using an alternate method.

The proposed action before the Commission is whether to grant this exemption pursuant to 10 CFR 72.7.

*Need for the Proposed Action:* The applicant has requested a license to construct and operate the ISF Facility, as described in its license application, dated November 19, 2001, on behalf of the Department of Energy (DOE). FWENC will be the license holder for the ISF Facility, which would be the second NRC-licensed ISFSI at the INEEL. The proposed facility will be adjacent to the existing ISFSI for the TMI–2 fuel debris, and close to the DOE facilities currently storing the spent fuel to be moved to the ISF Facility. The ISF Facility represents an additional milestone in the 1995 settlement agreement among DOE, the U.S. Navy, and the State of Idaho regarding the disposition of spent nuclear fuel at INEEL.

The exemption would allow the applicant to use risk-informed methods including a probabilistic seismic hazards analysis (PSHA) to define the design earthquake for the ISF Facility. This DE is a critical assumption for the design of the facility structures, systems, and components (SSCs) important to safety. These SSCs must be designed to withstand the effects of natural phenomena, including earthquakes, without impairing their capability to perform their safety functions. For sites west of the Rocky Mountains, including the ISF Facility site, 10 CFR 72.102(b) requires that seismicity be evaluated using techniques set forth in Appendix A of 10 CFR Part 100 for nuclear power plants. In applying that appendix, the applicant would be required to define the DE as the most significant earthquake postulated to occur at that site, irrespective of its frequency, or the estimated time the facility would be operational. This would result in unwarranted conservatism in the design and construction of the facility, placing an unnecessary burden on the applicant, increasing overall project costs and delaying implementation of this phase of the settlement agreement between DOE and the State of Idaho.

The NRC staff has evaluated the proposed exemption in its preliminary safety evaluation report (SER) for the ISF Facility, dated July 29, 2004. In the SER, the staff concludes that there are sufficient technical and regulatory bases to grant an exemption to 10 CFR 72.102(f) at the time a license is issued for the ISF Facility. These bases are that: (i) The probability and risk-informed analyses performed by the applicant demonstrate that the SSCs important to safety will maintain their capability to protect public health and safety, even considering earthquake ground motions more severe than the proposed DE; (ii) the applicant's exemption request is similar to previous exemption requests found acceptable by the NRC staff for the TMI–2 ISFSI and the Private Fuel Storage Facility; and (iii) the applicant's methods and analyses are consistent with the probabilistic approach and corresponding design earthquake values allowed under the recently added regulations in 10 CFR 72.103, as described in the associated regulatory guidance in NRC Regulatory Guide 3.73.

*Environmental Impacts of the Proposed Action:* The NRC staff previously evaluated the environmental impacts resulting from the construction, operation and decommissioning of the ISF Facility, and determined that such impacts would be acceptably small. The staff's conclusions are documented in the "Environmental Impact Statement for the Proposed Idaho Spent Fuel Facility at the Idaho National Engineering and Environmental Laboratory in Butte County, Idaho (Final Report), NUREG–1773," issued in

January 2004. In that environmental impact statement (EIS), and in the preliminary SER, the staff considered the design earthquake for the site based on the applicant's methods, and concluded that earthquake events would not result in unacceptable consequences or significant radiation releases from the proposed ISF Facility. Therefore, the staff finds that the proposed exemption, involving the use of an acceptable analytical method, will not have any significant environmental impact.

*Alternative to the Proposed Action:* As an alternative to the proposed action, the staff considered denial of the proposed exemption (*i.e.*, the "no-action" alternative). Denial of the exemption request would require the applicant to perform additional analyses and possibly revise the design of the ISF Facility, but these changes would not affect the conclusions of the EIS. Neither the proposed action nor the alternative to the proposed action will have a significant environmental impact. Therefore, the environmental impacts of the proposed action and the alternative action are similar.

*Agencies and Persons Consulted:* On August 2, 2004, Mr. Doug Walker, Senior Health Physicist with the State of Idaho INEEL Oversight Program, was contacted regarding the environmental assessment for the proposed exemption and had no comments. The NRC staff previously evaluated the environmental impacts of the ISF Facility in the final EIS issued in January 2004 and has determined that additional consultation under Section 7 of the Endangered Species Act is not required for this specific exemption which involves the use of an alternative analytical method and will not affect listed species or critical habitat. The NRC staff has similarly determined that the proposed exemption is not a type of activity having the potential to cause effects on historic properties. Therefore, no further consultation is required under Section 106 of the National Historic Preservation Act.

**Finding of No Significant Impact**

The environmental impacts of the proposed action have been reviewed in accordance with the requirements set forth in 10 CFR Part 51. Based upon the foregoing EA, the Commission finds that the proposed action of granting the exemption from 10 CFR 72.102(f), so that FWENC may employ alternative methods for determining the design earthquake for the ISF Facility, will not significantly impact the quality of the human environment. Accordingly, the Commission has determined that a Finding of No Significant Impact is appropriate, and that an environmental impact statement for the proposed exemption is not necessary.

For further details with respect to this exemption request, see the FWENC license application for the ISF Facility, and the accompanying Safety Analysis Report, dated November 19, 2001. The request for exemption was docketed under 10 CFR Part 72, Docket No. 72–25. These documents are available for public inspection at the Commission's Public Document Room, One White Flint North Building, 11555 Rockville Pike, Rockville, MD, or from the publicly available records component of NRC's Agencywide Documents Access and Management System (ADAMS). These documents may be accessed through the NRC's Public Electronic Reading Room on the Internet at *http://www.nrc.gov/reading-rm/adams.html*. If there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail at *pdr@nrc.gov*.

Dated at Rockville, Maryland, this 2nd day of September, 2004.

For the Nuclear Regulatory Commission.

**James R. Hall,**

*Senior Project Manager, Spent Fuel Project Office, Office of Nuclear Material Safety and Safeguards.*

[FR Doc. 04–20590 Filed 9–10–04; 8:45 am]

BILLING CODE 7590–01–P

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 72–25]**

## Foster Wheeler Environmental Corporation; Issuance of Environmental Assessment and Finding of No Significant Impact Regarding a Proposed Exemption

The U.S. Nuclear Regulatory Commission (NRC or the Commission) is considering issuance of an exemption, pursuant to 10 CFR 72.7, from the provisions of 10 CFR 72.30(c) to Foster Wheeler Environmental Corporation (FWENC or applicant). The requested exemption would allow FWENC to rely on the Statement of Intent from the Department of Energy (DOE) to satisfy the requirements for financial assurance for decommissioning of the Idaho Spent Fuel (ISF) Facility. FWENC submitted the exemption request on April 2, 2003, in support of its November 19, 2001, license application for the ISF Facility, an independent spent fuel storage installation (ISFSI) to be located at the Idaho National Engineering and Environmental Laboratory (INEEL).

**Environmental Assessment (EA)**

*Identification of Proposed Action:* The applicant requested an exemption from the requirement in 10 CFR 72.30(c) which states that financial assurance for decommissioning must be provided by one or more of the following methods, including: (1) Prepayment; (2) a surety method, insurance, or other guarantee method; (3) an external sinking fund; or (4) in the case of Federal, State, or local government licensees, a statement of intent containing a cost estimate for decommissioning, and indicating that funds for decommissioning will be obtained when necessary. FWENC, a private entity, will be the licensee for the ISF Facility, and the provisions of 10 CFR 72.30(c)(4) do not explicitly allow such a non-government entity to meet the decommissioning financial assurance requirements through reliance on a statement of intent. The requested exemption would allow the applicant to rely on the statement of intent provided by DOE for decommissioning funding assurance. DOE has contracted with FWENC for the licensing, construction, and operation of the ISF Facility, which will repackage and store spent fuel possessed by DOE, in partial fulfillment of the 1995 settlement agreement among DOE, the U.S. Navy, and the State of Idaho.

The proposed action before the Commission is whether to grant this exemption pursuant to 10 CFR 72.7.

*Need for the Proposed Action:* The applicant has requested a license to construct and operate the ISF Facility, as described in its license application, dated November 19, 2001, on behalf of the Department of Energy (DOE). FWENC will be the license holder for the ISF Facility, which would be the second NRC-licensed ISFSI at the INEEL. The proposed facility will be adjacent to the existing ISFSI for the TMI–2 fuel debris, and close to the DOE facilities currently storing the spent fuel to be moved to the ISF Facility. The ISF Facility represents an additional milestone in the 1995 settlement agreement among DOE, the U.S. Navy, and the State of Idaho regarding the disposition of spent nuclear fuel at INEEL.

The exemption would allow the applicant to rely on DOE's statement of intent to provide decommissioning funding for the ISF Facility when needed, instead of using one or more of the other methods specified in 10 CFR 72.30(c). These other methods would require the applicant to contribute substantial funds into one of these other

financial instruments well in advance of decommissioning. This facility will be designed and operated exclusively for the interim storage of DOE spent fuel, and the licensing, construction, and operational costs will be paid directly or indirectly by DOE. DOE has also committed to obtain sufficient funding for the decommissioning of the facility from the U.S. Congress, when needed, so funding for all phases of the ISF Facility will ultimately be provided by DOE. To preclude FWENC from relying on the method in 10 CFR 72.30(c)(4) to meet the decommissioning financial assurance requirements for this facility would result in an unnecessary financial burden on the applicant, increasing overall project costs.

The NRC staff has evaluated the proposed exemption in its preliminary safety evaluation report (SER) for the ISF Facility, dated July 29, 2004. In the SER, the staff concludes that the intent of 10 CFR 72.30(c)(4) is met and that the commitments identified in the requested exemption are consistent with the requirements of the regulation. The staff finds the exemption request acceptable and will impose appropriate license conditions to ensure that the decommissioning funding commitments will be met.

*Environmental Impacts of the Proposed Action:* The NRC staff previously evaluated the environmental impacts resulting from the construction, operation and decommissioning of the ISF Facility, and determined that such impacts would be acceptably small. The staff's conclusions are documented in the "Environmental Impact Statement for the Proposed Idaho Spent Fuel Facility at the Idaho National Engineering and Environmental Laboratory in Butte County, Idaho (Final Report), NUREG–1773," issued in January 2004. In that environmental impact statement (EIS), the staff performed a cost-benefit analysis, and concluded that the benefits of the facility outweigh the associated impacts and costs. This conclusion was based on the assumption that DOE would obtain the necessary decommissioning funding, as described in the exemption request. On this basis, and the fact that the proposed exemption deals with financial matters that will not affect the physical design or operation of the ISF Facility, the staff finds that the proposed exemption will not have any significant environmental impact.

*Alternative to the Proposed Action:* As an alternative to the proposed action, the staff considered denial of the proposed action (*i.e.*, the "no-action" alternative). Approval or denial of the exemption request would result in no change in the environmental impacts described in the staff's final EIS. Therefore, the environmental impacts of the proposed action and the alternative action are similar.

*Agencies and Persons Consulted:* On August 2, 2004, Mr. Doug Walker, Senior Health Physicist with the State of Idaho INEEL Oversight Program, was contacted regarding the environmental assessment for the proposed exemption and had no comments. The NRC staff previously evaluated the environmental impacts of the ISF Facility in the final EIS issued in January 2004, and has determined that additional consultation under Section 7 of the Endangered Species Act is not required for this specific exemption which involves financial assurance mechanisms and will not affect listed species or critical habitat. The NRC staff has similarly determined that the proposed exemption is not a type of activity having the potential to cause effects on historic properties. Therefore, no further consultation is required under Section 106 of the National Historic Preservation Act.

**Finding of No Significant Impact**

The environmental impacts of the proposed action have been reviewed in accordance with the requirements set forth in 10 CFR Part 51. Based upon the foregoing EA, the Commission finds that the proposed action of granting the exemption from 10 CFR 72.30(c), so that FWENC may rely on DOE's statement of intent for the decommissioning financial assurance for the ISF Facility, will not significantly impact the quality of the human environment. Accordingly, the Commission has determined that a Finding of No Significant Impact is appropriate, and that an environmental impact statement for the proposed exemption is not necessary.

For further details with respect to this exemption request, see the FWENC license application for the ISF Facility, and the accompanying Safety Analysis Report, dated November 19, 2001, and the request for exemption, dated April 2, 2003, which were docketed under 10 CFR Part 72, Docket No. 72–25. These documents are available for public inspection at the Commission's Public Document Room, One White Flint North Building, 11555 Rockville Pike, Rockville, MD, or from the publicly available records component of NRC's Agencywide Documents Access and Management System (ADAMS). These documents may be accessed through the NRC's Public Electronic Reading Room on the Internet at *http://www.nrc.gov/reading-rm/adams.html*. If there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail at *pdr@nrc.gov*.

Dated at Rockville, Maryland, this 2nd day of September, 2004.

For the Nuclear Regulatory Commission.

**James R. Hall,**

*Senior Project Manager, Spent Fuel Project Office, Office of Nuclear Material Safety and Safeguards.*

[FR Doc. 04–20591 Filed 9–10–04; 8:45 am]

BILLING CODE 7590–01–P

## RAILROAD RETIREMENT BOARD

### Agency Forms Submitted for OMB Review

*Summary:* In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Railroad Retirement Board (RRB) has submitted the following proposal(s) for the collection of information to the Office of Management and Budget for review and approval.

**Summary of Proposal(s)**

(1) *Collection title:* Application and claim for unemployment benefits and employment service.

(2) *Form(s) submitted:* UI–1, UI–1 (Internet), UI–3, UI–3 (Internet).

(3) *OMB number:* 3220–0022.

(4) *Expiration date of current OMB clearance:* 9/30/2006.

(5) *Type of request:* Revision of a currently approved collection.

(6) *Respondents:* Individuals or households.

(7) *Estimated annual number of respondents:* 11,200.

(8) *Total annual responses:* 127,200.

(9) *Total annual reporting hours:* 13,647.

(10) *Collection description:* Under Section 2 of the Railroad Unemployment Insurance Act, unemployment benefits are provided for qualified railroad employees. The collection obtains the information needed for determining the eligibility to and amount of such benefits from railroad employees.

*Additional Information or Comments:* Copies of the forms and supporting documents can be obtained from Charles Mierzwa, the agency clearance officer ((312) 751–3363) or *Charles.Mierzwa@rrb.gov*.

Comments regarding the information collection should be addressed to Ronald J. Hodapp, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611–2092 or *Ronald.Hodapp@rrb.gov* and to the

OMB Desk Officer for the RRB, at the Office of Management and Budget, Room 10230, New Executive Office Building, Washington. DC 20503.

Charles Mierzwa,

*Clearance Officer.*

[FR Doc. 04–20555 Filed 9–10–04; 8:45 am]

BILLING CODE 7905–01–P

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–50323; File No. SR–MSRB–2004–03]**

## Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto Consisting of Technical Amendments to Rule G–3 Relating to Professional Qualifications

September 7, 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 August 4, 2004, the Municipal Securities Rulemaking Board ("MSRB" or "Board") 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 MSRB. The MSRB has filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act,[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. On August 25, 2004, the MSRB filed Amendment No. 1 to the proposed rule change.[5] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The MSRB proposes to make technical amendments to MSRB Rule G–3 relating to professional qualifications. The text of the proposed rule change is set forth below. Proposed new language is in *italics*; proposed deletions are in [brackets].

**Rule G–3. Classification of Principals and Representatives; Numerical Requirements; Testing; Continuing Education Requirements**

No broker, dealer or municipal securities dealer or person who is a municipal securities representative, municipal securities principal, municipal securities sales principal or financial and operations principal (as hereafter defined) shall be qualified for purposes of rule G–2 unless such broker, dealer or municipal securities dealer or person meets the requirements of this rule.

No change.

(a) Municipal Securities Principal; Municipal Fund Securities Limited Principal.

(i)–(iii) No change.

(iv) Municipal Fund Securities Limited Principal.

(A)–(B) No change.

(C) Actions as Municipal Securities Principal. Any municipal fund securities limited principal may undertake all actions required or permitted under any Board rule to be taken by a municipal securities principal, but solely with respect to activities related to municipal fund securities, *and shall be subject to all provisions of Board rules applicable to municipal securities principals except to the extent inconsistent with this paragraph (b)(iv).*

(D) No change.

[(E) Temporary Provisions for Municipal Fund Securities Limited Principal. Notwithstanding any other provision of this rule, until March 31, 2003, the following provisions shall apply to any broker, dealer or municipal securities dealer whose municipal securities activities are limited exclusively to municipal fund securities:

(1) The broker, dealer or municipal securities dealer may designate any person who has taken and passed the General Securities Principal Qualification Examination or Investment Company and Annuity Principal Qualification Examination as a municipal fund securities limited principal.

(2) Any municipal fund securities limited principal designated as provided in clause (b)(iv)(E)(1) may undertake all actions required or permitted under any Board rule to be taken by a municipal securities principal to the same extent as set forth in subparagraph (b)(iv)(C).

(3) The broker, dealer or municipal securities dealer may count any municipal fund securities limited principal designated as provided in clause (b)(iv)(E)(1) toward the numerical requirement for municipal securities principal to the same extent as set forth in subparagraph (b)(iv)(D).

(4) On and after April 1, 2003, all municipal fund securities limited principals (including any municipal fund securities limited principals designated as provided in clause (b)(iv)(E)(1)) must be qualified as provided in subparagraph (b)(iv)(B).]

(c)–(h) 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 MSRB 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. The text of these statements may be examined at the places specified in Item IV below. MSRB 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

MSRB Rule G–3, on professional qualifications, currently includes a temporary transition period provision, which expired on March 31, 2003. During the transition period, Series 24 general securities principals and Series 26 investment company/variable contracts limited principals, without further qualification, were able to supervise the activities of a broker, dealer or municipal securities dealer (collectively referred to as "dealers") relating to municipal fund securities. Since April 1, 2003, the MSRB has required that every dealer have either a municipal fund securities limited principal (Series 51) or a municipal securities principal (Series 53), as appropriate, to supervise the dealer's activities relating to municipal fund securities even if these are the dealer's only municipal securities activities. Accordingly, the MSRB is deleting the expired transition period provision from MSRB Rule G–3.

MSRB Rule G–3 also provides that any municipal fund securities limited principal (Series 51) may undertake all actions required or permitted to be

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(2).

[5] *See* letter from Jill C. Finder, Assistant General Counsel, MSRB, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated August 25, 2004. Amendment No. 1 replaced the original rule filing in its entirety. For purposes of calculating the 60-day abrogation period, the Commission considers the proposal to have been filed on August 25, 2004, the date the MSRB filed Amendment No. 1. *See* Rule 19b–4(f)(2), 17 CFR 240.19b–4(f)(2).

taken by a traditional municipal securities principal (Series 53) under MSRB rules, but solely with respect to activities relating to municipal fund securities. Implicit in this authorization to act as a municipal securities principal is the reciprocal duty to comply with all obligations imposed by MSRB rules on municipal securities principals. The MSRB is amending MSRB Rule G–3 to make explicit this duty to comply with MSRB rules.

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act, which authorizes the MSRB to adopt rules that shall:

> Be 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 municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest.

The MSRB believes that the proposed rule change is consistent with these provisions in that it provides guidance to dealers that will facilitate their understanding of, and compliance with, existing MSRB rules by deleting an expired provision from MSRB Rule G–3 and by making explicit that Series 51 municipal fund securities limited principals are subject to all provisions of MSRB rules applicable to Series 53 municipal securities principals.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The MSRB does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

The MSRB has neither solicited nor received comments on the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The MSRB has designated this proposed rule change as constituting a stated policy, practice or interpretation with respect to the meaning, administration, or enforcement of an existing MSRB rule under Section 19(b)(3)(A)(ii) of the Act, which renders the proposed rule change effective upon receipt of this filing by the Commission. 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.[6]

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–MSRB–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–MSRB–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 Room. Copies of the filing also will be available for inspection and copying at the principal offices of the MSRB. 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–MSRB–2004–03 and should be submitted on or before October 4, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E4–2163 Filed 9–10–04; 8:45 am]

BILLING CODE 8010–01–P

[6] For purposes of calculating the 60-day abrogation period, the Commission considers the proposal to have been filed on August 25, 2004, the date the MSRB filed Amendment No. 1.

[7] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–50317; File No. SR–NASD–2004–94]**

## Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. Relating to Proposed Amendments to TRACE Rule 6250 and Related TRACE Rules To Disseminate Transaction Information on Certain TRACE-Eligible Securities and Facilitate Dissemination of Such Information

September 3, 2004.

**I. Introduction**

On June 17, 2004, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to: Amend NASD Rule 6250 to publicly disseminate transaction information for secondary market transactions in all TRACE-eligible securities other than those purchased or sold pursuant to Rule 144A under the Securities Act of 1933 ("Rule 144A Securities"), with information on transactions in certain securities dissemination on a delayed basis; make related amendments to Rule 6210 regarding classification of securities and Rule 6260 requiring the managing underwriter or group of underwriters to provide certain information to NASD, to facilitate dissemination of such transaction information; and delete provisions regarding market aggregates, last sale

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

data, and treatment of certain transaction reports in NASD Rule 6250.

Notice of the proposed rule change was published for comment in the **Federal Register** on July 2, 2004.[3] The Commission received one comment regarding the proposal, from The Bond Market Association ("TBMA Letter").[4] On August 9, 2004, the NASD submitted a response to the TBMA Letter and Amendment No. 1 to the proposed rule change.[5] This order approves the proposed rule change, as amended.

## II. Background

On January 23, 2001, the Commission approved the TRACE Rules to establish a corporate bond trade reporting and transaction dissemination facility and to eliminate Nasdaq's Fixed Income Pricing System ("FIPS").[6] The TRACE Rules became effective on July 1, 2002. On that day, members began to report transactions in all TRACE-eligible securities, and TRACE began the dissemination of certain reported information. Initially, TRACE disseminated transaction information only on investment grade securities with an initial issuance size of $1 billion or greater, and on 50 high-yield issues previously reported in the FIPS system, called the "FIPS 50." On January 31, 2003, the Commission approved an NASD proposal to expand TRACE dissemination to cover roughly 75 percent of the average daily trading volume of investment grade securities.[7]

Initially TRACE Rules required a member to report transaction information to TRACE within 75 minutes of execution. On June 18, 2003, the Commission approved an NASD proposal to reduce the transaction reporting interval from 75 minutes to 45 minutes.[8] More recently, the Commission approved an NASD proposal to further reduce the transaction reporting interval, from 45 minutes to 30 minutes (effective October 1, 2004), and later to 15 minutes (effective July 1, 2005).[9]

## III. The Amended Proposal

As more fully discussed in the Commission's Notice,[10] NASD proposes to amend Rule 6250 to: (1) Expand transaction dissemination to include secondary market transactions in all TRACE-eligible securities other than Rule 144A Securities, but provide for delays in dissemination of transactions in certain securities; (2) prohibit dissemination of secondary market transactions in Rule 144A Securities; and (3) delete provisions regarding market aggregate and last sale data and the treatment of certain transaction reports. NASD also proposes to amend Rule 6210 to revise the defined terms "Investment Grade" and "Non-Investment Grade," add a new defined term, "Split-Rated," and make clear that NASD may, for purposes of its rules, classify an unrated TRACE-eligible security as Investment Grade or Non-Investment Grade in certain circumstances. In addition, NASD proposes to amend Rule 6260 to require a managing underwriter or group of underwriters to provide information to enable NASD to implement the dissemination criteria regarding the new issue aftermarket in Rule 6250; and to make certain minor, technical changes.

With respect to revisions to the dissemination provisions in Rule 6250, NASD proposes to delay dissemination of transaction information in the new issue aftermarket by two business days for bonds rated by an NRSRO or classified by NASD as BBB, and by ten business days for bonds rated by an NRSRO or classified by NASD as BB or lower. In addition, NASD proposes to delay dissemination of transaction information in the secondary market other than the new issue aftermarket, for two business days for bonds rated by an NRSRO or classified by NASD as BB, and for four business days for bonds rated by an NRSRO or classified by NASD as B or lower, for transactions greater than $1 million (par value) where the security trades, on average, less than one time per day. Notwithstanding these delays, NASD estimates that approximately 99 percent of all secondary public transactions and 95 percent of par value traded in TRACE-eligible securities will be disseminated immediately on receipt of the transaction information by NASD.

NASD proposes to implement the dissemination provisions in two stages. In Stage One, NASD plans to implement the definitional change to Rule 6210 and implement immediate dissemination of TRACE-eligible securities other than Rule 144A Securities, except those subject to dissemination delays. Stage One will be effective not later than 60 days after the date of this approval. In Stage Two, NASD plans to complete the implementation of the rule changes approved by this Order. Stage Two will be effective on February 1, 2005. NASD represents that it intends to continue to review the trading and liquidity of TRACE-eligible securities during the implementation of Stages One and Two. As part of this review process, NASD states that, not later than nine months after implementation of Stage Two, it will ask the BTRC to reconvene to review the proposal. NASD states that, based on this review, the BTRC and NASD staff will make recommendations to the NASD Board. NASD states that the NASD Board will review the recommendations and decide whether to amend the dissemination provisions then in effect.

## IV. Summary of Comment Letter and NASD's Response Thereto

### *A. TBMA Letter*

In its letter, TBMA states that, while its representatives on the Bond Transaction Reporting Committee ("BTRC")[11] participated in the development of the proposal, they did not unanimously support it. TBMA states that its membership continues to have serious concerns about potential harm to liquidity resulting from dissemination of transaction data on lower rated, less frequently traded issues. The letter states that, while the proposal affords some protection for large trades in these issues, TBMA believes the delayed dissemination it proposes does not go far enough to protect liquidity. Specifically, TBMA states that certain of its members believe there is a set of infrequently traded BBB-related bonds that should be subject to the same two-business day delay that applies to infrequently traded BB-related bonds. TBMA also believes that the NASD proposal should count only large transactions (over $1 million), as

[3] *See* Securities Exchange Act Release No. 49920 (June 25, 2004), 69 FR 40429.

[4] *See* letter from Donald R. Mullen, Jr., Goldman, Sachs & Co., Chair, Corporate Credit Markets Division, TBMA, to Jonathan G. Katz, Secretary, Commission, dated July 23, 2004.

[5] *See* letter from Marc Menchel, Executive Vice President and General Counsel, Regulatory Policy and Oversight, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated August 6, 2004. Amendment No. 1, which addresses the implementation dates of the proposal, is a technical amendment and therefore not subject to notice and comment. *See* discussion, *infra*, Part III.

[6] *See* Securities Exchange Act Release No. 43873 (January 23, 2001), 66 FR 8131 (January 29, 2001). FIPS, which was operated by Nasdaq, collected transaction and quotation information on domestic, registered, non-convertible high-yield corporate bonds.

[7] *See* Securities Exchange Act Release No. 47302 (January 31, 2003), 68 FR 06233 (February 6, 2003).

[8] *See* Securities Exchange Act Release No. 48056 (June 18, 2003), 68 FR 37886 (June 25, 2003).

[9] *See* Securities Exchange Act Release No. 49854 (June 14, 2004), 68 FR 35088 (June 23, 2004).

[10] *See supra* note 3, at 14–32. A full description of the proposal is contained in the Notice.

[11] The BTRC is a committee on the NASD Board of Governors that is responsible for advising the NASD Board on issues relating to expansion of dissemination of transaction information through TRACE. The BTRC is appointed by the NASD Board and has ten members. Five of the ten members were recommended by the NASD staff; the other five were recommended by TBMA.

opposed to every transaction, in determining trading frequency for a given security for purposes of determining whether dissemination delays apply to large transactions in that security. TBMA urges NASD to monitor the effects of the increased dissemination set forth in the proposal, and seek appropriate adjustments to the proposed dissemination scheme on an expedited basis should harm to liquidity be shown to result. TBMA also recommends that NASD make its consolidated transaction data publicly available, so that the industry can assess the effects of transparency on liquidity.

*B. NASD's Response*

In response to the TBMA Letter, NASD states that it believes that its proposal strikes a well-reasoned balance between concerns regarding liquidity and the substantial benefits of increased transparency. NASD notes that the proposal was developed and supported by the BTRC. The NASD also notes that, after reviewing the two studies that it commissioned to address the relationship of transparency to liquidity, the NASD found no conclusive evidence that TRACE transparency has adversely affected liquidity, including liquidity of lower-rated bonds. In response to the recommendations of TBMA regarding ongoing NASD review, the NASD states that the proposal provides for NASD to continue to review the trading and liquidity of TRACE-eligible securities during the two stages of implementation of the proposal; and that NASD has authority to effect necessary amendments to TRACE Rules to protect the integrity of the market. In response to the comment of TBMA that NASD should make consolidated TRACE transaction data available, NASD states that transaction information on all publicly disseminated TRACE eligible securities will be available through the NASD Web site, vendors, or via an electronic feed directly from NASD.

**V. Discussion**

After careful consideration, the Commission finds that the proposed rule change, as amended, is consistent with the Act and the rules and regulations thereunder applicable to be registered securities association and, in particular, with the requirements of section 15A(b)(6) of the Act.[12] Specifically, the Commission finds that approval of the proposed rule change is consistent with section 15A(b)(6) of the Act in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.[13]

The Commission believes that, by expanding dissemination of transaction information to, by NASD's estimate, roughly 99 percent of all secondary transactions and 95 percent of par value traded in TRACE-eligible securities, the proposal will substantially increase the amount of information available to the public and market participants about the corporate bond markets, thereby promoting the protection of investors and the public interest. Specifically, under the proposal, TRACE will disseminate transaction information on non-investment grade bonds (other than the FIPS 50) for the first time, significantly enhancing the transparency of this important segment of the corporate bond market. The Commission believes that this proposal, in conjunction with the NASD's recent proposal reducing transaction reporting times in TRACE to 30 minutes (effective October 1, 2004), and then to 15 minutes (effective July 1, 2005),[14] represents a significant incremental improvement in the transparency of the corporate bond market. Moreover, the Commission believes that the proposed amendments to Rule 6210 (regarding classification of securities) and Rule 6260 (requiring the managing underwriter or group of underwriters to provide certain information to NASD) should assist the NASD in implementing the proposal.

The Commission notes that the proposal imposes dissemination delays for securities rated BBB or lower in the new issue aftermarket, and for larger transactions in infrequently traded non-investment grade bonds in the secondary market other than the new issue aftermarket. The Commission believes that these dissemination delays may unnecessarily restrict the availability of this transaction information to investors in this market. Moreover, the Commission notes that the two studies commissioned by the NASD to address the relationship between transparency and liquidity found no conclusive evidence that TRACE transparency has adversely affected liquidity.[15] Accordingly, the Commission expects that, not later than November 1, 2005 (nine months after the effective date of Stage Two), the NASD will submit a proposed rule change eliminating the delays in TRACE information dissemination. As previously noted, the Commission received one comment letter, from TBMA, on the proposed rule change. In its letter, TBMA argued that the delayed dissemination regime in the proposal does not go far enough to protect liquidity. As noted above, the Commission notes that economic studies commissioned and cited by NASD have shown no conclusive evidence that the transparency afforded by TRACE has adversely affected market liquidity.

Finally, the Commission believes that amendments to the TRACE Rules to prohibit dissemination of secondary market transactions in Rule 144A Securities and to delete provisions regarding market aggregate and last sale data and the treatment of certain transaction reports, should streamline and clarify the TRACE Rules, thus promoting the protection of investors and the public interest.

**VI. Conclusion**

For the reasons discussed above, the Commission finds that the amended proposal is consistent with 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, as amended (SR–NASD–2004–94), be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04–20588 Filed 9–10–04; 8:45 am]

BILLING CODE 8010–01–M

[12] 15 U.S.C. 78o–3(b)(6).

[13] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78(c)(f).

[14] *See* Securities Exchange Act Release No. 48056 (June 18, 2003), 68 FR 37886 (June 25 2003), *supra* note 9.

[15] *See* Commission Notice, *supra* note 3, at 16.

[16] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–50319; File No. SR–PCX–2004–75]**

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange, Inc. Relating to Minimum Terms for Equity Linked Notes ("ELNs")

September 7, 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 August 4, 2004, the Pacific Exchange, Inc. ("PCX"

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Exchange has designated the proposed rule change as constituting a "non-controversial" rule change under subparagraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by the Commission.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange, through its wholly owned subsidiary PCX Equities, Inc. ("PCXE"), proposes to modify the listing requirement related to the minimum and maximum terms to list Equity Linked Notes ("ELNs") on PCXE and traded on the Archipelago Exchange ("ArcaEx"), a facility of the PCXE. The PCX proposes to modify the two to seven year term requirement in PCXE Rule 5.2(j)(2) to a minimum one-year term requirement. The PCX also proposes to eliminate the maximum term for ELNs.

Below is the text of the proposed rule change. Proposed new language is *italicized*; proposed deletions are in brackets.

* * * * *

**Rules of PCX Equities, Inc.**

Rule 5

Listings

* * * * *

Equity Linked Notes ("ELNs")

Rule 5.2(j)(2)(A)—No Change.

(B) ELN Listing Standards

(i)(a)–(c)—No change.

(d) [a term of two to seven years] *a minimum term of one year* [, provided that if the issuer of the underlying security is a non-U.S. company, or if the underlying security is a sponsored ADR, the issue may not have a term of more than three years].

(C)–(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, the self-regulatory organization included statements concerning the purpose of and basis for the proposed modifications to the fee schedule. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization 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

ELNs are non-convertible debt of an issuer, whose value is based, at least in part, on the value of another issuer's common stock or non-convertible preferred stock. PCXE Rule 5.2(j)(2) sets forth the listing criteria applicable to ELNs. PCXE Rule 5.2(j)(2)(B)(i)(d) requires that ELNs have, among other things, a term of two to seven years to be eligible for listing, provided that if the issuer of the underlying security is a non-U.S. company, or if the underlying security is a sponsored American Depositary Receipts, the issue may not have a term of more than three years. The Exchange initially adopted this term requirement as a conservative measure to help ensure that the trading of ELNs did not have an adverse effect on the liquidity of the underlying stock and were not used in a manipulative manner.[5]

The Exchange proposes to modify the term requirements in Rule 5.2(j)(2)(B)(i)(d) to reduce the minimum term of ELNs, whether the ELN is based on U.S. or non-U.S. securities, to one year, and eliminate the maximum term requirement.[6] All other requirements in Rule 5.2(j)(2) would remain the same.

In recent years, several other self-regulatory organizations that have listing criteria for equity linked debt securities have reduced the minimum term requirement for such securities to one year.[7] The Exchange seeks to make the same modifications in order to provide ELN issuers with a greater choice of listing venues and remove the impediment to listing created by the current stringent term requirements. These modifications would also allow ArcaEx to compete more effectively with other listing venues for listings of ELNs.

The Exchange represents that it has sufficient resources and comprehensive surveillance procedures to identify and deter manipulative and other illicit trading activity in ELNs and securities linked to them. In conducting its surveillance procedures, the Exchange has not found any adverse effects as a result of the trading of ELNs and the securities to which ELNs are linked. Finally, the Exchange notes that NYSE, Amex, and the CHX have similar rules that reduce the minimum terms for their equity-linked debt instruments to one year and eliminate the maximum term.[8] Accordingly, the Exchange believes it is appropriate to relax the more stringent term requirements set forth in PCXE Rule 5.2(j)(2) by reducing the minimum term for ELNs to one year and eliminating the maximum term limit.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b)[9] of the Act, in general, and furthers the objectives of Section 6(b)(5)[10] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principals of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system.

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[3] 17 CFR 240.19b–4(f)(6).

[4] As required by 17 CFR 240.19b–4(f)(6), the Exchange has represented that the proposed rule change will not significantly affect the protection of investors or the public interest, nor will it impose any significant burden on competition. The Exchange also fulfilled its obligation to provide at least five-business days notice to the Commission of its intent to file this proposed rule change by notice on July 29, 2004. The Exchange's proposed rule changes are similar to the rules regarding the terms of equity-linked debt securities for the American Stock Exchange LLC ("Amex"), the Chicago Stock Exchange, Inc. ("CHX"), and the New York Stock Exchange, Inc. ("NYSE").

[5] The Amex and the NYSE initially adopted similar term limits for equity-linked debt securities listed on their exchanges. *See* Securities Exchange Act Release No. 32343 (May 20, 1993), 58 FR 30833 (May 27, 1993) and Securities Exchange Act Release No. 33468 (January 13, 1994), 59 FR 3387 (January 21, 1994), respectively.

[6] The Exchange represents that it will notify the Commission in advance if the Exchange intends to list ELNs of a non-U.S. company issuer and the issue has a term of more than three years.

[7] *See* Securities Exchange Act Release No. 42313 (January 4, 2000), 65 FR 2205 (January 13, 2000) (CHX reduced the minimum term of eligible equity linked debt securities from two years to one and eliminated maximum term requirement); Securities Exchange Act Release No. 42110 (November 5, 1999), 64 FR 61677 (November 12, 1999) (Amex reduced the minimum term of eligible equity linked debt securities from two years to one and eliminated maximum term requirement); and Securities Exchange Act Release No. 41992 (October 7, 1999), 64 FR 56007 (Oct. 15, 1999) (NYSE reduced the minimum term of eligible equity linked debt securities from two years to one and eliminated maximum term requirement).

[8] *See supra* note 7.

[9] 15 U.S.C. 78f(b).

[10] 10 15 U.S.C. 78f(b)(5).

*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 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 on the proposed rule change were neither solicited nor received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The PCX has designated the proposed rule change as one that: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. The Exchange has provided the Commission with written notice of its intent to file the proposed rule change, at least five business days prior to the filing date. Therefore, the foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [11] and Rule 19b–4(f)(6) thereunder.[12]

Pursuant to Rule 19b–4(f)(6)(iii) under the Act,[13] the proposal does not become operative for 30 days after the date of its filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. The PCX has requested that the Commission waive the 30-day operative delay so that the proposed rule change will become immediately effective upon filing on the basis that such rule changes are necessary for the Exchange to compete effectively with other listing venues for listing ELNs. The Exchange has fulfilled its obligation to provide the five-business days notice to the Commission of its intent to file this proposed rule change by notice on July 29, 2004. Therefore, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it conforms the listing criteria for ELNs to those of the Amex, the CHX and the NYSE.[14] Therefore, the Commission has determined to allow the proposed rule change to become effective and operative as of the date of filing with the Commission.[15]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that the action is necessary or appropriate in the public interest, for the protection of investors, or would otherwise further the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File No. SR–PCX–2004–75 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 No. SR–PCX–2004–75. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the PCX. 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–PCX–2004–75 and should be submitted on or before October 4, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E4–2164 Filed 9–10–04; 8:45 am]

BILLING CODE 8010–01–P

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6)(iii).

[14] *See supra* note 7.

[15] For purposes only of waiving the operative date of this proposal, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[16] 17 CFR 200.30–3(a)(12).

## SOCIAL SECURITY ADMINISTRATION

### Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages that will require clearance by the Office of Management and Budget (OMB) in compliance with Pub. L. 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. The information collection packages that may be included in this notice are for extensions (no change) of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and on ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Written comments and recommendations regarding the information collections should be submitted to the OMB Desk Officer and the SSA Reports Clearance Officer. The information can be mailed and/or faxed to the individuals at the addresses and fax numbers listed below:

(OMB), Office of Management and Budget, Attn: Desk Officer for SSA, New Executive Building, Room 10235, 725 17th St., NW., Washington, DC 20503, Fax: 202–395–6974.

(SSA), Social Security Administration, DCFAM, Attn: Reports Clearance Officer, 1338 Annex Building, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–965–6400.

I. The information collections listed below are pending at SSA and will be submitted to OMB within 60 days from

the date of this notice. Therefore, your comments should be submitted to SSA within 60 days from the date of this publication. You can obtain copies of the collection instruments by calling the SSA Reports Clearance Officer at 410–965–0454 or by writing to the address listed above.

1. RS/DI Quality Review Case Analysis: Sampled Number Holder, Auxiliaries/Survivors, Parents: Stewardship Annual Earnings Test Workbook—0960–0189. SSA uses the information collected by forms SSA–2930, SSA–2931, and SSA–2932 to establish a national payment accuracy rate for all cases in payment status; to measure the accuracy rate for newly adjudicated claims for beneficiaries receiving old-age, survivors, or disability insurance; and to serve as a source of information regarding problem areas in the RSI/DI programs. Form SSA–4569 is used to evaluate and determine the effectiveness of the annual earnings test and to use the results to develop ongoing improvements in the process. The respondents are beneficiaries and representative payees for beneficiaries receiving old age, survivors, or disability insurance.

*Type of Request:* Extension of an OMB-approved information collection.

| | Number of Respondents | Frequency of response | Average burden per response (minutes) | Estimated annual burden (hours) |
|---|---|---|---|---|
| SSA–2930 | 3,000 | 1 | 30 | 1,500 |
| SSA–2931 | 1,500 | 1 | 30 | 750 |
| SSA–2932 | 650 | 1 | 20 | 217 |
| SSA–4659 | 325 | 1 | 10 | 54 |
| Totals | 5,475 | | | 2,521 |

*Estimated Annual Burden:* 2,521 hours.

2. Request for Hearing by Administrative Law Judge—20 CFR 404.933 and 416.1433, 42 CFR 405.722—0960–0269. The information collected by form HA–501 is used by SSA to process a request for a hearing on an unfavorable determination of entitlement or eligibility to benefits administered by SSA. The respondents are individuals whose claims for benefits are denied and who request a hearing to appeal the denial.

*Type of Request:* Extension of an OMB-approved information collection.

*Number of Respondents:* 667,236.

*Frequency of Response:* 1.

*Average Burden Per Response:* 10 minutes.

*Estimated Annual Burden:* 111,206 hours.

3. Acknowledgement of Receipt (Notice of Hearing)—20 CFR 404.938 and 416.1438—0960–0671. The information collected by form HA–504 is used by SSA to process requests for hearings about unfavorable determinations of entitlement or eligibility to disability payments. Specifically, this form is used to acknowledge receipt of the notice of hearing issued by an Administrative Law Judge. The respondents are applicants for SSA disability payments who want to have a hearing to appeal an unfavorable entitlement or eligibility decision.

*Type of Request:* Extension of OMB-approved information collection.

*Number of Respondents:* 670,000.

*Frequency of Response:* 1.

*Average Burden Per Response:* 1 minute.

*Estimated Annual Burden:* 11,167 hours.

4. Medical Report (Individual with Childhood Impairment)—20 CFR 404.1512, .1514–.1515, and 416.912–.915—0960–0102. The information collected on Form SSA–3827 is needed to determine the claimant's physical and mental status prior to making a childhood disability determination. The respondents are medical sources.

*Type of Request:* Extension of an OMB-approved information collection.

*Number of Respondents:* 12,000.

*Frequency of Response:* 1.

*Average Burden Per Response:* 30 minutes.

*Estimated Annual Burden:* 6,000 hours.

5. Disability Hearing Officer's Report of Disability Hearing (DC)—20 CFR 416.1407—0906–0507. The information collected on form SSA–1204–BK is used by the Disability Hearing Officer (DHO) to conduct and document disability hearings, and to provide a structured format that covers all conceivable issues relating to SSI claims for disabled children. The completed SSA–1204–BK will aid the DHO in preparing the disability decision and will provide a record of what transpired in the hearing. The respondents are DHOs in the State Disability Determination Services.

*Type of Request:* Extension of an OMB-approved information collection.

*Number of Respondents:* 35,000.

*Frequency of Response:* 1.

*Average Burden Per Response:* 60 minutes.

*Estimated Annual Burden:* 35,000 hours.

6. Employer Report of Special Wage Payments—20 CFR 404.428–.429—0960–0565. SSA gathers the information on Form SSA–131 to prevent earnings-related overpayments to employees, and to avoid erroneous withholding of benefits. The respondents are employers who provide special wage payment verification.

*Type of Request:* Extension of an OMB-approved information collection.

*Number of Respondents:* 30,000.

*Frequency of Response:* 1.

*Average Burden Per Response:* 20 minutes.

*Estimated Annual Burden:* 10,000 hours.

II. The information collections listed below have been submitted to OMB for clearance. Your comments on the information collections would be most useful if received by OMB and SSA within 30 days from the date of this publication. You can obtain a copy of the OMB clearance packages by calling the SSA Reports Clearance Officer at 410–965–0454, or by writing to the address listed above.

1. Payment of Certain Travel Expenses—20 CFR 404.999(d) and 416.1499—0906–0434. This regulation mandates travel expense reimbursement by a State or Federal agency for claimants traveling to a consultative examination, or for claimants, their representatives, and non-subpoenaed witnesses who must travel over 75 miles to appear at a disability hearing. State and Federal personnel review the listing and the receipts to verify the amount of reimbursement. The respondents are claimants for Title II/XVI benefits and/or their representatives and non-subpoenaed witnesses.

*Type of Request:* Extension of an OMB-approved information collection.

*Number of Respondents:* 50,000.

*Frequency of Response:* 1.

*Average Burden Per Response:* 10 minutes.

*Estimated Annual Burden:* 8,333 hours.

2. Plan for Achieving Self-Support—20 CFR 416.1180–1182 and 416.1225—0960–0559. The information collected by form SSA–545 is used by SSA when a Supplemental Security Income (SSI) applicant/recipient desires to use available income and resources to obtain education and/or training in order to become self-supporting. The information is used to evaluate the recipient's plan for achieving self-support to determine whether the plan may be approved under the provisions of the SSI program. The respondents are SSI applicants/recipients who are blind or disabled.

*Type of Request:* Extension of an OMB-approved information collection.

*Number of Respondents:* 7,000.

*Frequency of Response:* 1.

*Average Burden Per Response:* 2 hours.

*Estimated Annual Burden:* 14,000 hours.

3. Request for Social Security Earnings Information—20 CFR 404.810 and 401.100—0960–0525. The Social Security Act provides that a wage earner, or someone authorized by a wage earner, may request Social Security earnings information from SSA using form SSA–7050. SSA uses the information collected on the form to verify that the requestor is authorized to access the earnings record and to produce the earnings statement. The respondents are wage earners and organizations and legal representatives authorized by the wage earner.

*Type of Request:* Extension of an OMB-approved information collection.

*Number of Respondents:* 87,000.

*Frequency of Response:* 1.

*Average Burden Per Response:* 11 minutes.

*Estimated Annual Burden:* 15,950 hours.

Dated: September 7, 2004.

**Elizabeth A. Davidson,**

*Reports Clearance Officer, Social Security Administration.*

[FR Doc. 04–20589 Filed 9–10–04; 8:45 am]

BILLING CODE 4191–02–P

## DEPARTMENT OF STATE

### Bureau of Administration

**[Public Notice 4828]**

### Notice of Availability of Alternative Fueled Vehicle (AFV) Report for Fiscal Year 2003

**AGENCY:** Department of State.

**ACTION:** Notice.

**SUMMARY:** The U.S. Department of State, Bureau of Administration, is issuing this notice in order to comply with the Energy Policy Act of 1992 and 42 U.S.C. 13218(b). The purpose of this notice is to announce the public availability of the Department of State's final Fiscal Year 2003 report at the following Web site: *http://www.state.gov/m/a/c8503.htm.*

**FOR FURTHER INFORMATION CONTACT:** Questions regarding AFV reports on the State Department Web site should be addressed to the Domestic Fleet Management and Operations Division (A/OPR/GSM/FMO) [Attn: Chappell Garner], 2201 C Street, NW., (Room B258), Washington, DC 20520, telephone (202) 647–3245.

Dated: September 7, 2004.

**Vincent J. Chaverini,**

*Deputy Assistant Secretary, Office of Operations, Department of State.*

[FR Doc. 04–20595 Filed 9–10–04; 8:45 am]

BILLING CODE 4710–24–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

**[Summary Notice No. PE–2004–73]**

### Petitions for Exemption; Summary of Petitions Received

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of petitions for exemption received.

**SUMMARY:** Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption part 11 of Title 14, Code of Federal Regulations (14 CFR), this notice contains a summary of certain petitions seeking relief from specified requirements of 14 CFR, dispositions of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

**DATES:** Comments on petitions received must identify the petition docket number involved and must be received on or before September 23, 2004.

**ADDRESSES:** You may submit comments [identified by DOT DMS Docket Number FAA–200X–XXXXX] by any of the following methods:

- Web site: *http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- Fax: 1–202–493–2251.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001.
- Hand Delivery : Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Tim Adams (202) 267–8033, Sandy Buchanan-Sumter (202) 267–7271, Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85 and 11.91.

Issued in Washington, DC, on September 3, 2004.

**Anthony F. Fazio,**

*Director, Office of Rulemaking.*

**Petitions for Exemption**

*Docket No.:* FAA–2004–17223.

*Petitioner:* The United States Air Force.

*Section of 14 CFR Affected:* 14 CFR 91.209(a)(2).

*Description of Relief Sought:* To allow the United States Air Force to conduct ground operations on military airfields and installations using night-vision goggle technology while operating fixed-wing and rotary-wing aircraft with the lighted position lights turned off (blacked-out).

[FR Doc. 04–20547 Filed 9–10–04; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

**[Summary Notice No. PE–2004–74]**

### Petitions for Exemption; Dispositions of Petitions Issued

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of dispositions of prior petitions.

**SUMMARY:** Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption part 11 of Title 14, Code of Federal Regulations (14 CFR), this notice contains a summary of certain dispositions of certain petitions previously received. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities.

**FOR FURTHER INFORMATION CONTACT:** Tim Adams (202) 267–8033, or Sandy Buchanan-Sumter (202) 267–7271, Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85 and 11.91.

Issued in Washington, DC, on September 3, 2004.

**Anthony F. Fazio,**

*Director, Office of Rulemaking.*

### Dispositions of Petitions

*Docket No.:* FAA–2002–11988.
*Petitioner:* Alpine Air, Inc.
*Section of 14 CFR Affected:* 14 CFR 135.143(c)(2).
*Description of Relief Sought/Disposition:* To permit Alpine Air, Inc., to operate certain aircraft under part 135 without a TSO–C112 (Mode S) transponder installed on those aircraft.
*Grant, 07/31/04, Exemption No. 7267B*

*Docket No.:* FAA–2004–18516.
*Petitioner:* Mr. Scott Rohlfing.
*Section of 14 CFR Affected:* 14 CFR 91.109(a).
*Description of Relief Sought/Disposition:* To permit Mr. Scott Rohlfing to conduct certain flight training in certain Beechcraft Bonanza/Debonair airplanes that are equipped with a functioning throwover control wheel.
*Grant, 08/03/04, Exemption No. 8368*

*Docket No.:* FAA–2002–12831.
*Petitioner:* Air Transport Association.
*Section of 14 CFR Affected:* 14 CFR 61.157(a); item I(b) of appendix A to part 61; 121.424(a), (b), and (d)(1); item I(a) of appendix E to part 121; and item I(b) of appendix F to part 121.
*Description of Relief Sought/Disposition:* To permit Air Transport Association member airlines and other qualifying part 121 certificate holders to conduct training and checking of pilots on airplanes that require two flight crewmembers for the required preflight inspection, both interior and exterior, using approved advanced pictorial means.
*Grant, 08/03/04, Exemption No. 4416J*

*Docket No.:* FAA–2001–10800.
*Petitioner:* Sierra Industries, Inc.
*Section of 14 CFR Affected:* 14 CFR 91.9(a) and 91.531(a)(1) and (2).
*Description of Relief Sought/Disposition:* To permit Sierra Industries, Inc., to permit certain qualified pilots of its Cessna Citation Model 500 series airplanes (Serial Nos. 0001 through 0349 only) equipped with supplemental type certificate (STC) No. SA8176SW or STC No. SA09377SC and either STC No. SA2172NM or STC No. SA645NW to operate those aircraft without a pilot who is designated as second in command. The amendment requested would add STC No. ST09559AC to the list of approved STCs.
*Grant, 8/3/2004, Exemption No. 5517H*

*Docket No.:* FAA–2001–10857.
*Petitioner:* Department of Defense.
*Section of 14 CFR Affected:* 14 CFR 91.117(a) and (b), 91.159(a), and 91.209(a)(1) and (b).
*Description of Relief Sought/Disposition:* To permit the Department of Defense to conduct air operations in support of drug law enforcement and traffic interdiction without meeting certain requirements pertaining to (1) aircraft speed, (2) cruising altitudes for flights conducted under visual flight rules, and (3) the use of aircraft position lights and anticollision light systems.
*Grant, 8/4/2004, Exemption No. 5100G*

*Docket No.:* FAA–2002–11568.
*Petitioner:* Broward County Mosquito Control.
*Section of 14 CFR Affected:* 14 CFR 137.53(c)(2).
*Description of Relief Sought/Disposition:* To permit Broward County Mosquito Control to conduct aerial applications of insecticide materials from a Beechcraft C–45H aircraft (registration No. N850BC, serial No. 51–11844A) without the aircraft being equipped with a device that is capable of jettisoning at least one-half of the aircraft's maximum authorized load of agricultural materials within 45 seconds when operating over a congested area.
*Grant, 8/9/2004, Exemption No. 8370*

*Docket No.:* FAA–2000–8476.
*Petitioner:* American Eagle Airlines, Inc., and Executive Airlines.
*Section of 14 CFR Affected:* 14 CFR 121.434 and 121.683.
*Description of Relief Sought/Disposition:* To permit American Eagle Airlines, Inc., and Executive Airlines to allow their pilots to transfer between the two air carriers without meeting the specific requirements of 14 CFR related to operating experience, operating cycles, consolidation of knowledge and skills, and recordkeeping.
*Denial, 8/11/2004, Exemption No. 8374*

*Docket No.:* FAA–2003–16491.
*Petitioner:* Department of the Army.
*Section of 14 CFR Affected:* 14 CFR 105.19(a) and (b).
*Description of Relief Sought/Disposition:* To permit the Department of the Army, 2nd Battalion, 75th Ranger Regiment to conduct certain night, unlighted parachute operations, outside special use airspace at Fort Lewis, Washington. The amendment requested would increase the altitude from 800 feet above ground level (AGL) to 1,500 feet AGL.
*Grant, 8/12/2004, Exemption No. 8255A*

*Docket No.:* FAA–2004–18845.
*Petitioner:* Maverick Helicopters.
*Section of 14 CFR Affected:* 14 CFR 135.143(c)(2).
*Description of Relief Sought/Disposition:* To permit Maverick Helicopters to operate certain aircraft under part 135 without a TSO-C112 (Mode S) transponder installed on those aircraft.
*Grant, 8/13/2004, Exemption No. 8380*

*Docket No.:* FAA–2001–10165.
*Petitioner:* North Jersey Chapter of the Ninety-Nines, Inc.
*Section of 14 CFR Affected:* 14 CFR 135.251, 135.255, and 135.353, and appendices I and J to part 121.
*Description of Relief Sought/Disposition:* To permit North Jersey Chapter of the Ninety-Nines, Inc., to conduct local sightseeing flights at the Lincoln Park Airport, Lincoln Park, New Jersey, on October 2, 2004, or on October 3, 2004, for compensation or hire, without complying with certain anti-drug and alcohol misuse prevention requirements of part 135, subject to certain conditions and limitations.
*Grant, 8/13/2004, Exemption No. 8379*

*Docket No.:* FAA–2004–18731.
*Petitioner:* Plainwell Pilots Association.
*Section of 14 CFR Affected:* 14 CFR 135.251, 135.255, and 135.353, and appendices I and J to part 121.
*Description of Relief Sought/Disposition:* To permit Plainwell Pilots

Association to conduct local sightseeing flights at the Plainwell Airport, Plainwell, Michigan, for a one-day event during the month of October 2004, for compensation or hire, without complying with certain anti-drug and alcohol misuse prevention requirements of part 135, subject to certain conditions and limitations.

*Grant, 8/13/2004, Exemption No. 8378*

*Docket No.:* FAA–2004–17944.
*Petitioner:* Spirit Airlines, Inc.
*Section of 14 CFR Affected:* 14 CFR 91.203(a) and (b) and 47.49.
*Description of Relief Sought/ Disposition:* To permit Spirit Airlines, Inc., to temporarily operate its U.S.-registered aircraft following incidental loss or mutilation of the certificate of airworthiness or registration, or both. Such operation is permitted only after the statement specified in conditions and limitations No. 3(a) of the exemption has been recorded in the aircraft logbook and the appropriate signature affixed thereto.

*Grant, 8/13/2004, Exemption No. 8377*

*Docket No.:* FAA–2000–8215.
*Petitioner:* Telesis TransAir, Inc.
*Section of 14 CFR Affected:* 14 CFR 135.143(c)(2).
*Description of Relief Sought/ Disposition:* To permit Telesis TransAir, Inc., to operate certain aircraft under part 135 without a TSO–C112 (Mode S) transponder installed on those aircraft.

*Grant, 8/20/2004, Exemption No. 7391B*

*Docket No.:* FAA–2000–8063.
*Petitioner:* Eagle Canyon Airlines, Inc. d.b.a. Scenic Airlines.
*Section of 14 CFR Affected:* 14 CFR 121.345(c)(2).
*Description of Relief Sought/ Disposition:* To permit Eagle Canyon Airlines, Inc., d.b.a. Scenic Airlines to operate certain aircraft under part 121 without a TSO–C112 (Mode S) transponder installed on those aircraft until December 31, 2004.

*Grant, 8/20/2004, Exemption No. 6839D*

*Docket No.:* FAA–2001–11131.
*Petitioner:* Mr. Gary K. Gates.
*Section of 14 CFR Affected:* 14 CFR 61.113(d) and (e).
*Description of Relief Sought/ Disposition:* To permit Mr. Gary K. Gates to conduct point-to-point airlifts of medical patients while holding a private pilot certificate with at least 1,000 hours of pilot in command time and instrument rating. He will provide transport to checkups and followup hospital visits and receive compensation for concurrent operating expenses.

*Denial, 8/16/2004, Exemption No. 8381*

*Docket No.:* FAA–2002–14080.
*Petitioner:* Air 1st Aviation Companies of Oklahoma, Inc.
*Section of 14 CFR Affected:* 14 CFR 135.143(c)(2).
*Description of Relief Sought/ Disposition:* To permit Air 1st Aviation Companies of Oklahoma, Inc., to operate certain aircraft under part 135 without a TSO–C112 (Mode S) transponder installed on those aircraft.

*Grant, 8/20/2004, Exemption No. 7938A*

[FR Doc. 04–20548 Filed 9–10–04; 8:45 am]
BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

### Environmental Impact Statement: Forsyth County, NC

**AGENCY:** Federal Highway Administration (FHWA), DOT.
**ACTION:** Revised notice of intent.

**SUMMARY:** The FHWA is issuing this notice to advise the public that a supplemental final environmental impact statement on the Western Section of the Northern Beltway and a supplemental draft environmental impact statement on the Eastern Section and Eastern Section Extension of the Winston-Salem Northern Beltway will be prepared as one document to address the impacts of the consolidated proposed Winston-Salem Northern Beltway projects in Forsyth County, North Carolina.

**FOR FURTHER INFORMATION CONTACT:** Ms. Emily Lawton, Operations Engineer, Federal Highway Administration, 310 New Bern Avenue, Suite 410, Raleigh, North Carolina 27601, Telephone: (919) 856–4350.

**SUPPLEMENTARY INFORMATION:** The FHWA, in cooperation with the North Carolina Department of Transportation (NCDOT), will prepare, as one document and under one cover, a supplemental final environmental impact statement on the Western Section of the Northern Beltway and a supplemental draft environmental impact statement on the Eastern Section and Eastern Section Extension of the Northern Beltway of Winston-Salem in Forsyth County. The document will address the impacts that all sections of the Northern Beltway will have on the environment. Public comments will be addressed in a subsequent environmental document that will also address any changes to the Western Section and the Eastern Section and Eastern Section Extension of the Northern Beltway, prepared as a single document. The proposed action would be the construction of a multi-lane divided, controlled access highway on new location from US 158 southwest of Winston-Salem to US 311 southeast of Winston-Salem. A Final Environmental Impact Statement on the Western Section, the portion from US 158 southwest of Winston-Salem to US 52 northwest of Winston-Salem (FHWA–NC–EIS–92–06–F), was approved by FHWA on 14 March 1996. A Draft Environmental Impact Statement on the Eastern Section, the portion of the facility from US 52 northwest of Winston-Salem to US 421 east of Winston-Salem (FHWA–NC–EIS–95–04–D), was approved by FHWA on 14 September 1995.

Alternatives under consideration include: (1) The "no-build", (2) improving existing facilities, (3) transportation demand management and transportation system management alternatives; (4) mass transit alternatives; and (5) a controlled access highway on new location.

Letters describing the proposed action and soliciting comments have been sent to appropriate Federal, State, and local agencies. Public meetings and meetings with local officials and neighborhood groups have been held in the study area. A public hearing will also be held. Information on the time and place of the public hearing will be provided in the local news media. The supplemental final environmental impact statement/ supplemental draft environmental impact statement will be available for public and agency review and comment at the time of the hearing.

To ensure that the full range of issues related to the proposed action are addressed and all significant issues are identified, comments and suggestions are invited from all interested parties. Comments and questions concerning the proposed action should be directed to the FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program)

Dated: September 1, 2004.

**Emily O. Lawton,**

*Operations Engineer, Raleigh, North Carolina.*

[FR Doc. 04–20594 Filed 9–10–04; 8:45 am]
BILLING CODE 4910–22–M

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

### Environmental Impact Statement: Jefferson County, NY

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of intent.

**SUMMARY:** The FHWA is issuing this notice to advise the public that an environmental impact statement will be prepared for the proposed highway project in Jefferson County, New York.

**FOR FURTHER INFORMATION CONTACT:** R. Carey Babyak P.E., Regional Director, 317 Washington Street, Watertown, NY 13601, Telephone: (315) 785–2333; *or* Robert Arnold, Division Administrator, Federal Highway Administration, New York division, Leo W. O'Brien Federal Building, 9th Floor, Clinton Avenue and North Pearl Street, Albany, New York 12207, Telephone: (518) 431–4127.

**SUPPLEMENTARY INFORMATION:** The FHWA, in cooperation with the New York State Department of Transportation (NYSDOT) will prepare an environmental impact statement (EIS) on a proposal to improve the transportation link between Interstate Route 81 and U.S. Route 11 north of the City of Watertown, in Jefferson County, New York. The proposed improvement would involve the construction of a new highway or the reconstruction of an existing highway in the towns of Pamelia and LeRay for a distance of about 7.7 kilometers (4.8 miles). Improvements to the corridor are considered necessary to provide for the existing and projected operational needs of the Fort Drum Army Base, address current and projected highway capacity issues, and enhance the traffic safety of the transportation system.

Alternatives under consideration include: (1) Taking no action; (2) creating a new interchange and alignment north of exit 48 on Interstate Route 81; (3) improving the interchange at exit 48 on Interstate Route 81 and reconstructing the existing highway network; and (4) rebuilding the interchange at exit 47 and creating a new alignment south of exit 48 on Interstate Route 81. Incorporated into and studied with the various build alternatives will be design variations of grade and alignment.

Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State, and local agencies, and to private organizations and citizens who have previously expressed interest in this proposal. A series of public information meetings will be held in the Towns of Pamelia and LeRay between September, 2004 and December, 2005. In addition, at least one public hearing will be held. Public notice will be given of the time and place of the meetings and hearings. The draft EIS will be available for public and agency review and comment. No formal NEPA scoping meeting is planned at this time.

To ensure that the full range of issues related to this proposal action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the NYSDOT or FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program)

Issued on: September 1, 2004.

**David W. Nardone,**

*Senior Operations Engineer, Federal Highway Administration, Albany, New York.*

[FR Doc. 04–20593 Filed 9–10–04; 8:45 am]

BILLING CODE 4910–22–M

## DEPARTMENT OF THE TREASURY

### Submission for OMB Review; Comment Request

September 2, 2004.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW, Washington, DC 20220.

*Dates:* Written comments should be received on or before October 13, 2004 to be assured of consideration.

**Bureau of the Public Debt (PD)**

*OMB Number:* 1535–0111.

*Form Number:* SB 2362, 2378 and 2383.

*Type of Review:* Reinstatement.

*Title:* Authorization for Purchase and Request for Change U.S. Savings Bonds.

*Description:* These forms are used to authorize employers to allot funds from employee's pay for the purchase of Savings Bonds.

*Respondents:* Individuals or households.

*Estimated Number of Respondents:* 1,300,000.

*Estimated Burden Hours Per Respondent:* 1 minute.

*Frequency of Response:* On occasion.

*Estimated Total Reporting Burden Hours:* 21,667 hours.

*Clearance Officer:* Vicki S. Thorpe, (304) 480–6553, Bureau of the Public Debt, 200 Third Street, Parkersburg, West VA 26106–1328.

*OMB Reviewer:* Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

**Lois K. Holland,**

*Treasury PRA Clearance Officer.*

[FR Doc. 04–20581 Filed 9–10–04; 8:45 am]

BILLING CODE 4810–39–P

## DEPARTMENT OF THE TREASURY

### Submission for OMB Review; Comment Request

August 30, 2004.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

**DATES:** Written comments should be received on or before October 13, 2004 to be assured of consideration.

**Internal Revenue Service (IRS)**

*OMB Number:* 1545–1032.

*Form Number:* IRS Form 8869.

*Type of Review:* Revision.

*Title:* Allocation of Individual Income Tax to the Virgin Islands.

*Description:* Form 8869 is used by U.S. citizens or residents as an attachment to Form 1040 when they have Virgin Islands source income. The data is used by IRS to verify the amount claimed on Form 1040 for taxes paid to the Virgin Islands.

*Respondents:* Individuals or households.

*Estimated Number of Respondents/ Recordkeepers:* 800.

*Estimated Burden Hours Respondent/ Recordkeeper:*
Recordkeeping—2 hr., 43 min.
Learning about the law or the form—18 min.
Preparing the form—1 hr., 4 min.
Copying, assembling, and sending the form to the IRS—20 min.
*Frequency of response:* Annually.
*Estimated Total Reporting/ Recordkeeping Burden:* 3,600 hours.
*OMB Number:* 1545–1102.
*Regulation Project Number:* PS–19–92 Final.
*Type of Review:* Extension.
*Title:* Carryover Allocations and Other Rules Relating to the Low-Income Housing Credit.
*Description:* The regulations provide the Service the information it needs to ensure that low-income housing tax credits are being properly allocated under section 42. This is accomplished through the use of carryover allocation documents, election statements, and binding agreements executed between taxpayers (*e.g.*, individuals, businesses, etc.) and housing credit agencies.
*Respondents:* Business or other for-profit, Farms, Individuals or households, Not-for-profit institutions, State, local or tribal government.
*Estimated Number of Respondents/ Recordkeepers:* 2,230.
*Estimated Burden Hours Respondent/ Recordkeeper:* 1 hr., 48 min.
*Frequency of response:* Other (one time).
*Estimated Total Reporting/ Recordkeeping Burden:* 4,008 hours.
*OMB Number:* 1545–1148.
*Regulation Project Number:* EE–113–90 (TD 8324) Final and Temporary.
*Type of Review:* Extension.
*Title:* Employee Business Expense-Reporting and Withholding Employee Business Expense Reimbursements and Allowances.
*Description:* These temporary and final regulations provide rules concerning the taxation of, and reporting and withholding on, employee business expense reimbursements and other expenses allowance arrangements.
*Respondents:* Business or other for-profit, Individuals or households, Not-for-profit institutions, Not-for-profit institutions, Farms, Federal Government, State, local or tribal government.
*Estimated Number of Recordkeepers:* 1,419,456.
*Estimated Burden Hours Recordkeeper:* 30 minutes.
*Estimated Total Recordkeeping Burden:* 709,728 hours.
*OMB Number:* 1545–1357.
*Regulatory Project Numbers:* PS–78–91 Final, PS–50–92 Final and REG–114664–97 Final.
*Type of Review:* Extension.
*Title: PS–78–91 Final:* Procedure for Monitoring Compliance with Low-Income Housing Credit Requirements; *PS–50–92 Final:* Rules to Carry Out the Purposes of Section 42 and for Correcting Administrative Errors and Omissions; and *REG–114664–97 Final:* Compliance Monitoring and Miscellaneous Issues Relating to the Low-Income Housing Credit.
*Description: PS–78–91* The regulations require State allocation plans to provide a procedure for State and local housing credit agencies to monitor for compliance with the requirements of section 42 and report any noncompliance to the IRS. *PS–50–92* These regulations concern the Secretary's authority to provide guidance under section 42, and provide for the correction of administrative errors and omissions related to the allocation of low-income housing credit dollar amounts and recordkeeping. *REG–114664–97* The regulations amend the procedures for State and local housing credit agencies' compliance monitoring and the rules for State and local housing credit agencies' correction of administrative errors and omissions.
*Respondents:* Business or other for-profit, Individuals or households, Not-for-profit institutions, State, local or tribal government.
*Estimated Number of Respondents/ Recordkeepers:* 22,055.
*Estimated Burden Hours Respondent/ Recordkeeper:* 4 hours, 45 minutes.
*Frequency of response:* On occasion.
*Estimated Total Reporting/ Recordkeeping Burden:* 104,899 hours.
*OMB Number:* 1545–1397.
*Form Number:* IRS Form 8453–OL.
*Type of Review:* Extension.
*Title:* U.S. Individual Income Tax Declaration for an IRS *e-file* Online Return.
*Description:* This form is used to secure taxpayer signatures and declarations in conjunction with the Online Electronic Filing program. This form, together with electronic transmission, comprises the taxpayer's return.
*Respondents:* Individuals or households.
*Estimated Number of Respondents/ Recordkeepers:* 50,000.
*Estimated Burden Hours Respondent/ Recordkeeper:* 15 minutes.
*Frequency of response:* Annually.
*Estimated Total Reporting/ Recordkeeping Burden:* 12,500 hours.
*OMB Number:* 1545–1575.
*Regulation Project Number:* REG–116608–97 Final.
*Type of Review:* Extension.
*Title:* Eligibility Requirements after Denial of the Earned Income Credit.
*Description:* This information is to provide guidance to taxpayers who have been denied the earned income credit (EIC).
*Respondents:* Individuals or households.
*Estimated Number of Respondents:* 1.
*Estimated Burden Hours Respondent:* 1 hour.
*Frequency of response:* Other (once).
*Estimated Total Reporting Burden:* 1 hour.
*Clearance Officer:* Paul H. Finger, (202) 622–4078, Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.
*OMB Reviewer:* Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

**Lois K. Holland,**
*Treasury PRA Clearance Officer.*
[FR Doc. 04–20582 Filed 9–10–04; 8:45 am]
BILLING CODE 4830–01–P

## DEPARTMENT OF THE TREASURY

### Submission for OMB Review; Comment Request

August 30, 2004.

The Department of the Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

**DATES:** Written comments should be received on or before October 13, 2004 to be assured of consideration.

**Internal Revenue Service (IRS)**

*OMB Number:* 1545–1619.
*Form Number:* IRS Form 8862.
*Type of Review:* Revision.
*Title:* Information to Claim Earned Income Credit after Disallowance.
*Description:* Section 32 of the Internal Revenue Code allows taxpayers an earned income credit (EIC) for each of their qualifying children. Section 32(k),

as enacted by section 1085(a)(1) of P.L. 105–34, disallows the EIC for a statutory period if the taxpayer improperly claimed it in a prior year. Form 8862 helps taxpayers reestablish their eligibility to claim the EIC.

*Respondents:* Individuals or households.

*Estimated Number of Respondents/ Recordkeepers:* 1,000,000.

*Estimated Burden Hours Respondent/ Recordkeeper:*

Recordkeeping—26 min.
Learning about the law or the form—9 min.
Preparing the form —16 min.
Copying, assembling, and sending the form to the IRS—20 min.

*Frequency of response:* Annually.

*Estimated Total Reporting/ Recordkeeping Burden:* 1,220,000 hours.

*Clearance Officer:* Paul H. Finger, (202) 622–4078, Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

*OMB Reviewer:* Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

**Lois K. Holland,**

*Treasury PRA Clearance Officer.*

[FR Doc. 04–20583 Filed 9–10–04; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF THE TREASURY

### Submission for OMB Review; Comment Request

September 2, 2004.

The Department of the Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

*Dates:* Written comments should be received on or before October 13, 2004 to be assured of consideration.

**Internal Revenue Service (IRS)**

*OMB Number:* 1545–0056.

*Form Number:* IRS Form 1023.

*Type of Review:* Revision.

*Title:* Application for Recognition of Exemption under Section 501(c)(3) of the Internal Revenue Code.

*Description:* Form 1023 is filed by applicants seeking Federal income tax exemption as organizations described in section 501(c)(3). IRS uses the information to determine if the applicant is exempt and whether the applicant is a private foundation.

*Respondents:* Not-for-profit institutions.

*Estimated Number of Respondents/ Recordkeepers:* 29,409.

*Estimated Burden Hours Respondent/ Recordkeeper:*

| Form 1023 and Schedules | Recordkeeping | Learning about the law or the form | Preparing the form | Copying, assembling, and sending the form to the IRS |
|---|---|---|---|---|
| Parts 1 to XI | 89 hr., 12 min | 5 hr., 10 min | 9 hr., 39 min | 48 min |
| 1023 Schedule A | 10 hr., 2 min | 6 min | 16 min | |
| 1023 Schedule B | 15 hr., 18 min | 12 min | 27 min | |
| 1023 Schedule C | 11 hr., 14 min | 12 min | 23 min | |
| 1023 Schedule D | 9 hr., 48 min | 42 min | 53 min | |
| 1023 Schedule E | 14 hr., 35 min | 1 hr., 9 min | 2 hr., 22 min | 16 min. |
| 1023 Schedule F | 11 hr., 28 min | 12 min | 23 min | |
| 1023 Schedule G | 6 hr., 42 min | 6 min | 12 min | |
| 1023 Schedule H | 7 hr., 53 min | 42 min | 51 min | |

*Frequency of response:* On occasion.

*Estimated Total Reporting/ Recordkeeping Burden:* 3,131,492 hours.

*OMB Number:* 1545–0150.

*Form Number:* IRS Form 2848.

*Type of Review:* Extension.

*Title:* Power of Attorney and Declaration of Representative.

*Description:* Form 2848 is used to authorize someone to act for the respondent in tax matters. It grants all powers that the taxpayer has except signing a return and cashing refund checks. Date is used to identify representatives and to ensure that confidential information is not divulged to unauthorized persons. IRS Form 1023 is also used to input representative on CAF (Central Authorization File).

*Respondents:* Individuals or households, Business of other for-profit, Not-for-profit institutions, Farms.

*Estimated Number of Respondents/ Recordkeepers:* 800,000.

*Estimated Burden Hours Respondent/ Recordkeeper:*

Recordkeeping—6 *
Learning about the law or the form—31 *
Preparing the form—26 *
Copying, assembling, and sending the form to the IRS—34 *

* In minutes.

*Frequency of response:* Annually.

*Estimated Total Reporting/ Recordkeeping Burden:* 1,320,500 hours.

*OMB Number:* 1545–0901.

*Form Number:* IRS Form 1098.

*Type of Review:* Extension.

*Title:* Mortgage Interest Statement.

*Description:* Form 1098 is used to report $600 or more of mortgage interest received from an individual in the course of the mortgagor's trade or business.

*Respondents:* Individuals or households, Business or other for-profit.

*Estimated Number of Respondents/ Recordkeepers:* 171,000.

*Estimated Burden Hours Respondent/ Recordkeeper:* 7 minutes.

*Frequency of response:* Annually.

*Estimated Total Reporting/ Recordkeeping Burden:* 8,038,699 hours.

*OMB Number:* 1545–0971.

*Form Number:* IRS Form 1041–ES.

*Type of Review:* Extension.

*Title:* Estimated Income Tax for Estates and Trusts.

*Description:* Form 1041–ES is used by fiduciaries of estates and trusts to make estimated tax payments if their estimated tax is $1,000 or more. IRS uses the data to credit taxpayers' accounts and to determine if the estimated tax has been properly computed and timely paid.

*Respondents:* Business or other for-profit.

*Estimated Number of Respondents/ Recordkeepers:* 1,200,000.

*Estimated Burden Hours Respondent/ Recordkeeper:*

Recordkeeping—19 min.

Learning about the law or the form—15 min.
Preparing the form—1 hr., 43 min.
Copying, assembling, and sending the form to the IRS—1 hr., 0 min.

*Frequency of response:* Annually.
*Estimated Total Reporting/ Recordkeeping Burden:* 3,161,236 hours.
*OMB Number:* 1545–1119.
*Form Number:* IRS Forms 8804, 8805 and 8813.
*Type of Review:* Extension.
*Title: Form 8804:* Annual Return for Partnership Withholding Tax (Section 1446);
*Form 8805:* Foreign Partner's Information Statement of Section 1446 Withholding Tax; and
*Form 8813:* Partnership Withholding Tax Payment Voucher (Section 1446).
*Description:* Code section 1446 requires partnerships to pay a withholding tax if they have effectively connected taxable income allocable to foreign partners. Forms 8804, 8805, and 8813 are used by withholding agents to provide IRS and affected partners with data to assure proper withholding, crediting to partners' accounts and compliance.
*Respondents:* Business or other for-profit, Individuals or households.
*Estimated Number of Respondents/ Recordkeepers:* 5,000.
*Estimated Burden Hours Respondent/ Recordkeeper:*

| Form | 8804 | 8805 | 8813 |
|---|---|---|---|
| Recordkeeping | *52 | *39 | *26 |
| Learning about the law or the form | *52 | *52 | *49 |
| Preparing the form | *24 | *16 | *16 |
| Copying, assembling, and sending the form to the IRS | *20 | *13 | *10 |

* In minutes.

*Frequency of response:* On occasion.
*Estimated Total Reporting/ Recordkeeping Burden:* 108,100 hours.
*OMB Number:* 1545–1186.
*Form Number:* IRS Form 8825.
*Type of Review:* Extension.
*Title:* Rental Real Estate Income and Expense of a Partnership or an S Corporation.
*Description:* Form 8825 is used to verify that partnerships and S corporations have correctly reported their income and expenses from rental real estate property. The form is filed with either Form 1065 or Form 1120S.
*Respondents:* Business or other for-profit.
*Estimated Number of Respondents/ Recordkeepers:* 705,000.
*Estimated Burden Hours Respondent/ Recordkeeper:*
Recordkeeping—6 hr., 27 min.
Learning about the law or the form—34 min.
Preparing the form—1 hr., 37 min.
Copying, assembling, and sending the form to the IRS—16 min.

*Frequency of response:* Annually.
*Estimated Total Reporting/ Recordkeeping Burden:* 6,288,600 hours.
*OMB Number:* 1545–1266.
*Form Number:* IRS Form 8829.
*Type of Review:* Extension.
*Title:* Expenses for Business Use of Your Home.
*Description:* Internal Revenue Code (ICR) section 280A limits the deduction for business use of a home to the gross income from the business use minus certain business deductions. Amounts not allowed due to the limitations can be carried over to the following year. Form 8829 is used to verify that the deduction is properly figured.
*Respondents:* Individuals or households.
*Estimated Number of Respondents/ Recordkeepers:* 4,000,000.
*Estimated Burden Hours Respondent/ Recordkeeper:*
Recordkeeping—52 min.
Learning about the law or the form—7 min.
Preparing the form—1 hr., 15 min.
Copying, assembling, and sending the form to the IRS—20 min.

*Frequency of response:* Annually.
*Estimated Total Reporting/ Recordkeeping Burden:* 10,400,000 hours.
*OMB Number:* 1545–1623.
*Regulation Project Number:* REG–246256–96 Final.
*Type of Review:* Extension.
*Title:* Excise Taxes on Excess Benefit Transactions.
*Description:* The rule affects organizations described in Internal Revenue Code sections 501(c)(3) and (4) (applicable tax-exempt organizations). The collection of information entails obtaining and relying on appropriate comparability data and documenting the basis of an organization's determination that compensation is reasonable, or a property transfer (or transfer of the right to use property) is a fair market value. These actions comprise two of the requirements specified in the legislative history for obtaining the rebuttable presumption of reasonableness. Once an applicable tax-exempt organization satisfies the requirements of the presumption, section 4598 excise taxes can only be imposed if the IRS develops sufficient contrary evidence to rebut the probative value of the evidence put forth by the parties to the transaction.
*Respondents:* Not-for-profit institutions.
*Estimated Number of Recordkeepers:* 150,427.
*Estimated Burden Hours Recordkeeper:* 6 hours, 3 minutes.
*Estimated Total Recordkeeping Burden:* 910,083 hours.
*OMB Number:* 1545–1746.
*Form Number:* IRS Form 13094.
*Type of Review:* Extension.
*Title:* Recommendation for Juvenile Employment with the Internal Revenue Service.
*Description:* The data collected on the form provides the Internal Revenue Service with a consistent method for making suitability determination on juveniles for employment within the Service.
*Respondents:* Individuals or households, Not-for-profit institutions.
*Estimated Number of Respondents:* 2,500.
*Estimated Burden Hours Respondent:* 5 minutes.
*Frequency of response:* On occasion.
*Estimated Total Reporting Burden:* 208 hours.
*OMB Number:* 1545–1888.
*Form Number:* IRS Form 13559.
*Type of Review:* Extension.
*Title:* Rating in State-Qualified Private Plans.
*Description:* The Trade Reform Act of 2002, Public Law No. 107–210 created the Health Coverage Tax Credit (HCTC) for the purchase of private health coverage for certain individuals. Individuals who claim the credit must be enrolled in a qualified health plan. Only specific health plans qualify for the HCTC including those qualified by a state. A state qualified health plan must be submitted to the IRS by the state's Department of Insurance as meeting the legislative requirements for health insurance set forth in the Trade Act of 2002 and defined in Internal Revenue Code (IRC) section 35(e)(2). Any Statement Department of Insurance submitting a plan as qualified for HCTC will submit Form 13559, Rating in State-Qualified Private Plans, to provide information sufficient to determine its compliance with HCTC requirements and provide information about the health plan to those individuals who are eligible for the NCTC.
*Respondents:* Business or other for-profit, Federal Government, State, Local or Tribal Government.
*Estimated Number of Respondents/ Recordkeepers:* 100.
*Estimated Burden Hours Respondent/ Recordkeeper:* 30 minutes.
*Frequency of response:* On occasion.
*Estimated Total Reporting/ Recordkeeping Burden:* 50 hours.
*Clearance Officer:* Paul H. Finger, (202) 622–4078, Internal Revenue

Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

*OMB Reviewer:* Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503..

**Lois K. Holland,**

*Treasury PRA Clearance Officer.*

[FR Doc. 04–20584 Filed 9–10–04; 8:45 am]

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September 13, 2004

Part II

# Environmental Protection Agency

40 CFR Part 63
National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers and Process Heaters; Final Rule

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 63**

**[OAR–2002–0058; FRL–7633–9]**

**RIN 2060–AG69**

## National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers and Process Heaters

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The EPA is promulgating national emission standards for hazardous air pollutants (NESHAP) for industrial, commercial, and institutional boilers and process heaters. The EPA has identified industrial, commercial, and institutional boilers and process heaters as major sources of hazardous air pollutants (HAP) emissions. The final rule will implement section 112(d) of the Clean Air Act (CAA) by requiring all major sources to meet HAP emissions standards reflecting the application of the maximum achievable control technology (MACT). The final rule is expected to reduce HAP emissions by 50,600 to 58,000 tons per year (tpy).

The HAP emitted by facilities in the boiler and process heater source category include arsenic, cadmium, chromium, hydrogen chloride (HCl), hydrogen fluoride, lead, manganese, mercury, nickel, and various organic HAP. Exposure to these substances has been demonstrated to cause adverse health effects such as irritation to the lung, skin, and mucus membranes, effects on the central nervous system, kidney damage, and cancer. These adverse health effects associated with the exposure to these specific HAP are further described in this preamble. In general, these findings only have been shown with concentrations higher than those typically in the ambient air.

The final rule contains numerous compliance provisions including health-based compliance alternatives for the hydrogen chloride and total selected metals emission limits.

**DATES:** The final rule is effective November 12, 2004. The incorporation by reference of certain publications listed in the final rule is approved by the Director of the Federal Register as of November 12, 2004.

**ADDRESSES:** The official public docket is the collection of materials that is available for public viewing at the Office of Air and Radiation Docket and Information Center (Air Docket) in the EPA Docket Center, Room B–102, 1301 Constitution Avenue, NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** For information concerning applicability and rule determinations, contact your State or local representative or appropriate EPA Regional Office representative. For information concerning rule development, contact Jim Eddinger, Combustion Group, Emission Standards Division (C439–01), U.S. EPA, Research Triangle Park, North Carolina 27711, telephone number (919) 541–5426, fax number (919) 541–5450, electronic mail address *eddinger.jim@epa.gov*.

**SUPPLEMENTARY INFORMATION:** Regulated Entities. Categories and entities potentially regulated by this action include:

| Category | NAICS code | SIC code | Examples of potentially regulated entities |
|---|---|---|---|
| Any industry using a boiler or process heater as defined in the final rule. | 211 | 13 | Extractors of crude petroleum and natural gas. |
| | 321 | 24 | Manufacturers of lumber and wood products. |
| | 322 | 26 | Pulp and paper mills. |
| | 325 | 28 | Chemical manufacturers. |
| | 324 | 29 | Petroleum refineries, and manufacturers of coal products. |
| | 316, 326, 339 | 30 | Manufacturers of rubber and miscellaneous plastic products. |
| | 331 | 33 | Steel works, blast furnaces. |
| | 332 | 34 | Electroplating, plating, polishing, anodizing, and coloring. |
| | 336 | 37 | Manufacturers of motor vehicle parts and accessories. |
| | 221 | 49 | Electric, gas, and sanitary services. |
| | 622 | 80 | Health services. |
| | 611 | 82 | Educational services. |

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists examples of the types of entities EPA is now aware could potentially be regulated by this action. Other types of entities not listed could also be affected. To determine whether your facility, company, business, organization, etc., is regulated by this action, you should examine the applicability criteria in § 63.7485 of the final rule. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

*Docket.* The EPA has established an official public docket for this action under Docket ID No. OAR–2002–0058 and Docket ID No. A–96–47. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. All items may not be listed under both docket numbers, so interested parties should inspect both docket numbers to ensure that they have received all materials relevant to the final rule. 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 Air and Radiation Docket and Information Center (Air Docket) in the EPA Docket Center, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Air and Radiation Docket is (202)

566–1742. A reasonable fee may be charged for copying docket materials.

*Electronic Access.* You may access this Federal Register document electronically through the EPA Internet under the "Federal Register" listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket identification number.

*Worldwide Web (WWW).* In addition to being available in the docket, an electronic copy of the final rule is also available on the WWW through the Technology Transfer Network (TTN). Following signature, a copy of the final rule will be posted on the TTN policy and guidance page for newly proposed or promulgated rules at the following address: *http://www.epa.gov/ttn/oarpg.* The TTN provides information and technology exchange in various areas of air pollution control. If more information regarding the TTN is needed, call the TTN HELP line at (919) 541–5384.

*Judicial Review.* Under section 307(b)(1) of the CAA, judicial review of the NESHAP is available by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by November 12, 2004. Only those objections to the final rule that were raised with reasonable specificity during the period for public comment may be raised during judicial review. Under section 307(b)(2) of the CAA, the requirements that are the subject of the final rule may not be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

*Background Information Document.* The EPA proposed the NESHAP for industrial, commercial, and institutional boilers and process heaters on January 13, 2003 (68 FR 1660) and received 218 comment letters on the proposal. A memorandum "National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers and Process Heaters, Summary of Public Comments and Responses," containing EPA's responses to each public comment is available in Docket No. OAR–2002–0058.

*Outline.* The information presented in this preamble is organized as follows:



## I. Background Information

### *A. What Is the Statutory Authority for the Final Rule?*

Section 112 of the CAA requires us to list categories and subcategories of major sources and area sources of HAP and to establish NESHAP for the listed source categories and subcategories. Industrial boilers, commercial and institutional boilers, and process heaters were listed on July 16, 1992 (57 FR 31576). Major sources of HAP are those that have the potential to emit greater than 10 tpy of any one HAP or 25 tpy of any combination of HAP.

### *B. What Criteria Are Used in the Development of NESHAP?*

Section 112(c)(2) of the CAA requires that we establish NESHAP for control of HAP from both existing and new major sources, based upon the criteria set out in CAA section 112(d). The CAA requires the NESHAP to reflect the maximum degree of reduction in emissions of HAP that is achievable, taking into consideration the cost of achieving the emission reduction, any non-air quality health and environmental impacts, and energy requirements. This level of control is commonly referred to as the MACT.

The minimum control level allowed for NESHAP (the minimum level of stringency for MACT) is the "MACT floor," as defined under section 112(d)(3) of the CAA. The MACT floor for existing sources is the emission limitation achieved by the average of the best-performing 12 percent of existing sources for categories and subcategories with 30 or more sources, or the average of the best-performing five sources for categories or subcategories with fewer than 30 sources. For new sources, the MACT floor cannot be less stringent than the emission control achieved in practice by the best-controlled similar source.

### *C. How Was the Final Rule Developed?*

We proposed standards for industrial, commercial, and institutional boilers and process heaters on January 13, 2003 (68 FR 1660). Public comments were solicited at the time of proposal. The public comment period lasted from January 13, 2003, to March 14, 2003.

We received a total of 218 public comment letters on the proposed rule. Comments were submitted by industry trade associations, owners/operators of boilers and process heaters, State regulatory agencies and their representatives, and environmental groups. Today's final rule reflects our consideration of all of the comments and additional information received. Major public comments on the proposed rules, along with our responses to those comments, are summarized in this preamble.

*D. What Is the Relationship Between the Final Rule and Other Combustion Rules?*

The final rule regulates source categories covering industrial boilers, institutional and commercial boilers, and process heaters. These source categories potentially include combustion units that are already regulated by other MACT standards. Therefore, we are excluding from the final rule any combustion units that are already or will be subject to regulation under another MACT standard under 40 CFR part 63.

Combustion units that are regulated by other standards and are therefore excluded from the final rule include solid waste incineration units covered by section 129 of the CAA; boilers or process heaters required to have a permit under section 3005 of the Solid Waste Disposal Act or covered by the hazardous waste combustor NESHAP in 40 CFR part 63, subpart EEE [1]; and recovery boilers or furnaces covered by 40 CFR part 63, subpart MM.

With regards to solid waste incineration units covered by section 129 of the CAA, EPA solicited on February 17, 2004 (69 FR 7390) public comments on the definition of "commercial and industrial solid waste incineration unit" for the purpose of determining which combustion sources to regulate under section 129 and which to regulate under section 112 (*e.g.*, boilers and process heaters). As stated above, combustion units covered under section 129 are not subject to the final rule.

Electric utility steam generating units are not subject to the final rule. An electric utility steam generating unit is a fossil fuel-fired combustion unit of more than 25 megawatts that serves a generator that produces electricity for sale. A fossil fuel-fired unit that cogenerates steam and electricity and supplies more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale is considered an electric utility steam generating unit. Non-fossil fuel-fired utility boilers and electric utility steam generating units less than 25 megawatts are covered by the final rule.

In 1986, EPA codified the NSPS for industrial boilers (40 CFR part 60, subparts Db and Dc) and revised portions of them in 1999. The NSPS regulates emissions of particulate matter (PM), sulfur dioxide, and nitrogen oxides from boilers constructed after June 19, 1984. Sources subject to the NSPS are also subject to the final rule because the final rule regulates sources of hazardous air pollutants while the NSPS does not. However, in developing the final rule for industrial, commercial, and institutional boilers and process heaters, EPA minimized the monitoring requirements, testing requirements, and recordkeeping requirements to avoid duplicating requirements.

Because of the broad applicability of the final rule due to the definition of a process heater, certain process heaters could appear to fit the applicability of another existing MACT rule. We have, therefore, included in the list of combustion units not subject to the final rule refining kettles subject to the secondary lead MACT rule (40 CFR part 63, subpart X); ethylene cracking furnaces covered by 40 CFR part 63, subpart YY; and blast furnace stoves described in the EPA document entitled "National Emission Standards for Hazardous Air Pollutants for Integrated Iron and Steel Plants—Background Information for Proposed Standards" (EPA–453/R–01–005).

*E. What Are the Health Effects of Pollutants Emitted From Industrial, Commercial, and Institutional Boilers and Process Heaters?*

The final rule protects air quality and promotes the public health by reducing emissions of some of the HAP listed in section 112(b)(1) of the CAA. As noted above, emissions data collected during development of the proposed rule show that HCl emissions represent the predominant HAP emitted by industrial boilers. Industrial boilers emit lesser amounts of hydrogen fluoride, chlorine, metals (arsenic, cadmium, chromium, mercury, manganese, nickel, and lead), and organic HAP emissions. Although numerous organic HAP may be emitted from industrial boilers and process heaters, only a few account for essentially all the mass of organic HAP emissions. These organic HAP are: Formaldehyde, benzene, and acetaldehyde.

Exposure to high levels of these HAP is associated with a variety of adverse health effects. These adverse health effects include chronic health disorders (*e.g.*, irritation of the lung, skin, and mucus membranes, effects on the central nervous system, and damage to the kidneys), and acute health disorders (*e.g.*, lung irritation and congestion, alimentary effects such as nausea and vomiting, and effects on the kidney and central nervous system). We have classified three of the HAP as human carcinogens and five as probable human carcinogens. Our screening assessment for respiratory HAP and for central nervous system (CNS) HAP, using health protective assumptions, indicates that manganese and chlorine are the only boiler-related HAP that are reasonably expected to approach health based criteria concentrations at receptor locations at or beyond facility boundaries. Emissions of all other HAP modeled on an individual basis appears to be insignificant relative to the concentration that would produce the health effects that they represent. The maximal hazard index (HI) for summation of the HAP modeled in the screening assessment for respiratory effects, including chlorine, was less than 3. The maximal HI for summation of the HAP modeled in the screening assessment for CNS effects, including manganese, was less than 3. Therefore, effects noted below for HAP at high concentrations are not expected to occur prior or after regulation as a result of emissions from these facilities, and are provided to illustrate the nature of the contaminant's effects at high dose. A screening assessment was also conducted for acute effects, and no exceedances were seen. Therefore, potential acute effects are not discussed below. However, to the extent the adverse effects do occur, the final rule will reduce emissions and subsequent exposures.

Acetaldehyde

Acetaldehyde is ubiquitous in the environment and may be formed in the body from the breakdown of ethanol (ethyl alcohol). In humans, symptoms of chronic (long-term) exposure to acetaldehyde resemble those of alcoholism. Long-term inhalation exposure studies in animals reported effects on the nasal epithelium and mucous membranes, and increased kidney weight. The EPA has classified acetaldehyde as a probable human carcinogen (Group B2) based on animal studies that have shown nasal tumors in rats and laryngeal tumors in hamsters.

[1] Please note that boilers that burn small quantities of hazardous waste under the exemptions provided by 40 CFR 266.108 are subject to today's final rule.

Arsenic

Chronic (long-term) inhalation exposure to inorganic arsenic in humans is associated with irritation of the skin and mucous membranes. Human data suggest a relationship between inhalation exposure for women working at or living near metal smelters and an increased risk of reproductive effects. Inorganic arsenic exposure in humans by the inhalation route has been shown to be strongly associated with lung cancer, while ingestion of inorganic arsenic in humans has been linked to a form of skin cancer and also to bladder, liver, and lung cancer. The EPA has classified inorganic arsenic as a Group A, human carcinogen.

Benzene

Chronic (long-term) inhalation exposure has caused various disorders in the blood, including reduced numbers of red blood cells. Increased incidence of leukemia (cancer of the tissues that form white blood cells) has been observed in humans occupationally exposed to benzene. The EPA has classified benzene as a Group A, known human carcinogen.

Beryllium

Chronic (long-term) inhalation exposure of humans to high levels of beryllium has been reported to cause chronic beryllium disease (berylliosis), in which granulomatous (noncancerous) lesions develop in the lung. Inhalation exposure to high levels of beryllium has been demonstrated to cause lung cancer in rats and monkeys. Human studies are limited, but suggest a causal relationship between beryllium exposure and an increased risk of lung cancer. We have classified beryllium as a Group B1, probable human carcinogen, when inhaled; data are inadequate to determine whether beryllium is carcinogenic when ingested.

Cadmium

Chronic (long-term) inhalation or oral exposure to cadmium leads to a build-up of cadmium in the kidneys that can cause kidney disease. Cadmium has been shown to be a developmental toxicant at high doses in animals, resulting in fetal malformations and other effects, but no conclusive evidence exists in humans. Animal studies have demonstrated an increase in lung cancer from long-term inhalation exposure to cadmium. The EPA has classified cadmium as a Group B1, probable carcinogen.

Chlorine

Chlorine is a commonly used household cleaner and disinfectant. Chlorine is an irritant to the eyes, the upper respiratory tract, and lungs. Chronic (long-term) exposure to chlorine gas in workers has resulted in respiratory effects, including eye and throat irritation and airflow obstruction. No information is available on the carcinogenic effects of chlorine in humans from inhalation exposure. A National Toxicology Program (NTP) study showed no evidence of carcinogenic activity in male rats or male and female mice, and equivocal evidence in female rats, from ingestion of chlorinated water. The EPA has not classified chlorine for potential carcinogenicity.

Chromium

Chromium may be emitted by industrial boilers in two forms, trivalent chromium (chromium III) or hexavalent chromium (chromium VI). The respiratory tract is the major target organ for chromium VI toxicity for inhalation exposures. Bronchitis, decreased pulmonary function, pneumonia, and other respiratory effects have been noted from chronic high dose exposure in occupational settings to chromium VI. Limited human studies suggest that chromium VI inhalation exposure may be associated with complications during pregnancy and childbirth, while animal studies have not reported reproductive effects from inhalation exposure to chromium VI. Human and animal studies have clearly established that inhaled chromium VI is a carcinogen, resulting in an increased risk of lung cancer. The EPA has classified chromium VI as a Group A, human carcinogen.

Chromium III is less toxic than chromium VI. The respiratory tract is also the major target organ for chromium III toxicity, similar to chromium VI. Chromium III is an essential element in humans, with a daily intake of 50 to 200 micrograms per day recommended for an adult. The body can detoxify some amount of chromium VI to chromium III. The EPA has not classified chromium III with respect to carcinogenicity.

Formaldehyde

Exposure to formaldehyde irritates the eyes, nose, and throat. Reproductive effects, such as menstrual disorders and pregnancy problems, have been reported in female workers exposed to high levels of formaldehyde. Limited human studies have reported an association between formaldehyde exposure and lung and nasopharyngeal cancer. Animal inhalation studies have reported an increased incidence of nasal squamous cell cancer. The EPA considers formaldehyde a probable human carcinogen (Group B2).

Hydrogen chloride

Hydrogen chloride, also called hydrochloric acid, is corrosive to the eyes, skin, and mucous membranes at high concentration. Chronic (long-term) occupational exposure to high levels of hydrochloric acid has been reported to cause gastritis, bronchitis, and dermatitis in workers. Prolonged exposure to lower concentrations may also cause dental discoloration and erosion. No information is available on the reproductive or developmental effects of hydrochloric acid in humans. In rats exposed to high levels of hydrochloric acid by inhalation, altered estrus cycles have been reported in females and increased fetal mortality and decreased fetal weight have been reported in offspring. The EPA has not classified hydrochloric acid for carcinogenicity.

Hydrogen fluoride

Chronic (long-term) exposure to fluoride at low levels has a beneficial effect of dental cavity prevention and may also be useful for the treatment of osteoporosis. Exposure to higher levels of fluoride may cause dental fluorosis. One study reported menstrual irregularities in women occupationally exposed to fluoride. The EPA has not classified hydrogen fluoride for carcinogenicity.

Lead

Lead can cause a variety of effects at low dose levels. Chronic (long-term) exposure to high levels of lead in humans results in effects on the blood, central nervous system (CNS), blood pressure, and kidneys. Children are particularly sensitive to the chronic effects of lead, with slowed cognitive development, reduced growth and other effects reported. Reproductive effects, such as decreased sperm count in men and spontaneous abortions in women, have been associated with lead exposure. The developing fetus is at particular risk from maternal lead exposure, with low birth weight and slowed postnatal neurobehavioral development noted. Human studies are inconclusive regarding lead exposure and cancer, while animal studies have reported an increase in kidney cancer from high-dose lead exposure by the oral route. The EPA has classified lead as a Group B2, probable human carcinogen.

Manganese

Health effects in humans have been associated with both deficiencies and excess intakes of manganese. Chronic (long-term) exposure to low levels of manganese in the diet is considered to be nutritionally essential in humans, with a recommended daily allowance of 2 to 5 milligrams per day (mg/d). Chronic exposure to high levels of manganese by inhalation in humans results primarily in CNS effects. Visual reaction time, hand steadiness, and eye-hand coordination were affected in chronically-exposed workers. Impotence and loss of libido have been noted in male workers afflicted with manganism attributed to high-dose inhalation exposures. The EPA has classified manganese in Group D, not classifiable as to carcinogenicity in humans.

Mercury

Mercury exists in three forms: Elemental mercury, inorganic mercury compounds (primarily mercuric chloride), and organic mercury compounds (primarily methyl mercury). Each form exhibits different health effects. Various major sources may release elemental or inorganic mercury; environmental methyl mercury is typically formed by biological processes after mercury has precipitated from the air.

Chronic (long-term) exposure to elemental mercury in humans also affects the CNS, with effects such as increased excitability, irritability, excessive shyness, and tremors. The EPA has not classified elemental mercury with respect to cancer.

The major effect from chronic exposure to inorganic mercury is kidney effects. Reproductive and developmental animal studies have reported effects such as alterations in testicular tissue, increased embryo resorption rates, and abnormalities of development. Mercuric chloride (an inorganic mercury compound) exposure has been shown to result in tumors in experimental animals. The EPA has classified mercuric chloride as a Group C, possible human carcinogen.

Nickel

Nickel is an essential element in some animal species, and it has been suggested it may be essential for human nutrition. Nickel dermatitis, consisting of itching of the fingers, hand and forearms, is the most common effect in humans from chronic (long-term) skin contact with nickel. Respiratory effects have also been reported in humans from inhalation exposure to nickel. No information is available regarding the reproductive or developmental effects of nickel in humans, but animal studies have reported such effects, although a consistent dose-response relationship has not been seen. Nickel forms released from industrial boilers include soluble nickel compounds, nickel subsulfide, and nickel carbonyl. Human and animal studies have reported an increased risk of lung and nasal cancers from exposure to nickel refinery dusts and nickel subsulfide. Animal studies of soluble nickel compounds (*i.e.*, nickel carbonyl) have reported lung tumors. The EPA has classified nickel refinery subsulfide as Group A, human carcinogens and nickel carbonyl as a Group B2, probable human carcinogen.

Selenium

Selenium is a naturally occurring substance that is toxic at high concentrations but is also a nutritionally essential element. Studies of humans chronically (long-term) exposed to high levels of selenium in food and water have reported discoloration of the skin, pathological deformation and loss of nails, loss of hair, excessive tooth decay and discoloration, lack of mental alertness, and listlessness. The consumption of high levels of selenium by pigs, sheep, and cattle has been shown to interfere with normal fetal development and to produce birth defects. Results of human and animal studies suggest that supplementation with some forms of selenium may result in a reduced incidence of several tumor types. One selenium compound, selenium sulfide, is carcinogenic in animals exposed orally. We have classified elemental selenium as a Group D, not classifiable as to human carcinogenicity, and selenium sulfide as a Group B2, probable human carcinogen.

## II. Summary of the Final Rule

### *A. What Source Categories and Subcategories Are Affected by the Final Rule?*

The final rule affects industrial boilers, institutional and commercial boilers, and process heaters. In the final rule, process heater means an enclosed device using controlled flame, that is not a boiler, and the unit's primary purpose is to transfer heat indirectly to a process material (liquid, gas, or solid) or to heat a transfer material for use in a process unit, instead of generating steam. Process heaters are devices in which the combustion gases do not directly come into contact with process materials. Process heaters do not include units used for comfort heat or space heat, food preparation for on-site consumption, or autoclaves. Boiler means an enclosed device using controlled flame combustion and having the primary purpose of recovering thermal energy in the form of steam or hot water. Waste heat boilers are excluded from the definition of boiler. A waste heat boiler (or heat recovery steam generator) means a device, without controlled flame combustion, that recovers normally unused energy and converts it to usable heat. Waste heat boilers incorporating duct or supplemental burners that are designed to supply 50 percent or more of the total rated heat input capacity of the waste heat boiler are considered boilers and not waste heat boilers. Emissions from a combustion unit with a waste heat boiler are regulated by the applicable standards for the particular type of combustion unit. For example, emissions from a commercial or industrial solid waste incineration unit, or other incineration unit with a waste heat boiler are regulated by standards established under section 129 of the CAA.

Hot water heaters also are not regulated under the final rule. A hot water heater is a closed vessel, with a capacity of no more than 120 U.S. gallons, in which water is heated by combustion of gaseous or liquid fuel and is withdrawn for use external to the vessel at pressures not exceeding 160 pounds per square inch gauge and water temperatures not exceeding 210 degree Fahrenheit (99 degrees Celsius).

Temporary boilers also are not regulated under the final rule. A temporary boiler is any gaseous or liquid fuel-fired boiler that is designed, and is capable of, being carried or moved from one location to another, and remains at any one location for less than 180 consecutive days. Additionally, any new temporary boiler that replaces an existing temporary boiler and is intended to perform the same or similar function will be included in the determination of the consecutive 180-day time period.

Boilers or process heaters that are used specifically for research and development are not regulated under the final rule. However, units that only provide steam to a process at a research and development facility are still subject to the final rule.

### *B. What Is the Affected Source?*

In the final rule, the affected source is defined as follows: (1) The collection of all existing industrial, commercial, or institutional boilers and process heaters within a subcategory located at a major source; or (2) each new or reconstructed industrial, commercial or institutional

boiler and process heater located at a major source.

The affected source does not include combustion units that are subject to another standard under 40 CFR part 63, or covered by other standards listed in this preamble.

*C. What Pollutants Are Emitted and Controlled?*

Boilers and process heaters can emit a wide variety of HAP, depending on the material burned. Because of the large number of HAP potentially present in emissions and the disparity in the quantity and quality of the emissions information available, we use several surrogates to control multiple HAP in the final rule. This will reduce the burden of implementation and compliance on both regulators and the regulated community.

We grouped the HAP into four common categories: mercury, non-mercury metallic HAP, inorganic HAP, and organic HAP. In general, the pollutants within each group have similar characteristics and can be controlled with the same techniques.

Next, we identified compounds that could be used as surrogates for all the compounds in each pollutant category. For the non-mercury metallic HAP, we chose to use PM as a surrogate. Most, if not all, non-mercury metallic HAP emitted from combustion sources will appear on the flue gas fly-ash. Therefore, the same control techniques that would be used to control the fly-ash PM will control non-mercury metallic HAP. Particulate matter was also chosen instead of specific metallic HAP because all fuels do not emit the same type and amount of metallic HAP but most generally emit PM. The use of PM as a surrogate will also eliminate the cost of performance testing to comply with numerous standards for individual metals.

However, we are sensitive to the fact that some sources burn fuels containing very little metals, but would have sufficient PM emissions to require control under the PM provisions of the proposed rule. In such cases, PM would not be an appropriate surrogate for metallic HAP. Therefore, in the final rule, an alternative metals emission limit is included. A source may choose to comply with the alternative metals emissions limit instead of the PM limit to meet the final rule.

For inorganic HAP, we chose to use HCl as a surrogate. The emissions test information available indicate that the primary inorganic HAP emitted from boilers and process heaters are acid gases, with HCl present in the largest amounts. Other inorganic compounds emitted are found in much smaller quantities. Also, control technologies that would reduce HCl would also control other inorganic compounds that are acid gases. Thus, the best controls for HCl would also be the best controls for other inorganic HAP that are acid gases. Therefore, HCl is a good surrogate for inorganic HAP because controlling HCl will result in a corresponding control of other inorganic HAP emissions.

For organic HAP, we chose to use carbon monoxide (CO) as a surrogate to represent the variety of organic compounds, including dioxins, emitted from the various fuels burned in boilers and process heaters. Because CO is a good indicator of incomplete combustion, there is a direct correlation between CO emissions and the formation of organic HAP emissions. Monitoring equipment for CO is readily available, which is not the case for organic HAP. Also, it is significantly easier and less expensive to measure and monitor CO emissions than to measure and monitor emissions of each individual organic HAP. Therefore, using CO as a surrogate for organic HAP is a reasonable approach because minimizing CO emissions will result in minimizing organic HAP emissions.

*D. Does the Final Rule Apply to Me?*

The final rule applies to you if you own or operate a boiler or process heater located at a major source meeting the requirements in the final rule.

*E. What Are the Emission Limitations and Work Practice Standards?*

You must meet the emission limits and work practice standards for the subcategories in Table 1 of this preamble for each of the pollutants listed. Emission limits and work practice standards were developed for new and existing sources; and for large, small, and limited use solid, liquid, and gas fuel-fired units. Large units are those watertube boilers and process heaters with heat input capacities greater than 10 million British thermal units per hour (MMBtu/hr). Small units are any firetube boilers or any boiler and process heater with heat input capacities less than or equal to 10 MMBtu/hr. Limited use units are those large units with capacity utilizations less than or equal to 10 percent as required in a federally enforceable permit.

If your new or existing boiler or process heater is permitted to burn a solid fuel (either as a primary fuel or a backup fuel), or any combination of solid fuel with liquid or gaseous fuel, the unit is in one of the solid subcategories. If your new or existing boiler or process heater burns a liquid fuel, or a liquid fuel in combination with a gaseous fuel, the unit is in one of the liquid subcategories, except if the unit burns liquid only during periods of gas curtailment. If your new or existing boiler or process heater burns a gaseous fuel not combined with any liquid or solid fuels, or burns liquid fuel only during periods of gas curtailment or gas supply emergencies, the unit is in the gaseous subcategory.

TABLE 1—EMISSION LIMITS AND WORK PRACTICE STANDARDS FOR BOILERS AND PROCESS HEATERS

[(Pounds per million British thermal units (lb/MMBtu)]

| Source | Subcategory | Particulate Matter (PM) | or | Total Selected Metals | Hydrogen Chloride (HCl) | Mercury (Hg) | Carbon Monoxide (CO) (ppm) |
|---|---|---|---|---|---|---|---|
| New or reconstructed Boiler or Process Heater. | Solid Fuel, Large Unit. | 0.025 | or | 0.0003 | 0.02 | 0.000003 | 400 (@7% oxygen). |
| | Solid Fuel, Small Unit. | 0.025 | or | 0.0003 | 0.02 | 0.000003 | |
| | Solid Fuel, Limited Use. | 0.025 | or | 0.0003 | 0.02 | 0.000003 | 400 (@7% oxygen). |
| | Liquid Fuel, Large Unit. | 0.03 | ..... | ..... | 0.0005 | ..... | 400 (@3% oxygen). |

TABLE 1—EMISSION LIMITS AND WORK PRACTICE STANDARDS FOR BOILERS AND PROCESS HEATERS—Continued

[(Pounds per million British thermal units (lb/MMBtu)]

| Source | Subcategory | Particulate Matter (PM) | or | Total Selected Metals | Hydrogen Chloride (HCl) | Mercury (Hg) | Carbon Monoxide (CO) (ppm) |
|---|---|---|---|---|---|---|---|
| | Liquid Fuel, Small Unit. | 0.03 | ..... | ..... | 0.0009 | ..... | |
| | Liquid Fuel, Limited Use. | 0.03 | ..... | ..... | 0.0009 | ..... | 400 (@3% oxygen). |
| | Gaseous Fuel, Large Unit. | | ..... | ..... | ..... | ..... | 400 (@3% oxygen). |
| | Gaseous Fuel, Small Unit. | | ..... | ..... | ..... | ..... | |
| | Gaseous Fuel Limited Use. | | ..... | ..... | ..... | ..... | 400 (@3% oxygen). |
| Existing Boiler or Process Heater. | Solid Fuel, Large Unit. | 0.07 | or | 0.001 | 0.09 | 0.000009 | |
| | Solid Fuel, Small Unit. | | ..... | ..... | ..... | ..... | |
| | Solid Fuel, Limited Use. | 0.21 | or | 0.004 | ..... | ..... | |
| | Liquid Fuel, Large Unit. | | ..... | ..... | ..... | ..... | |
| | Liquid Fuel, Small Unit. | | ..... | ..... | ..... | ..... | |
| | Liquid Fuel, Limited Use. | | ..... | ..... | ..... | ..... | |
| | Gaseous Fuel ..... | | ..... | ..... | ..... | ..... | |

For solid fuel-fired boilers or process heaters, sources may choose one of two emission limit options: (1) Existing and new affected units may choose to limit PM emissions to the level listed in Table 1 of this preamble, or (2) existing and new affected units may choose to limit total selected metals emissions to the level listed in Table 1 of this preamble. Sources meeting the emission limits must also meet operating limits.

We have provided several compliance alternatives in the final rule. Sources may choose to demonstrate compliance based on the fuel pollutant content. Sources are also allowed to demonstrate compliance for existing large solid fuel units using emissions averaging.

*F. What Are the Testing and Initial Compliance Requirements?*

As the owner or operator of a new or existing boiler or process heater, you must conduct performance tests (*i.e.* stack testing) or an initial fuel analysis to demonstrate compliance with any applicable emission limits. The applicable emission limits and, therefore, the required performance tests and fuel analysis are different depending on the subcategory classification of the unit. Existing units in the small solid fuel subcategory and existing units in any of the liquid or gaseous fuel subcategories do not have applicable emission limits and, therefore, are not required to conduct stack tests or fuel analyses. Other units are required to conduct the following compliance tests or fuel analyses where applicable:

(1) Conduct initial and annual stack tests to determine compliance with the PM emission limits using EPA Method 5 or Method 17 in appendix A to part 60 of this chapter.

(2) Affected sources in the solid fuel subcategories may choose to comply with an alternative total selected metals emission limit instead of PM. Sources would conduct initial and annual stack tests to determine compliance with the total selected metals emission limit using EPA Method 29 in appendix A to part 60 of this chapter.

(3) Conduct initial and annual stack tests to determine compliance with the mercury emission limits using EPA Method 29 in appendix A to part 60 of this chapter or the ASTM D6784–02.

(4) Conduct initial and annual stack tests to determine compliance with the HCl emission limits using EPA Method 26 in appendix A to part 60 of this chapter (for boilers without wet scrubbers) or EPA Method 26A in appendix A to part 60 of this chapter (for boilers with wet scrubbers).

(5) For new boilers and process heaters in any of the limited use subcategories and new boilers and process heaters in any of the large subcategories with heat input capacities greater than 10 MMBtu/hr but less than 100 MMBtu/hr, conduct initial and annual stack tests to determine compliance with the CO work practice limit using EPA Method 10, 10A, or 10B in appendix A to part 60 of this chapter.

(6) Use EPA Method 19 in appendix A to part 60 of this chapter to convert measured concentration values to pounds per million British thermal units (MMBtu) values.

(7) For new units in any of the liquid fuel subcategories that do not burn residual oil, instead of conducting an initial and annual compliance test you may submit a signed statement in the Notification of Compliance Status report that indicates that you only burn liquid fossil fuels other than residual oil.

(8) For affected sources that choose to meet the emission limits based on fuel analysis, conduct the fuel analysis using method ASTM D5865–01ae1 or ASTM E711–87 to determine heat content; ASTM D3684–01 (for coal), SW–846–7471A (for solid samples) or SW–846–7470A (for liquid samples) to determine mercury levels; SW–846–6010B or ASTM D3683–94 (for coal) or ASTM E885–88 (for biomass) to determine total selected metals concentration; SW–846–9250 or ASTM E776–87 (for biomass) to determine chlorine concentration; and ASTM D3173 or ASTM E871 to determine moisture content.

As part of the initial compliance demonstration, you must monitor specified operating parameters during the initial performance tests that demonstrate compliance with the PM (or metals), mercury, and HCl emission limits. You must calculate the average parameter values measured during each

test run over the 3-run performance test. The minimum or maximum of the three average values (depending on the parameter measured) for each applicable parameter establishes the site-specific operating limit. The applicable operating parameters for which operating limits must be established are based on the emissions limits applicable to your unit as well as the types of add-on controls on the unit. A summary of the operating limits that must be established for the various types of controls are as follows:

(1) For boilers and process heaters without wet scrubbers that must comply with the mercury emission limit and either a PM emission limit or a total selected metals emission limit, you must meet an opacity limit of 20 percent for existing sources (based on 6-minute averages), except for one 6-minute period per hour of not more than 27 percent, or 10 percent for new sources (based on 1-hour block averages). Or, if the unit is controlled with a fabric filter, instead of meeting an opacity operating limit, you may elect to operate the fabric filter using a bag leak detection system such that corrective actions are initiated within 1 hour of a bag leak detection system alarm and you operate and maintain the fabric filter such that the alarm is not engaged for more than 5 percent of the total operating time in a 6-month reporting period.

(2) For boilers and process heaters without wet or dry scrubbers that must comply with an HCl emission limit, you must determine the average chloride content level in the input fuel(s) during the HCl performance test. This is your maximum chloride input operating limit.

(3) For boilers and process heaters with wet scrubbers that must comply with a mercury, PM (or total selected metals) and/or an HCl emission limit, you must measure pressure drop and liquid flow rate of the scrubber during the performance test and calculate the average value for each test run. The minimum test run average establishes your site-specific pressure drop and liquid flow rate operating levels. If different average parameter levels are measured during the mercury, PM (or metals) and HCl tests, the highest of the minimum test run average values establishes your site-specific operating limit. If you are complying with an HCl emission limit, you must measure pH during the performance test for HCl and determine the average for each test run and the minimum value for the performance test. This establishes your minimum pH operating limit.

(4) For boilers and process heaters with dry scrubbers that must comply with an HCl emission limit, you must measure the sorbent injection rate during the performance test for mercury and HCl and calculate the average for each test run. The minimum test run average during the performance test establishes your site-specific minimum sorbent injection rate operating limit.

(5) For boilers and process heaters with fabric filters in combination with wet scrubbers that must comply with a mercury emission limit, PM (or total selected metals) emission limit and/or an HCl emission limit, you must measure the pH, pressure drop, and liquid flowrate of the wet scrubber during the performance test and calculate the average value for each test run. The minimum test run average establishes your site-specific pH, pressure drop, and liquid flowrate operating limits for the wet scrubber. Furthermore, the fabric filter must be operated such that the bag leak detection system alarm does not sound more than 5 percent of the operating time during any 6-month period.

(6) For boilers and process heaters with electrostatic precipitators (ESP) in combination with wet scrubbers that must comply with a mercury, PM (or total selected metals) and/or an HCl emission limit, you must measure the pH, pressure drop, and liquid flow rate of the wet scrubber during the HCl performance test, and you must measure the voltage and secondary current of the ESP collection plates or total power input during the mercury and PM (or metals) performance test. Calculate the average value of these parameters for each test run. The minimum test run averages establish your site-specific minimum pH, pressure drop, and liquid flowrate operating limit for the wet scrubber and the minimum voltage and current operating limits for the ESP.

(7) For boilers and process heaters that choose to comply with the alternative total selected metals emission limit instead of PM, you must determine the total selected metals content of the inlet fuels that were burned during the total selected metals performance test. This value is your maximum fuel inlet metals content operating limit.

(8) For boilers and process heaters that burn a mixture of multiple fuels, you must determine the mercury content of the inlet fuels that were burned during the mercury performance test. This value is your maximum fuel inlet mercury operating limit. Units burning only a single fuel type (not including start-up fuels) do not need to determine, by fuel analysis, the fuel inlet operating limit when conducting performance tests.

(9) For new boilers and process heaters in any of the large subcategories and with heat input capacities greater or equal to 100 MMBtu/hr, you must monitor CO to demonstrate that average CO emissions, on a 30-day rolling average, are at or below an exhaust concentration of 400 parts per million (ppm) by volume on a dry basis corrected to 3 percent oxygen for units in the liquid subcategories and corrected to 7 percent for units in the solid subcategories. For new boilers and process heaters in any of the limited use subcategories or with heat input capacities less than 100 MMBtu/hr, you must conduct initial test of CO emissions to demonstrate compliance with the CO work practice limit.

The final rule also provides you another compliance alternative. You may demonstrate compliance by emissions averaging for existing large solid fuel boilers in States that choose to allow emissions averaging in their operating permit program.

*G. What Are the Continuous Compliance Requirements?*

To demonstrate continuous compliance with the emission limitations, you must monitor and comply with the applicable site-specific operating limits established during the performance tests or fuel analysis. Upon detecting an excursion or exceedance, you must restore operation of the unit to its normal or usual manner of operation as expeditiously as practicable in accordance with good air pollution control practices for minimizing emissions. The response shall include minimizing the period of any startup, shutdown or malfunction and taking any necessary corrective actions to restore normal operation and prevent the likely recurrence of the cause of an excursion or exceedance. Such actions may include initial inspections and evaluation, recording that operations returned to normal without operator action, or any necessary follow-up actions to return operation to below the work practice standard.

(1) For boilers and process heaters without wet scrubbers that must comply with a mercury emission limit and either a PM emission limit or a total selected metals emission limit, you must continuously monitor opacity and maintain the opacity at or below the maximum opacity operating limit for new and existing sources. Or, if the unit is controlled with a fabric filter, instead of continuous monitoring opacity, the fabric filter may be continuously operated such that the bag leak detection system alarm does not sound

more than 5 percent of the operating time during any 6-month period.

(2) For boilers and process heaters without wet or dry scrubbers that must comply with an HCl emission limit, you must maintain monthly records of fuel use that demonstrate that you have burned no new fuel types or new mixtures such that you have maintained the fuel HCl content level at or below your site-specific maximum HCl input operating limit. If you plan to burn a new fuel type or a new mixture than what was burned during the initial performance test, then you must re-calculate the maximum HCl input anticipated from the new fuels based on supplier data or your own fuel analysis. If the results of re-calculating the HCl input exceeds the average HCl content level established during the initial test, then you must conduct a new performance test to demonstrate continuous compliance with the HCl emission limit.

(3) For boilers and process heaters with wet scrubbers that must comply with a mercury, PM (or total selected metals) and/or an HCl emission limit, you must monitor pressure drop and liquid flow rate of the scrubber and maintain the 3-hour block averages at or above the operating limits established during the performance test. You must monitor the pH of the scrubber and maintain the 3-hour block average at or above the operating limit established during the performance test to demonstrate continuous compliance with the HCl emission limits.

(4) For boilers and process heaters with dry scrubbers that must comply with a PM (or total selected metals) or mercury emission limit, and/or an HCl emission limit, you must continuously monitor the sorbent injection rate and maintain it at or above the operating limits established during the HCl performance test.

(5) For boilers and process heaters with fabric filters in combination with wet scrubbers, you must monitor the pH, pressure drop, and liquid flow rate of the wet scrubber and maintain the levels at or above the operating limits established during the HCl performance test. You must also maintain the operation of the fabric filter such that the bag leak detection system alarm does not sound more than 5 percent of the operating time during any 6-month period.

(6) For boilers and process heaters with ESP in combination with wet scrubbers that must comply with a mercury, PM and/or an HCl emission limit, you must monitor the pH, pressure drop, and liquid flow rate of the wet scrubber and maintain the 3-hour block averages at or above the operating limits established during the HCl performance test. Also, you must monitor the voltage and secondary current of the ESP collection plates or total power input and maintain the 3-hour block averages at or above the operating limits established during the mercury or PM (or metals) performance test.

(7) For boilers and process heaters that choose to comply with the alternative total selected metals limit instead of PM emission limit, you must maintain monthly fuel records that demonstrate that you burned no new fuel type or new mixtures such that the total selected metals content of the inlet fuel was maintained at or below your maximum fuel inlet metals content operating limit set during the metals performance test. If you plan to burn a new fuel type or new mixture, then you must re-calculate the maximum metals input anticipated from the new fuels based on supplier data or own fuel analysis. If the results of re-calculating the metals input exceeds the average metals content level established during the initial test, then you must conduct a new performance test to demonstrate continuous compliance with the alternate selected metals emission limit.

(8) For boilers and process heaters that must comply with the mercury emission limit, you must maintain monthly fuel records that demonstrate that you burned no new fuel type or new mixture such that the total selected mercury content of the inlet fuel was maintained at or below your maximum fuel inlet metals content operating limit set during the mercury performance test. If you plan to burn a new fuel type or new mixture than what was burned during the initial performance test, then you must re-calculate the maximum mercury input anticipated from the new fuels based on supplier data or own fuel analysis. If the results of re-calculating the mercury input exceeds the average mercury content level established during the initial test, then you must conduct a new performance test to demonstrate continuous compliance with the mercury emission limit.

(9) For boilers and process heaters that choose to comply with any emission limit based on fuel analysis, you must maintain monthly fuel records to demonstrate that the content of fuel is maintained below the appropriate applicable emission limit.

(10) For new boilers and process heaters in any of the large subcategories with heat input capacities greater or equal to 100 MMBtu/hr, you must continuously monitor CO and maintain the 30-day rolling average CO emissions at or below 400 ppm by volume on a dry basis (corrected to 3 percent oxygen for units in the liquid or gaseous subcategories, and 7 percent for units in the solid fuel subcategories) to demonstrate compliance with the work practice standards at all times except during startup, shutdown, and malfunction and when the unit is operating less than 50 percent of the rated capacity.

If a control device other than the ones specified in this section is used to comply with the final rule, you must establish site-specific operating limits and establish appropriate continuous monitoring requirements, as approved by the EPA Administrator.

If you choose to comply using emissions averaging, you must demonstrate on a monthly basis that mercury, metals, PM, and HCl emission limits can be met over a 12-month period.

*H. What Are the Notification, Recordkeeping and Reporting Requirements?*

If your boiler or process heater is in the existing large gaseous fuel subcategory, or existing limited use gaseous fuel subcategory, or existing large liquid fuel subcategory, or existing limited use liquid fuel subcategory, or a new small liquid fuel unit that only burn gaseous fuels or distillate oil, you only have to submit the initial notification report. If your boiler or process heater is in the existing small gaseous, liquid, or solid fuel subcategories or new small gaseous fuel subcategory, you are not required to keep any records or submit any reports.

If your boiler or process heater is in any other subcategory, then you must keep the following records:

(1) All reports and notifications submitted to comply with the final rule.

(2) Continuous monitoring data as required in the final rule.

(3) Each instance in which you did not meet each emission limit work practice and operating limit, including periods of startup, shutdown, and malfunction (*i.e.*, deviations from the final rule).

(4) Monthly hours of operation by each source that is in a limited use subcategory.

(5) Monthly fuel use by each boilers and process heaters subject to an emission limit including a description of the type(s) of fuel(s) burned, amount of each fuel type burned, and units of measure.

(6) Calculations and supporting information of chloride fuel input, as required in the final rule.

(7) Calculations and supporting information of total selected metals and mercury fuel input, as required in the final rule, if applicable.

(8) A copy of the results of all performance tests, fuel analysis, opacity observations, performance evaluations, or other compliance demonstrations conducted to demonstrate initial or continuous compliance with the final rule.

(9) A copy of any federally enforceable permit that limits the annual capacity factor of the source to less than or equal to 10 percent.

(10) A copy of your site-specific startup, shutdown, and malfunction plan.

(11) A copy of your site-specific monitoring plan developed for the final rule, if applicable.

(12) A copy of your site-specific fuel analysis plan developed for the final rule, if applicable.

(13) A copy of the emissions averaging plan, if applicable.

You must submit the following reports and notifications:

(1) Notifications required by the General Provisions.

(2) Initial Notification no later than 120 calendar days after you become subject to the final rule.

(3) Notification of Intent to conduct performance tests and/or compliance demonstration at least 30 calendar days before the performance test and/or compliance demonstration is scheduled.

(4) Notification of Compliance Status 60 calendar days following completion of the performance test and/or compliance demonstration.

(5) Notification of intent to demonstrate compliance by emissions averaging.

(6) Notification of intent to demonstrate eligibility for either health-based compliance alternative.

(7) Compliance reports semi-annually.

*I. What Are the Health-Based Compliance Alternatives, and How Do I Demonstrate Eligibility?*

HCl Compliance Alternative

As an alternative to the requirement for each large solid fuel-fired boiler to demonstrate compliance with the HCl emission limit in the final rule, you may demonstrate compliance with a health-based HCl equivalent allowable emission limit.

The procedures for demonstrating eligibility for the HCl compliance alternative (as outlined in appendix A of the final rule) are:

(1) You must include in your demonstration every emission point covered under the final rule.

(2) You must conduct HCl and chlorine emissions tests for every emission point covered under the final rule.

(3) You must determine the total maximum hourly mass HCl-equivalent emission rate for your affected source by summing the maximum hourly emission rates of HCl and chlorine for each of the affected units at your facility covered under the final rule.

(4) Use the look-up table in the appendix A of the final rule to determine if your facility is in compliance with the health-based HCl-equivalent emission limit.

(5) Select the maximum allowable HCl-equivalent emission rate from the look-up table in appendix A of the final rule for your affected source using the average stack height of your emission units covered under the final rule as your stack height and the minimum distance between any affected emission point and the property boundary as your property boundary.

(6) Your facility is in compliance if your maximum HCl-equivalent emission rate does not exceed the value specified in the look-up table in appendix A of the final rule.

(7) As an alternative to using the look-up table, you may conduct a site-specific compliance demonstration (as outlined in appendix A of the final rule) which demonstrates that the subpart DDDDD units at your facility are not expected to cause an individual chronic inhalation exposure from HCl and chlorine which can exceed a Hazard Index (HI) value of 1.0.

Total Selected Metals Compliance Alternative

In lieu of complying with the emission standard for total selected metals (TSM) in the final rule based on the sum of emissions for the eight selected metals, you may demonstrate eligibility for complying with the TSM standard based on excluding manganese emissions from the summation of TSM emissions for the affected source unit(s).

The procedures for demonstrating eligibility for the TSM compliance alternative (as outlined in appendix A of the final rule) are:

(1) You must include in your demonstration every emission point covered under the final rule that emits manganese.

(2) You must conduct manganese emissions tests for every emission point covered under the final rule that emits manganese.

(3) You must determine the total maximum hourly manganese emission rate from your affected source by summing the maximum hourly manganese emission rates for each of the affected units at your facility covered under the final rule.

(4) Use the look-up table in appendix A of the final rule to determine if your facility is eligible for complying with the alternative TSM limit based on the sum of emissions for seven metals (excluding manganese) for the affected source units.

(5) Select the maximum allowable manganese emission rate from the look-up table in appendix A of the final rule for your affected source using the average stack height of your emission units covered under the final rule as your stack height and the minimum distance between any of those emission points and the property boundary as your property boundary.

(6) Your facility is eligible if your maximum manganese emission rate does not exceed the value specified in the look-up table in appendix A of the final rule.

(7) As an alternative to using look-up table to determine if your facility is eligible for the TSM compliance alternative, you may conduct a site-specific compliance demonstration (as outlined in appendix A of the final rule) which demonstrates that the subpart DDDDD units at your facility are not expected to cause an individual chronic inhalation exposure from manganese which can exceed a Hazard Quotient (HQ) value of 1.0.

If you elect to demonstrate eligibility for either of the health-based compliance alternatives, you must submit certified documentation supporting compliance with the procedures at least 1 year before the compliance date.

You must submit supporting documentation including documentation of all maximum capacities, existing control devices used to reduce emissions, stack parameters, and property boundary distances to each affected source of HCl-equivalent and/or manganese emissions.

You must keep records of the information used in developing the eligibility demonstration for your affected source.

To be eligible for either health-based compliance alternative, the parameters that defined your affected source as eligible for the health-based compliance alternatives (including, but not limited to, fuel type, type of control devices, process parameters reflecting the emission rates used for your eligibility demonstration) must be incorporated as Federally enforceable limits into your title V permit. If you do not meet these criteria, then your affected source is subject to the applicable emission

limits, operating limits, and work practice standards in the final rule.

If you intend to change key parameters (including distance of stack to the property boundary) that may result in lower allowable health-based emission limits, you must recalculate the limits under the provisions of this section, and submit documentation supporting the revised limits prior to initiating the change to the key parameter.

If you intend to install a new solid fuel-fired boiler or process heater or change any existing emissions controls that may result in increasing HCl-equivalent and/or manganese emissions, you must recalculate the total maximum hourly HCl-equivalent and/or manganese emission rate from your affected source, and submit certified documentation supporting continued eligibility under the revised information prior to initiating the new installation or change to the emissions controls.

## III. What Are the Significant Changes Since Proposal?

### *A. Definition of Affected Source*

The definition of affected source in § 63.7490 has been revised to be: (1) The collection of all existing industrial, commercial, or institutional boilers or process heaters within a subcategory located at a major source; and/or (2) each new or reconstructed industrial, commercial, or institutional boiler or process heater located at a major source.

### *B. Sources Not Covered by the NESHAP*

The applicability section of the final rule (§ 63.7490(c)) has been written to clarify that the following are not subject to the final rule: Blast furnace stoves, any boiler or process heater specifically listed as an affected source in another MACT standard, temporary boilers, and blast furnace gas fuel-fired boilers and process heaters.

### *C. Emission Limits*

The emission limit for mercury in the existing large solid fuel subcategories has been written as 0.000009 lb/MMBtu (from 0.000007 lb/MMBtu at proposal).

### *D. Definitions Added or Revised*

The EPA has written the definitions of large, limited use, and small gaseous subcategories to include gaseous fuel-fired boilers and process heaters that burn liquid fuel during periods of gas curtailment or gas supply emergencies.

The final rule also includes a definition of fuel type which is used in the fuel analysis compliance options. Fuel type means each category of fuels that share a common name of classification. Examples include, but are not limited to: bituminous coal, subbituminous coal, lignite, anthracite, biomass, construction/demolition material, salt water laden wood, creosote treated wood, tires, and residual oil. Individual fuel types received from different suppliers are not considered new fuel types except for construction/demolition material.

Construction/demolition material means waste building material that result from the construction or demolition operations on houses and commercial and industrial buildings.

Unadulterated wood, component of biomass, means wood or wood products that have not been painted, pigment-stained, or pressure treated with compounds such as chromate copper arsenate, pentachlorophenol, and creosote. Plywood, particle board, oriented strand board, and other types of wood products bound by glues and resins are included in this definition.

We have included a definition for temporary boiler to mean any gaseous or liquid fuel-fired boiler that is designed, and is capable of, being carried or moved from one location to another. A temporary boiler that remains at a location for more than 180 consecutive days is no longer considered to be a temporary boiler. Any temporary boiler that replaces a temporary boiler at a location and is intended to perform the same or similar function will be included in calculating the consecutive time period.

The final rule also contains a definition written for waste heat boiler that identifies waste heat boilers incorporating duct or supplemental burners that are designed to supply 50 percent or more of the total rated heat input capacity of the waste heat boiler as not being waste heat boilers, but are considered boilers and subject to the final rule.

### *E. Requirements for Sources in Subcategories Without Emission Limits or Work Practice Requirements*

In the final rule, we have clarified that sources in the existing large and limited use gaseous fuel subcategories, existing large and limited use liquid fuel subcategories, and new small liquid fuel subcategory that burn only distillate oil are only subject to the initial notification requirements in § 63.9(b) of subpart A of this part and are not required to submit as startup, shutdown, and malfunction (SSM) plan as part of their initial notification. We have written the final rule to state that sources in the existing small gaseous fuel, liquid fuel, and solid fuel subcategories and in the new small gaseous fuel subcategory are not subject to any requirements in the final rule or of subpart A of this part.

### *F. Carbon Monoxide Work Practice Emission Levels and Requirements*

The final rule provides revisions to the CO work practice emission levels. For new sources in the solid fuel subcategory, the work practice standard has been written to be corrected to 7 percent oxygen rather than 3 percent. Units in the gaseous and liquid fuel subcategories still have to correct to 3 percent oxygen.

The final rule also allows sources with heat input capacities greater than 10 MMBtu/hr but less than 100 MMBtu/hr to conduct initial and annual compliance tests to demonstrate compliance with the CO limit. Sources greater than 100 MMBtu/hr must still demonstrate compliance using CO continuous emission monitors (CEMS).

The final rule also does not allow you to calculate data average using data recorded during periods where your boiler or process heater is operating at less than 50 percent of its rated capacity, monitoring malfunctions, associated repairs, out-of-control periods, or required quality assurance or control activities. You must use all data collected during all other periods in assessing compliance.

### *G. Fuel Analysis Option*

We have clarified the fuel analysis options in the final rule. You are not required to conduct performance tests for hydrogen chloride, mercury, or total selected metals if you demonstrate compliance with the hydrogen chloride, mercury, or total selected metals limits based on the fuel pollutant content. Your operating limit is then the emission limit of the applicable pollutant. You are not required to conduct emission tests.

If you demonstrate compliance with the HCl, mercury, or TSM limit by performance tests, then your operating limits are the operating limits of the control device (if used) and the fuel pollutant content of the fuel type/mixture burned. Units burning multiple fuel types are required to determine by fuel analysis, the fuel pollutant content of the fuel/mixture burned during the performance test.

The final rule specifies the testing and initial and continuous compliance requirements to be used when complying with the fuel analysis options. Fuel analysis tests for total chloride, gross calorific value, mercury, metal analysis, sample collection, and sample preparation are included in the final rule.

We have written the requirement to remove the need for conducting additional tests if you receive fuel from a new supplier. You are required to conduct another performance test, if you demonstrated compliance through performance testing, only when you burn a new fuel type or mixture and the results of recalculating the fuel pollutant content are higher than the level established during the initial performance test.

*H. Emissions Averaging*

We have included a compliance alternative in the final rule to allow emissions averaging between existing large solid fuel boilers. Compliance must be demonstrated on a 12-month rolling average basis, determined at the end of every month. If you elect to comply with the emissions averaging compliance alternative, you must use equations provided in the final rule to demonstrate that particulate matter or TSM, HCl, or mercury from all applicable units do not exceed the emission limits specified in the final rule. If you use this option, you must also develop and submit an implementation plan no later than 6 months before the date that the facility intends to demonstrate compliance.

*I. Opacity Limit*

At proposal, we required sources meeting the PM and mercury limits to determine site-specific opacity operating limits based on levels during the initial performance test. To demonstrate continuous compliance with the opacity limit, the opacity operating limits have been established to be 20 percent (based on 6-minute averages) except for one 6-minute period per hour of not more than 27 percent for existing sources and 10 percent (based on 1-hour block averages) for new sources.

*J. Operating Limit Determination*

The final rule defines maximum and minimum operating parameters that must be met. For sources complying with the alternative opacity requirement of establishing opacity limits during the initial performance test, the maximum opacity operating limit is 110 percent of the highest test-run average opacity measured according to the final rule during the most recent performance test demonstrating compliance with the applicable emission limit. For sources meeting the standards using scrubbers or ESP, the minimum pressure drop, scrubber effluent pH, scrubber flow rate, sorbent flow rate, voltage or amperage means 90 percent of the lowest test run average pressure drop, scrubber effluent pH, scrubber flow rate, sorbent flow rate, voltage or amperage measured according to the most recent performance test demonstrating compliance with the applicable emission limits.

The final rule clarifies that operation above the established maximum or below the established minimum operating parameters constitute a deviation of established operating parameters.

*K. Revision of Compliance Dates*

In § 63.7510, we have also written the date by which you have to complete a compliance demonstration to be 180 days after the compliance date instead of at the compliance date.

## IV. What Are the Responses to Significant Comments?

We received 218 public comment letters on the proposed rule. Complete summaries of all the comments and responses are found in the Response-to-Comments document (see **SUPPLEMENTARY INFORMATION** section).

*A. Applicability*

*Comment:* Many commenters requested that EPA exempt units that are not subject to emission limits or work practice requirements from monitoring, recordkeeping, and reporting requirements.

*Response:* Sources in subcategories that do not have any emission limitations and work practices are not required to keep records or reports other than the initial notification. This is appropriate because no reports other than the initial notification would apply to these units. The SSM plan is not necessary nor required for these units because § 63.6(e)(3) of subpart A of this part requires an affected source to develop an SSM plan for control equipment used to comply with the relevant standard. The proposed rule was not intended to require monitoring, recordkeeping, and reporting (including startup, shutdown, and malfunction plans), other than the initial notification for sources not subject to an emission limit. We have clarified this decision in the final rule. We have also determined that existing small units and new small gaseous fuel units, which are not subject to emission limits or work practices in this standard, and which are also not subject to such requirements in any other Federal regulation, should also not have to provide an initial notification. These small sources are generally gas-fired and since they have minimal emissions, they are usually considered as insignificant emission units by State permitting agencies.

*Comment:* Several commenters requested that EPA specifically exclude portable/transportable units from the final rule. The commenters stated that facilities periodically use these units to supply or supplement other site steam supplies when there is a mechanical problem that takes a unit out of service or during planned outages. The commenters added that because they are used on a limited basis, portable units are not fully integrated with site control systems and most portable/transportable units are owned by a rental company and may not be operated by the facility owner/operator.

*Response:* We agree with the commenters that temporary/portable units are used only on a limited basis and are not integrated into a facility's control system. These units are gas or oil fired units. Units in the existing gaseous or liquid subcategories are not subject to emission limits or work practice standards. Consequently, we have decided that temporary/portable units are not subject to the final rule. We have added a definition for temporary boiler to mean any gaseous or liquid fuel-fired boiler that is designed, and is capable of, being carried or moved from one location to another. A temporary boiler that remains at a location for more than 180 consecutive days is no longer considered to be a temporary boiler. Any temporary boiler that replaces a temporary boiler at a location and is intended to perform the same or similar function will be included in calculating the consecutive time period. We chose the 180-day time frame because that is the length of time a new source has after startup to conduct the initial performance test.

*Comment:* Several commenters requested EPA provide a lower size cut-off for the small unit subcategory. Several commenters argued that the benefits from requiring smaller units to install controls would be minimal given the overall monitoring, recordkeeping, and reporting burden. Several commenters also requested lower size cutoffs to make the final rule similar to others established by EPA (*e.g.*, NSPS Nitrogen Oxide ($NO_X$) SIP Call). Several commenters noted several recent court decisions in which the court has decided that a *de minimis* exemption is appropriate since the regulation of small sources would yield a gain of trivial or no value yet would impose significant regulatory burden. A wide range of lower size cutoffs were suggested. However, one commenter said that EPA should not develop *de minimis* exemptions. The commenter noted that *de minimis* exemptions do not spare EPA's resources for use on other

purposes and are not justified by reductions in industry burden or inconvenience. The commenter noted that EPA did not establish any administrative record justifying the *de minimis* exemption.

*Response:* We have reviewed the commenters arguments and all the data provided in the comment letters. There is no justification for developing a lower size cut-off or *de minimis* level. We would also note the designation of large and small subcategories was not based solely on size of the unit. Large and small subcategories were developed because small units less than 10 MMBtu/hr heat input typically use a combustor design that is not common in larger units. Large boilers generally use the watertube combustor design. The design of the boiler or process heater will influence the completeness of the combustion process which will influence the formation of organic HAP emissions. Additionally, the vast majority of small units use natural gas as fuel. The EPA chose to develop large and small subcategories to account for these differences and their affect on the type of emissions. The cut-off between the large and small subcategories of 10 MMBtu/hr was based on typical sizes for fire tube units, and also when considering cut-offs in State and Federal rules. Lastly, we would like to note that the final rule does not impose any requirements for existing units in any of the small subcategories.

*Comment:* Many commenters asked EPA to clarify which sources are not covered by the final rule.

*Response:* We have included an extensive list of sources that are not subject to the final rule. The final rule clarifies that boilers and process heaters that are included as part of the affected source in any other NESHAP are not subject to the NESHAP for industrial boilers and process heaters. However, we do not exclude boilers and process heaters that are used as control devices unless they are specifically considered part of any other NESHAP's definition of affected source. Incinerators, thermal oxidizers, and flares do not generally fall under the definition of a boiler or process heater and would not be subject to the final rule. The final rule excludes waste heat boilers and waste heat boilers with supplemental firing, as long as the supplemental firing does not provide more than 50 percent of the waste heat boiler's heat input. If your waste heat boiler does receive 50 percent of its total heat input from supplemental firing, it would be subject to the NESHAP for industrial boilers unless it is subject to any other NESHAP. We specifically exclude comfort heaters from the final rule. However, this exclusion does not include boilers used to make steam or heated water for comfort heat. If your boiler meets the definition of a hot water heater, then it would not be subject to the final rule. However, if the temperature, pressure, or capacity specifications of your boiler exceed the criteria specified for hot water heaters, then your boiler would be subject to the final rule. We recognize the unique properties of blast furnace gas having high CO concentrations and none to almost no organic compounds. Consequently, we agree that for these sources CO is not a surrogate for organic HAP emissions since CO is the primary component of blast furnace gas and virtually no organic HAP are generated in its combustion. As a result, we exclude from the final rule units that receive 90 percent or more of their total heat input from blast furnace gas. In addition, research and development (R&D) operations are not subject to the final rule. However, units that only provide steam to a process or for heating at a research and development facility are still subject to the final rule. This should address the commenters' concern over overlapping applicability.

*Comment:* Several commenters suggested that EPA revise the proposed definition of affected source to be consistent with the definition of affected source in the General Provisions. The definition in the rule as proposed is much more narrow than that in the General Provisions, even though the General Provisions states that each standard will redefine affected source based on published justification as to why the definition would result in significant administration, practical or implementation problems. The commenters argued that EPA failed to provide justification for the proposed definition of affected source, which is narrower than the definition of affected source in the General Provisions.

*Response:* We agree with the commenters and in the final rule have incorporated the broader definition of affected source from the revised General Provisions. The General Provisions define the affected source as "the collection of equipment, activities, or both within a single contiguous area and under common control that is included in a section 112(c) source category or subcategory * * *" Therefore, the definition of existing affected source in the final rule is the collection of existing industrial, commercial, or institutional boilers and process heaters within a subcategory located at a major source of HAP emissions.

*B. Format*

*Comment:* Several commenters opposed using one or more surrogates for the HAP regulated. Some commenters stated that EPA must set emission standards for each HAP emitted by this category. One commenter explained that the use of surrogates is acceptable if: (1) The surrogates reflect the actual emissions of the represented pollutants, (2) the emission limit set for the surrogate is consistent with the emission limit calculated for the represented pollutants, and (3) the surrogates have substantially the same properties as the represented pollutants and is controlled by the same mechanism. Based on these criteria, the commenter argued that EPA's selection of surrogates is inadequate. One commenter specifically contended that CO is not an adequate surrogate for dioxin because dioxin emissions are affected by the temperature of the emissions, how quickly the temperature is lowered, and the levels of chlorine in the materials that are being combusted and control devices. Other commenters supported the use of surrogates to represent the HAP list.

*Response:* As discussed in the proposal preamble, the use of surrogates for the HAP regulated is appropriate. Because of the large number of HAP potentially present, the disparity in the quality and quantity of the emissions information available, particularly for different fuel types, we chose to group HAP into four categories: Mercury, non-mercury metallic HAP, inorganic HAP, and organic HAP. In general, the pollutants within each group have similar characteristics and can be controlled with the same techniques. We then chose compounds that could be used as surrogates for all the compounds in each pollutant category. We have used surrogates in previous NESHAP as a technique to reduce the performance testing costs, and thus the use of surrogates is appropriate in the final rule.

For inorganic HAP, we chose to use HCl as a surrogate. The emissions test information available to us indicated that the primary inorganic HAP emitted from boilers and process heaters is HCl. Much smaller amounts of hydrogen fluoride and chlorine are emitted. Control technologies that would reduce HCl would also control other inorganic HAP. Additionally, we had limited emissions information for other inorganic HAP. By focusing on HCl, we have achieved control of the largest emitted and most widely emitted HAP,

and control of HCl would also constitute control of other inorganic HAP.

For non-mercury metallic HAP, we chose to use PM as a surrogate. Most, if not all, non-mercury metallic HAP emitted from combustion sources will appear on the flue gas fly-ash. Therefore, the same control technology that would be used to control fly-ash PM will control non-mercury metallic HAP. A review of data in the emission database for PM control devices having both inlet and outlet emissions results shows control efficiencies for each non-mercury metallic HAP similar to PM. Particulate matter was also chosen instead of a specific metallic HAP because all fuels do not emit the same type and amount of metallic HAP, but most generally emit PM that includes some amount and combination of metallic HAP. We maintain that particulate matter reflects the emissions of non-mercury metallic HAP as these compounds usually comprise a percentage of the emitted particulate matter. Since the NESHAP program is technology-based, the technologies that have been developed and implemented to control particulate matter, also control non-mercury metallic HAP. Furthermore, since non-mercury metallic HAP is a component of particulate matter, we can use particulate matter as a surrogate for the purposes of the final rule.

While we did use PM as a surrogate for non-mercury metallic HAP, we also provided an alternative total selected metals emission limit based on the sum of the emissions of the eight most common and largest emitted metallic HAP compounds from boilers and process heaters. Again, a total selected metals number was used instead of limits for each individual metallic HAP because sufficient information was not available for each metallic HAP for every fuel type. However, a total metals number could be calculated for every fuel type.

We realize that mercury emissions can exist in different forms depending on combustion conditions and concentrations of other compounds. That is why we have mercury as a separate pollutant category in the final rule and do not provide for a surrogate.

For organic HAP, we chose to use CO as a surrogate to represent the variety of organic compounds emitted from the various fuels burned. Both organic HAP and CO emissions are the result of incomplete combustion of the fuel. Because CO is a good indicator of incomplete combustion, there is a direct correlation between CO emissions and minimizing organic HAP emissions. The extent to which CO and HAP emissions are related can also depend on site-specific operating conditions for each boiler or process heater. This site-specific nature may result in various degrees of correlation between CO and organic HAP emissions, but it is proven that reductions in CO emissions result in a reduction of organic HAP emissions. The control methods for both CO and organic HAP are the same, *i.e.*, complete combustion. This result would not have been different if MACT floor analyses were conducted for specific organic HAP or for a surrogate compound such as CO. For boilers and process heaters, we have determined that CO is a reasonable indicator of incomplete combustion. Also, we did not set emission limits for each specific organic HAP because we lacked sufficient information for many of the organic HAP for all the fuels combusted. We acknowledge that there are many factors that affect the formation of dioxin, but we also recognize that dioxin can be formed in both the combustion unit and downstream in the associated PM control device. Minimizing organic HAP emissions can limit the formation of dioxin in the combustion unit. We reviewed all the good combustion practice (GCP) information available in the boiler population database and determined that no floor level of control exists, except for limiting CO emissions, such that GCP could be incorporated into the standard. One control technique, controlling inlet temperature to the PM control device, that has demonstrated controlling downstream formation of dioxins in other source categories (*e.g.*, municipal waste combustors) was analyzed for industrial boilers. In all cases, no increase in dioxins emissions were indicated across the PM control device even at high inlet temperatures. However, we requested comment on controls that would achieve reductions of organic HAP, including any additional data that might be available. The EPA did not receive any additional supporting information or data. Additionally, more stringent options beyond the floor level of control were evaluated, but were determined to be too costly and emissions reductions associated with the options could not be evaluated because no information was available that indicated a relationship between the GCP and emission reduction of organics (including dioxin).

*C. Compliance Schedule*

*Comment:* Many commenters requested that EPA provide an additional year to comply with the final rule. Commenters explained that the time lines associated with permitting, capital appropriation, project bid, and construction activities are significant and that the 3-year deadline would not provide adequate time for the estimated 3,730 existing units at affected sources to be retrofitted as necessary to meet the new MACT standards. The commenters added that sources subject to the final rule would also be competing with sources that are subject to other combustion rules for the same vendors.

*Response:* The EPA disagrees with the commenters that the 3-year compliance deadline is too short considering the number of sources that will be competing for the resources and materials from engineering consultants, equipment vendors, construction contractors, financial institutions, and other critical suppliers. The EPA recognizes the possibility that these same consultants, vendors, etc., may also be used to comply with the utility MACT standard. However, we know that many sources will not need to install controls. As a result, since not everyone will need more than 3 years to actually install controls, the final rule does not allow an extra year for existing sources to comply with the final rule. Section 112(i)(3)(B) of the CAA allows EPA or the permit authority, on a case-by-case basis, to grant an extension permitting an existing source up to 1 additional year to comply with standards if such additional period is necessary for the installation of controls. This provision is sufficient for those sources where the 3-year deadline would not provide adequate time to retrofit as necessary to comply with the requirements of the standard. We anticipate that a number of units will seek and be granted the 1-year extension since construction of needed control devices could be constrained by the potential impacts on delays in obtaining funding and potential labor and equipment shortages.

*D. Subcategorization*

*Comment:* Two commenters said that EPA does not have the authority to develop subcategories for the purpose of reducing compliance costs or weakening the standard. The commenters also noted that costs should not be considered in subcategorizing and establishing the MACT floor. One commenter explained that EPA has failed to present a persuasive rationale for the establishment of new or different subcategories, such as a wood-fired unit subcategory and noted that EPA cannot subcategorize based on fuel type, cost, level of emissions reductions, control technology applicability or effectiveness, achievability of emissions reductions, or health risks. The

commenter argued that EPA cannot subcategorize to reduce cost because that would change CAA section 112 standards into a cost-benefit program and that is not legally defensible. The commenter noted that the DC Circuit court recently held that, when confronted with the cost argument, costs are not relevant when determining MACT floors.

*Response:* If the commenters are referring to the request for comment regarding further subcategorizations than what was proposed, the EPA agrees that there is no justification for any further subcategories. The final rule maintains the subcategories presented in the proposed rule. If the commenters are referring to subcategories presented in the proposed rule, section 112(d)(1) of the CAA states "the Administrator may distinguish among classes, types, and sizes of sources within a category or subcategory" in establishing emission standards. Thus, we have discretion in determining appropriate subcategories based on classes, types, and sizes of sources. We used this discretion in developing subcategories for the industrial, commercial, and institutional boilers and process heaters source category. Through subcategorization, we are able to define subsets of similar emission sources within a source category if differences in emissions characteristics, processes, air pollution control device (APCD) viability, or opportunities for pollution prevention exist within the source category. We first subcategorized boilers and process heaters based on the physical state of the fuel (solid, liquid, or gaseous), which will affect the type of pollutants emitted and controls applicable, and the design and operation of the boiler, which influences the formation of organic HAP emissions. We then further subcategorized boilers and process heaters based on size. Our distinctions are based on technological differences in the equipment. For example, small units are package units typically having capacities less than 10 million Btu per hour heat input and use a combustor design which is not common in large units. A review of the information gathered on boilers also shows that a number of units operate as backup, emergency, or peaking units that operate infrequently. The boiler database indicates that these infrequently operated units typically operate 10 percent of the year or less. These limited use boilers, when called upon to operate, must respond without failure and without lengthy periods of startup. Since their use and operation are different compared to typical industrial, commercial, and institutional boilers, we decided that such limited use units should have their own subcategory.

Neither the subcategories or MACT floor analysis was conducted considering costs, either in the proposed rule or in the final rule.

*Comment:* Many commenters requested EPA to develop a separate subcategory for small municipal electric utilities. Reasons for creating a subcategory for small electrical utility steam generating units included: (1) EPA has authority to establish such a subcategory of sources to be regulated under CAA section 112 and is meant to address control costs and feasibility, (2) past EPA practice supports subcategorization in this instance, (3) differences between municipal utility boilers and non-utility boilers justify subcategorization, and (4) EPA cannot properly account for cost and energy concerns mandated in the MACT standard setting process without subcategorization for municipal utility boilers. The commenters added that the unique physical attributes of municipally-owned utilities, as well as their significant and direct impact on municipal tax base, support a separate subcategorization.

*Response:* The EPA sees no technical or legal justification for creating a separate subcategory for municipal utilities. Boilers at municipal utilities fire the same type of fuels, have the same type of combustor designs, and can use the same type of controls as other units in the large subcategory. Consequently, the subcategories that are in the final rule are the same as at proposal. We would also like to clarify that subcategories were developed based on combustor design and not on industrial sector. Also, had we gone beyond-the-floor, we would have considered cost in the final determination. Since we did not go beyond-the-floor level of control, cost did not play a role in the analysis.

*Comment:* Many commenters requested EPA add a subcategory for medium sized boilers and process heaters.

*Response:* The EPA does not see justification for creating a separate subcategory for medium sized units. The designation of large and small subcategories was not based

*Response:* The EPA does not see justification for creating a separate subcategory for medium sized units. The designation of large and small subcategories was not based solely on size of the unit. Large and small subcategories were developed because small units less than 10 MMBtu/hr heat input typically use a combustor design that is not common in larger units. Large boilers generally use the watertube combustor design. The design of the boiler or process heater will influence the completeness of the combustion process which will influence the formation of organic HAP emissions. The EPA developed large and small subcategories to account for these differences and their affect on the type of emissions. The proposed size break between the large and small subcategories of 10 MMBtu/hr was based on typical sizes for firetube and cast iron units and considering cut-offs in State and Federal permitting requirements and rules. The EPA does not view medium sized boilers as being different than larger boilers. Combustor designs, applicable air pollution control devices, fuels used, and operation are similar for large and medium. While actual pollution controls used and monitoring equipment may be different, the CAA does not allow EPA to subcategorize on these parameters.

Section 112(d)(1) of the CAA allows EPA to distinguish among classes, types, and size in establishing MACT standards. As indicated above, at proposal, the size break selected between large and small units of 10 MMBtu/hr was based on typical sizes for fire tube units and also considering cut-offs in State and Federal permitting requirements and emission rules. Based on comments, we have examined information in the docket regarding the population and characteristics of industrial, commercial, and institutional boilers. It is correct that boilers below 10 MMBtu/hr are generally not required to be permitted and are either firetube or cast iron boilers. Based on review of the thousands of responses received on an information collection request (ICR) conducted during the rulemaking process, it is obvious and appropriate that the distinction between small and large units needs to include size. It is apparent from the ICR responses that facilities know the size of their units but do not generally know the exact type of the units. Many responses indicated that the boiler was both firetube and watertube. Many more responses did not list the boiler type at all. Therefore, the inclusion of size in the definition of small and large subcategories is appropriate.

Based on review of the 1979 EPA document on boiler population and the ICR survey database, the appropriate size break between small and large type units is 10 MMBtu/hr. In the EPA document, 99 percent of the boilers listed as being below 10 MMbtu/hr are either firetube or cast iron. Since these trends are from a 25 year old report, we

analyzed our ICR survey database which confirmed these findings.

*E. MACT Floor*

*Comment*: Several commenters supported EPA's finding that the MACT floor level for existing gas and liquid fuel-fired units is no emissions reductions. Other commenters contended that EPA has legal authority to set the MACT floor as "no emissions control" for particular HAP categories. A commenter noted that EPA has a clear statutory obligation to set emission standards for each listed HAP. One commenter specifically challenged EPA's determination that "no control" is the MACT floor for organic pollutants. The commenter noted that the U.S. Court of Appeals for the DC Circuit had squarely held, in the National Lime case, that EPA was not allowed to make a "no control" determination for a pollutant emitted by a listed category of sources.

*Response*: First, the MACT floor methodology we use is consistent with DC Circuit's holding in the National Lime case. The DC Circuit held that by focusing only on technology EPA ignored the directive in CAA section 112(d)(2) to consider pollution-reducing measures including process changes and substitution of materials.

The EPA has ample legal authority to set the MACT floor at "no emissions reductions." This is because the statute requires EPA to set standards that are duplicable by others. In the National Lime case, the court threw out EPA's determination of a no control floor because it was based only on a control technology approach. The court stated that EPA must look at what the best performers achieve, regardless of how they achieve it. Therefore, our determination that the MACT floor for certain subcategories or HAP is "no emissions reductions" is lawful because we determined that the best-performing sources were not achieving emissions reductions through the use of an emission control system and there were no other appropriate methods by which boilers and process heaters could reduce HAP emissions. Furthermore, setting emissions standards on the basis of actual emissions data alone where facilities have no way of controlling their HAP emissions would contravene the plain statutory language as well as Congressional intent that affected sources not be forced to shut down.

The EPA agrees with the commenter that all factors which might control HAP emissions must be considered in making a floor determination for each subcategory. However, EPA disagrees that it must express the floor as a quantitative emission level in those instances where the source on which the floor determination is based has not adopted or implemented any measure that would reduce emissions.

A detailed discussion of the MACT floor methodology is presented in the memorandum "MACT Floor Analysis for New and Existing Sources in the Industrial, Commercial, and Institutional Boilers and Process Heaters Source Categories" in the docket. In summary, we considered several approaches to identifying MACT floor for existing industrial, commercial, and institutional boilers and process heaters. Based on recent court decisions, in most cases the most acceptable approach for determining the MACT floor is likely to involve primarily the consideration of available emissions test data. However, after review of the available HAP emission test data, we determined that it was inappropriate to use this MACT floor approach to establish emission limits for boilers and process heaters. The main problem with using only the HAP emissions data is that, based on the test data alone, uncontrolled units (or units with low efficiency add-on controls) were frequently identified as being among the best performing 12 percent of sources in a subcategory, while many units with high efficiency controls were not. However, these uncontrolled or poorly controlled units are not truly among the best controlled units in the category. Rather, the emissions from these units are relatively low because of particular characteristics of the fuel that they burn, that can not reasonably be replicated by other units in the category or subcategory. A review of fuel analyses indicate that the concentration of HAP (metals, HCl, mercury) vary greatly, not only between fuel types, but also within each fuel type. Therefore, a unit without any add-on controls, but burning a fuel containing lower amounts of HAP, can have emission levels that are lower than the emissions from a unit with the best available add-on controls. If only the available HAP emissions data are used, the resulting MACT floor levels would, in most cases, be unachievable for many, if not most, existing units, even those that employ the most effective available emission control technology. Another problem with using only emissions data is that there is very limited or no HAP emissions information available to the Agency for the subcategories. This is consistent with the fact that units in these source categories have not historically been required to test for HAP emissions.

We also considered using HAP emission limits contained in State regulations and permits as a surrogate for actual emission data in order to identify the emissions levels from the best performing units in the category for purposes of establishing MACT standards. However, we found no State regulations or State permits which specifically limit HAP emissions from these sources.

Consequently, we concluded that the most appropriate approach for determining MACT floors for boilers and process heaters is to look at the control options used by the units within each subcategory in order to identify the best performing units. Information was available regarding the emission control options employed by the population of boilers identified by the EPA. We considered several possible control techniques (*i.e.*, factors that influence emissions), including fuel substitution, process changes and work practices, and add-on control technologies.

We first considered whether fuel switching would be an appropriate control option for sources in each subcategory. We considered the feasibility of both fuel switching to other fuels used in the subcategory and to fuels from other subcategories. This consideration included determining whether switching fuels would achieve lower HAP emissions. A second consideration was whether fuel switching could be technically achieved by boilers and process heaters in the subcategory considering the existing design of boilers and process heaters. We also considered the availability of various types of fuel. After considering these factors, we determined that fuel switching was not an appropriate control technology for purposes of determining the MACT floor level of control for any subcategory. This decision was based on the overall effect of fuel switching on HAP emissions, technical and design considerations, and concerns about fuel availability.

We also concluded that process changes or work practices were not appropriate criteria for identifying the MACT floor level of control for units in the boilers and process heaters category. The HAP emissions from boilers and process heaters are either fuel dependent (*i.e.*, mercury, metals, and inorganic HAP) or combustion related (*i.e.*, organic HAP). Fuel dependent HAP are typically controlled by removing them from the flue gas after combustion. Therefore, they are not affected by the operation of the boiler or process heater. Consequently, process changes would be ineffective in reducing these fuel-related HAP emissions.

On the other hand, organic HAP can be formed from incomplete combustion

of the fuel. Good combustion practice (GCP), in terms of boilers and process heaters, could be defined as the system design and work practices expected to minimize organic HAP emissions. While few sources in EPA's database specifically reported using good combustion practices, the data that we have suggests that boilers and process heaters within each subcategory might use any of a wide variety of different work practices, depending on the characteristics of the individual unit. The lack of information, and lack of a uniform approach to assuring combustion efficiency, is not surprising given the extreme diversity of boilers and process heaters, and given the fact that no applicable Federal standards, and most applicable State standards, do not include work practice requirements for boilers and process heaters. Even those States that do have such requirements do not require the same work practices. For example, CO emissions are generally a good indicator of incomplete combustion, and, therefore, low CO emissions might reflect good combustion practices. (As discussed in the proposal, CO is considered a surrogate for organic HAP emissions.) Therefore, we considered whether existing CO emission limits might be used to establish good combustion practice standards for boilers and process heaters. We reviewed State regulations applicable to boilers and process heaters, and then for each subcategory we matched the applicability of State CO emission limits with information on the locations and characteristics of the boilers and process heaters in the population database. Ultimately, we found that very few units (less than 6 percent) in any subcategory were subject to CO emission limits. We concluded that this information did not allow EPA to identify a level of performance that was representative of good combustion across the various units in any subcategory. Therefore, we did not establish a CO emission limit, as a surrogate for organic HAP emissions, as a part of the MACT floor for existing units. However, we have considered the appropriateness of such requirements in the context of evaluation possible beyond-the-floor options.

In general, boilers and process heaters are designed for good combustion. Facilities have an economic incentive to ensure that fuel is not wasted, and the combustion device operates properly and is appropriately maintained. In fact, existing boilers and process heaters are used typically as high efficiency control devices to control (reduce) emission streams containing organic HAP compounds from various process operations. Therefore, EPA's inability to establish a combustion practice requirement as part of the MACT floor for existing sources in this category should not reduce the incentive for owners and operators to run their boilers and process heaters at top efficiency.

As a result of the evaluation of the feasibility of establishing emission limits based on control techniques such as fuel switching and good combustion practices, we concluded that add-on control technology should be the primary factor for purposes of identifying the best controlled units within each subcategory of boilers and process heaters. We identified the types of air pollution control techniques currently used. We ranked those controls according to their effectiveness in removing the different HAP categories of pollutants; including metallic HAP and PM, inorganic HAP such as acid gases, mercury, and organic HAP. We then listed all the boilers and process heaters in the population database in order of decreasing control device effectiveness within each subcategory for each pollutant type. Then we identified the top 12 percent of units within each category based on this ranking, and determined what kind of emission control technology, or combination of technologies, the units in the top 12 percent employed. Finally, we looked at the emissions test data from boilers and process heaters that used the same control technology, or technologies, as the units in the top 12 percent to estimate the average emissions limitation achieved by these units.

This approach reasonably ensures that the emission limit selected as the MACT floor adequately represents the average level of control actually achieved by units in the top 12 percent. The analysis of the measured emissions from units representative of the top 12 percent is reasonably designed to provide a meaningful estimate of the average performance, or central tendency, of the best controlled 12 percent of units in a given subcategory. For existing subcategories where less than 12 percent of units in the subcategory use any type of control technology, we looked to see if we could estimate the central tendency of the best controlled units by looking at the unit occupying the median point in the top 12 percent (the unit at the 94th percentile). If the median unit of the top 12 percent is using some control technology, we might use the measured emission performance of that individual unit as the basis for estimating an appropriate average level of control of the top 12 percent. For subcategories where less than 6 percent of the units in a HAP grouping used controls or limited emissions, the median unit for that HAP grouping reflects no emissions reductions. Therefore, in these circumstances, EPA has appropriately established the MACT floor emission levels for these sources as no emission reduction.

*Comment:* Many commenters opposed EPA using emissions data from units in the large subcategory to develop emission limits for units in the small or limited use subcategories. Some commenters stated that it was not appropriate to assume that emissions rates achievable by large units are achievable by small units, even the best controlled units. Other commenters argued that the use of large unit data in MACT determinations for other subcategories would defeat the purpose of the subcategorization and violate the requirements of CAA section 112 because the use of this data does not represent sources in the relevant category or subcategory.

*Response:* The EPA disagrees with the commenters and maintains that it has conducted the MACT floor analysis appropriately. Section 112(d) of the CAA requires us to establish emission limits for new sources based on the performance of the best-controlled similar source. The CAA does not specify that the similar source must be within the same source category or subcategory. To the contrary, our interpretation of section 112(d) is that we are obligated to consider similar sources from other source categories or subcategories in determining the best-controlled similar source for establishing MACT for new sources.

For new limited use and small units, we concluded that the best-controlled similar sources are found in the large subcategory. First, EPA determined the control technology used by the best controlled sources in the subcategory. For example, only units in the population database less than 10 MMBtu/hr (and not in the limited use subcategory) were used to determine the MACT floor control technology for units in the small subcategories. Second, EPA used information in the emissions test database to establish the emission level associated with the MACT floor control technology. The emissions test database did not contain test data for limited use or small boilers and process heaters. Section 112(d) of the CAA requires EPA to use information from similar sources to set the MACT floor. Such sources may not be in the same subcategory. Although the units in the small and

limited use subcategories are different enough to warrant their own subcategory (*i.e.*, different purposes and operation), emissions of the specific types of HAP for which limits are being proposed are expected to be related more to the type of fuel burned and the type of control used, than to unit operation. Consequently, EPA determined that emissions information from large fuel-fired units could be used to establish MACT floor levels for the small and limited use subcategories because the fuels and controls are similar. The proposal preamble requested additional information from commenters to refine/revise the approach if necessary. No commenters provided emissions information for limited use or small subcategory boilers or process heaters.

*Comment:* Several commenters requested that EPA account for variability in fuel composition as MACT floors are established and to provide adequate allowances for inherent fuel supply variability. Some commenters argued that there is no flexibility in the rule to account for this variability and noted that coal composition can vary by location and also within an individual seam.

*Response:* As described in the memorandum "Revised MACT Floor Analysis for the Industrial, Commercial, and Institutional Boilers and Process Heater National Emission Standards for Hazardous Air Pollutants Based on Public Comments" in the docket, the calculation of numerical emission limits was a two-step analysis. The first step involved calculating a numerical average of the appropriate subset of emission test data. The second step involved generating and applying an appropriate variability factor to account for unavoidable variations in emissions due to uncontrollable variations in fuel characteristics and ordinary operational variability. Accounting for variability is appropriate in order to generate a more accurate estimation of the actual, long term, performance of a source (*e.g.*, the source occupying the median point in the top 12 percent). An emission test provides a momentary snapshot, not an estimation of continuous performance. In order to translate the former into the latter, we must account for that ordinary and unavoidable variability that the source is likely to experience over time. This gives us a more reasonable estimate of the actual level of emissions control that the unit is achieving. The EPA contends that by considering the variability of emissions information, we have indirectly incorporated variability in fuel, operating conditions, and sampling and analytical conditions because these parameters vary from emission tests conducted from one unit to another, and even within each test set of three measurements at a single unit. The most elementary measure of variation is range. Range is defined as the difference between the largest and smallest values. This is the variability methodology used in the proposed rule. That is, for each unit with multiple emissions tests conducted over time, the variability was calculated by dividing the highest three-run test result by the lowest three-run test result. The overall variability was calculated by averaging all the individual unit variability factors. This overall variability factor was multiplied by the overall average emission level to derive a MACT floor limit representative of the average emission limitation achieved by the top 12 percent of units. This approach adequately accounts for inherent fuel supply variability. Based on comments, EPA did conduct a more robust statistical analysis (t-test) of the mercury emissions data used in the MACT floor analysis to identify the 97.5th percent confidence limit. This analysis provided similar results to the variability analysis conducted in the proposed rule. Consequently, EPA decided not to change its variability methodology. A detailed discussion of the statistical analysis conducted is provided in the memorandum "Statistical Analysis of Mercury Test Data Variability in Response to Public Comments on Determination of the MACT Floor for Mercury Emissions" in the docket.

*Comment:* Several commenters supported EPA's finding that the MACT floor level of control for existing gaseous and liquid fuel units is no control. Other commenters noted that EPA has a clear statutory obligation to set emission standards for each listed HAP (the commenter cited legal briefs). One commenter specifically challenged EPA's determination of the MACT floor for organic pollutants. The commenter explained that EPA should rank the units for which emissions data is available according to the best performing units, not based on the add-on control level of 6 percent of the total population. The commenter noted that the U.S. Court of Appeals for the DC Circuit had squarely held, in the National Lime case, that EPA was not allowed to make a "no control" determination for a pollutant emitted by a listed category of sources.

*Response:* The EPA agrees that all factors which might control HAP emissions must be considered in making a floor determination for each subcategory. However, EPA disagrees that it must express the floor as a quantitative emission level in those instances where the sources on which the floor determination is based has not adopted or implemented any measure that would reduce emissions. For several subcategories and certain HAP, EPA has not identified any adjustments or other operational modifications that would materially reduce emissions by these units, and EPA had determined that no add-on controls are presently in use. In these circumstances, EPA has established appropriately the MACT floors for these sources as no emission reduction.

*Comment:* One commenter pointed out that the variability factor used to make the calculated MACT floor less stringent is not allowed by section 112 of the CAA. The commenter mentioned that the variability factors are not consistent, as one factor considers the fuel variability and the other factor considers the test data variability.

*Response:* Section 112(d)(2) of the CAA requires that emissions standards promulgated shall require the maximum degree of reductions in emissions that the EPA Administrator, taking into consideration the costs of achieving such emission reduction, determines is achievable for new and existing sources in the subcategory to which such emission standards applies. Accounting for variability is appropriate in order to generate a more accurate estimation of the actual, long term, performance of a source (*e.g.*, the source occupying the median point in the top 12 percent). An emission test provides a momentary snapshot, not an estimation of continuous performance. In order to translate the former into the latter, we must account for that ordinary and unavoidable variability that the source is like to experience over time. This give us a more reasonable estimate of the actual level of emissions control that the unit is achieving. As such, due to variations in fuel burned, and ordinary operational variability any emission limit set from a point source measurement alone may not be indicative of normal emissions or operations of the unit. Attempting to base a standard (either a floor standard, or a beyond-the-floor standard) solely on point measurements would lead to unachievable standards for all sources. Limits set by EPA must be achieved at all times, and it is important that the MACT floor limit adequately account for the normal and unavoidable variability in the process and in the operation of the control device.

Variability was assessed two ways. For existing subcategories, variability in emissions information was used to develop variability factors for all

subcategories where emissions information was available. Variability in fuel content was used only in situations regarding determining the achievable MACT floor level for new sources from the emission test result on the best controlled similar source. This approach is appropriate since the main uncertainty associated with the emission test result from the best controlled similar source is fuel variability. Corresponding fuel analysis results were not available for the emissions test results from the best controlled similar source. Whereas, the average emission level of the best 12 percent of the units has, besides fuel variability, the uncertainty associated with operational and design variability of the various control devices installed on units that represent the best 12 percent of the units. For example, available fuel analysis information shows that mercury content of coal varies by a factor of 12.54. Dividing the highest mercury emission test result by the lowest mercury test results from coal-fired units included in units that represent the best 12 percent results in a variability factor of 20. Therefore, we concluded that fuel availability was inherently considered in the MACT floor analysis approach used for existing subcategories.

*Comment:* Many commenters requested that EPA revise the MACT floor methodology for mercury emission limits. The commenters contended that the variability factor was calculated inappropriately. Other commenters stated that EPA should account for variability in fuel composition in the MACT floor analysis. Other commenters expressed concern that the floor level of control was based on fabric filters, which has not been proven at all sources to reduce mercury.

*Response:* As discussed in the proposal preamble, the MACT floor analysis for mercury was based on a two step process. First the percentage of units with control technologies that could achieve mercury emissions reductions was determined using the boiler population databases. If the control technology analysis indicated that at least 12 percent of sources in the subcategory used a control device that could achieve mercury emissions reductions, then the control technology present at the median (6th percentile) was identified as the MACT floor control technology. The MACT floor level of control for mercury was identified as a fabric filter. The control effectiveness of fabric filters was based on emissions information for utility boilers that indicated that mercury emissions reductions were being achieved with this technology. In this case, we could use control efficiency information from another similar source category to supplement the information available in this source category because of the similarity in fuel burned, combustor type, and control methodology and operation. We maintain that fabric filters are still the appropriate level of control for the MACT floor.

Second, the emission limit associated with the MACT floor control technology was calculated using emissions information for units in the subcategory, whenever possible. For most of the subcategories developed, emissions information was adequate. Only for the emission limit for new source liquids and the variability factor for new source solids was fuel pollutant content incorporated into the MACT floor analyses. The mercury fuel content of coal from the utility industry was used in developing the variability factors for new solid fired units. This was done because mercury emissions are dependent on the quantity of mercury in the fuel burned. Coal available to utilities and industrial boilers and process heaters is expected to be similar, and coal is the solid fuel that is routinely used in such units that has generally the greatest degree of HAP variability. We maintain that the utility database used at proposal to develop the variability factor for new sources was adequate in establishing the MACT floor emission limit.

The EPA recognizes that the mercury emissions database for industrial boilers is limited. However, EPA is directed by the CAA to develop standards for sources using whatever data is available. Prior to proposal and during the Industrial Combustion Coordinated Rulemaking (ICCR) process, EPA conducted a thorough search for HAP emission test reports. This search was supported by industry, trade groups, and States. For criteria pollutants, such as PM, substantial emission information was available and gathered. For mercury and other HAP, this was not the case. Industrial boilers have not generally been required to test for HAP emissions. In the proposed rule, EPA requested commenters to provide additional emissions information. However, only one source provided any additional mercury emissions data. This information (test results from three additional coal-fired industrial boilers) was used to revise the mercury emission limit for existing sources. We also reviewed the mercury emission database used to develop the MACT floor emission limit for existing sources. After review, we determined that a revision to the variability factor was appropriate. The additional data and the revised variability factor was used to re-calculate the mercury emission limit to be 0.000009 lb/MMBtu (from 0.000007 lb/MMBtu at proposal). A detailed discussion of the revised MACT floor analysis conducted is provided in the memorandum "Revised MACT Floor Analysis for the Industrial, Commercial, and Institutional Boilers and Process Heaters National Emission Standards for Hazardous Air Pollutants Based on Public Comments" in the docket.

Variability of the emissions data were incorporated into the final emission limits. The EPA contends that by considering the variability of emissions information, we have indirectly incorporated variability in fuel, operating conditions, and sampling and analytical conditions because these parameters vary from emission tests conducted from one unit to another, and even within one unit. The EPA does not consider it appropriate or feasible to incorporate variability from a multitude of parameters because such information is not available and cannot be correlated to the emissions information in the emissions test database. For the final rule, EPA did conduct a statistical analysis of the data to identify the 97.5th percent confidence interval. This analysis provided similar results to the variability analysis conducted in the proposed rule. Consequently, EPA decided not to change its variability methodology. A detailed discussion of the statistical analysis conducted is provided in the memorandum "Statistical Analysis of Mercury Test Data Variability in Response to Public Comments on Determination of the MACT Floor for Mercury Emissions" in the docket.

*Comment:* Several commenters contended that the California standards which the CO requirements are based on do not require CO CEMS, but require initial compliance testing and periodic subsequent performance testing.

*Response:* The commenters are correct that the California CO regulations do not require CO CEMS. The regulations do provide sources with the option of conducting annual testing or installing CO CEMS to demonstrate compliance with the CO emission limit. Because the regulations that were the basis of the MACT floor do not provide specifics on which boilers should conduct annual testing and which should use CO CEMS, we reviewed the cost information provided by the commenters to make this determination. In considering the additional cost information and reviewing the cost information used in the proposed rule, the EPA decided that

changes to the CO compliance requirements were warranted. The final rule requires that new units with heat input capacities less than 100 MMBtu/hr conduct initial and annual performance tests for CO emissions. New units with heat input capacities greater or equal to 100 MMBtu/hr are still required to install, operate, and maintain a CO CEMS.

Regardless of whether the California regulations do or do not require CO CEMS, we would have reviewed the need for continuous monitoring and operating limits in order to ensure the most accurate indication of proper operation of the control system. The purpose of all of the minimum operating parameter limits in the standard is to ensure continuous compliance by ensuring that the air pollution control equipment is operating as they were during the latest performance test demonstrating compliance with the emission limits. The operating parameters are established as "minimum" to provide enforceable boundaries in their operation. Operating outside the bounds of the minimum parameters may lead to increased air emissions.

The EPA would also like to clarify that operation above the CO limit constitutes a deviation of the work practice standard. However, the determination of what deviations constitute violations of the standard is up to the discretion of the entity responsible for enforcement of the standards.

*F. Beyond the MACT Floor*

*Comment:* Many commenters contended that carbon injection should have been required as a beyond-the-floor option. Other commenters supported EPA's decision to not require any controls beyond-the-floor.

*Response:* For the final rule, EPA maintains that options beyond the MACT floor are not appropriate for the standard. The EPA is required by the CAA to set the standard at a minimum on the best controlled 12 percent of sources (for existing units) or best controlled similar source (for new units). The CAA also requires EPA to consider costs and non-air quality impacts and energy requirements when considering more stringent requirements than the MACT floor. As documented in the memorandum "Methodology for Estimating Costs and Emissions Impacts for Industrial, Commercial, and Institutional Boilers and Process Heaters National Emission Standards for Hazardous Air Pollutants" in the docket, EPA did consider the cost and emission impacts of a variety of regulatory options more stringent than the MACT floor for each subcategory. The EPA recognizes that for some subcategories, more stringent controls than the MACT floor can be applied and achieve additional emissions reductions. However, EPA also determined that the cost impacts of such controls were very high. Considering both the costs and emissions reductions, EPA determined that it would be infeasible to require any options more stringent than the floor level.

For the final rule, EPA maintains that carbon injection should not be required as an above the floor technology. As discussed in the proposal preamble, we identified one existing industrial boiler that was using carbon injection. The emissions data that we obtained from the boiler indicated that this carbon injection unit was not achieving mercury emissions reductions. This result led us to conclude that it was not the new source floor level of control. However, there may have been other reasons for the ineffectiveness of this system (*e.g.*, low inlet mercury levels, insufficient carbon injection rate, ESP instead of fabric filter for PM control). Therefore, we considered carbon injection as a beyond-the-floor option, but decided that while this control technique has been used in other source categories, there is no demonstrated evidence that it would work for industrial boilers and process heaters because the type of mercury emitted and properties of the emission streams are sufficiently different for boilers and process heaters and other source categories.

*G. Work Practice Requirements*

*Comment:* Many commenters requested EPA consider exceedences of the CO limit to be a trigger for corrective action rather than a violation.

*Response:* In the final rule, we have clarified that an exceedence of the CO limit constitutes a deviation of the work practice standard. An observed exceedence of a monitoring parameter is not an automatic violation. You are required to report any deviation from an applicable emission limitation (including operating limit). We will review the information in your report along with other available information to determine if the deviation constitutes a violation. The determination of what emission or operating limit deviation constitutes violations of the standard is up to the discretion of the entity responsible for enforcement of the standard.

*H. Compliance*

*Comment:* Many commenters requested that EPA simplify and write the fuel monitoring requirements to not require retesting of fuel for changes in fuel supplier.

*Response:* We agree that the fuel monitoring requirements in the proposal needed to be clarified and explained further. Therefore, we have clarified the fuel analysis options in the final rule. If you elect to demonstrate compliance with the HCl, mercury, or total selected metals limit by using fuel which has a statistically lower pollutant content than the emission limit, then your operating limit is the emission limit of the applicable pollutant. Under this option, you are not required to conduct performance tests (*i.e.* stack tests).

If you demonstrate compliance with the HCl, mercury, or total selected metals limit by using fuel with a statistically higher pollutant content than the applicable emission limit, but performance tests demonstrate that you can meet the emission limits, then your operating limits are the operating limits of the control device (if used) and the fuel pollutant content of the fuel type/mixture burned.

The final rule specifies the testing methodology and procedures and the initial and continuous compliance requirements to be used when complying with the fuel analysis options. Fuel analysis tests for total chloride, gross calorific value, mercury, metal analysis, sample collection, and sample preparation are included in the final rule.

If you elect to comply based on fuel analysis, you are required to statistically analyze, using the z-test, the data to determine the 90th percentile confidence level. It is the 90th percentile confidence level that is required to be used to determine compliance with the applicable emission limit. The statistical approach is required to assist in ensuring continuous compliance by statistically accounting for the inherent variability in the fuel type.

You are required to recalculate the fuel pollutant content only if you burn a new fuel type or fuel mixture. You are required to conduct another performance test if you demonstrate compliance through performance testing, you burn a new fuel type or mixture, and the results of recalculating the fuel pollutant content are higher than the level established during the initial performance test.

*Comment:* Many commenters requested EPA consider exceedences of

parametric limits to be a trigger for corrective action rather than a violation.

*Response:* In the final rule, we have clarified that an exceedence of the parametric limits constitute a deviation of the operating limits. An observed exceedence of a monitoring parameter is not an automatic violation. You are required to report any deviation from an applicable emission limitation (including operating limit). We will review the information in your report along with other available information to determine if the deviation constitutes a violation. The determination of what emission or operating limit deviation constitutes violations of the standard is up to the discretion of the entity responsible for enforcement of the standard.

*Comment:* Many commenters requested EPA revise the opacity requirements. Commenters objected to the provision in the proposed NESHAP that would establish an opacity "operating limit" based on the initial performance test. Some commenters contended that EPA has provided no data or references demonstrating a relationship between opacity and particulate, total metals, or mercury emissions. Other commenters argued that the proposed opacity limit approach for dry control devices is unworkable due to the inherent inability of continuous opacity monitors (COMS) to accurately measure opacity at levels less than 10 percent. Some commenters argued that the performance and opacity achieved during the initial test may not be representative of the unit's performance. Other commenters explained that equipment condition, fuel and operating variations, and other uncontrollable parameters may result in varying emissions and emissions control equipment efficiencies over time. Commenters suggested requiring the NSPS limits for opacity rather than setting opacity based on the initial compliance test.

*Response:* We have reviewed the information provided by the commenters, and agree that the opacity operating limit requirements in the proposed rule are not appropriate for this source category. Because of the variability in fuels burned, the combination of fuels burned, and the typical operation of boilers and process heaters, we have decided that an opacity limit set based on the initial performance test may not be representative of the units typical performance.

We have revised the opacity operating limit provision by requiring existing units to maintain opacity to less than or equal to 20 percent (based on 6-minute averages) except for one 6-minute period per hour of not more than 27 percent. This is the opacity limit contained in the current NSPS for industrial boilers, which has a similar PM emission limit as the final rule. Therefore, it was determined that it was appropriate to include a similar opacity level as the control device operating limit for existing units. New sources can maintain their opacity operating limit to less than or equal to 10 percent (based on 1-hour block averages). This level appears to be the lowest opacity level currently applicable to industrial boilers in State regulations.

*Comment:* Several commenters objected to the requirement to conduct performance testing at worst case conditions. The commenters found this requirement to be unrealistic because stack testing must be scheduled well in advance and worst-case conditions depend on fuel, load, and many other variables, making it impossible to assure that the testing will occur during worst-case conditions. Two commenters contended there can be no guarantee that mineral properties for a fuel source at the time of the baseline test can be guaranteed beyond the content identified during purchase contract negotiations with a fuel supplier. Two commenters suggested that EPA define what worst case conditions are because sources do not have the experience to determine worst-case representative process conditions.

*Response:* We agree that more direction and clarification is needed regarding testing at worst case conditions. We have modified fuel sampling requirements and performance testing fuel use requirements to simplify compliance. During performance testing, sources are required to burn the type of fuel or mixture of fuel types that have the highest concentration of regulated HAP. This, in combination with revised fuel sampling requirements (*e.g.*, based on fuel type and not on supplier, etc.), will simplify the determination of the fuel blend during the performance test. Sources are also required to conduct performance tests under representative full load operating conditions.

*Comment:* Several commenters objected to the requirement for annual performance tests because they felt that it is overly burdensome given the ongoing compliance demonstrations required by the NESHAP. Several commenters suggested that initial performance testing should be required with subsequent performance testing occurring every 3 to 5 years. Some commenters stated that 5-year test intervals are consistent with title V permits and have been allowed in other MACT standards (*e.g.* Hazardous Waste Combustors).

*Response:* We have worked to minimize the testing and monitoring requirements of the final rule while retaining the ability to ensure compliance with the emission limits and work practice requirements. We are providing an option for sources to conduct performance testing once every 3 years if they conduct successful performance testing for 3 consecutive years. We are also allowing sources to demonstrate compliance with the HCl, mercury, and total selected metals emission limits through fuel testing if they do not need emission control devices to achieve the standard.

*I. Emissions Averaging*

In the proposal preamble, we solicited comments on an emissions averaging or bubbling compliance alternative, as part of the EPA's general policy of encouraging the use of flexible compliance approaches where they can be properly monitored and enforced, and whether EPA should include emissions averaging in the final rule. Emissions averaging can provide sources the flexibility to comply in the least costly manner while still maintaining regulation that is workable and enforceable. We requested comment on an averaging approach for determining compliance with the non-mercury metallic HAP, HCl, mercury, and/or PM standards for existing sources. We indicated that averaging would allow owners and operators to submit non-mercury metals, mercury, HCl, and/or PM emissions limits to the EPA Administrator for approval for each existing boiler in the averaging group such that if these emission limits are met, the total emissions from all existing boilers in the averaging group are less than or equal to emission limits (for non-mercury metals, mercury, HCl, or PM) applicable to units in the particular subcategory. We indicated also that averaging would not be applicable to new sources and could only be used between boilers and process heaters in the same subcategory. Also, owners or operators of existing sources subject to the Industrial Boiler New Source Performance Standards NSPS (40 CFR part 60, subparts Db and Dc) would be required to continue to meet the PM emission standard of that NSPS regardless of whether or not they are averaging.

Emissions averaging has been incorporated into the final rule as an alternative means of complying with the final rule. Emissions averaging allows an individual affected unit emitting

above the allowable emission limit required by the final rule to comply with that emission limit by averaging its emissions with other affected units at the same facility emitting below the allowable emission limit required by the final rule.

*Comment:* Many commenters supported including averaging in the final rule. Commenters cited numerous reasons, including cost effectiveness, energy efficiency, greater flexibility in compliance, and greater environmental benefit. Commenters also cited 40 CFR part 63, subpart MM, Pulping Chemical Recovery Combustion MACT as a precedent for including emissions averaging in MACT standards. Two commenters disagreed with allowing emissions averaging, stating that it would complicate compliance determinations, does not fit within the CAA mandate, and is inconsistent with the purpose of CAA section 112. Many of those commenters who supported emissions averaging recommended additional flexibility, such as including new units, and bubbling across subcategories.

*Response:* The final rule includes an emissions averaging compliance alternative because emissions averaging represents an equivalent, more flexible, and less costly alternative to controlling certain emission points to MACT levels. We have concluded that a limited form of averaging could be implemented and not lessen the stringency of the standard. We agree with the commenters that some type of emissions averaging would provide flexibility in compliance, cost and energy savings to owners and operators. We also recognize that we must ensure that any emissions averaging option can be implemented and enforced, will be clear to sources, and most importantly, will achieve no less emissions reductions than unit by unit implementation of the MACT requirements.

The final rule is not the first NESHAP to include provisions permitting emission averaging. In general, EPA has concluded that it is permissible to establish within a NESHAP a unified compliance regimen that permits averaging across affected units subject to the standard under certain conditions. Averaging across affected units is permitted only if it can be demonstrated that the total quantity of any particular HAP that may be emitted by that portion of a contiguous major source that is subject to the NESHAP will not be greater under the averaging mechanism than it would be if each individual affected unit complied separately with the applicable standard. Under this rigorous test, the practical outcome of averaging is equivalent in every respect to compliance by the discrete units, and the statutory policy embodied in the MACT floor provisions is, therefore, fully effectuated.

The EPA has generally imposed certain limits on the scope and nature of emissions averaging programs. These limits include: (1) No averaging between different types of pollutants, (2) no averaging between sources that are not part of the same major source, (3) no averaging between sources within the same major source that are not subject to the same NESHAP, and (4) no averaging between existing sources and new sources.

The final rule fully satisfies each of these criteria. Accordingly, EPA has concluded that the averaging of emissions across affected units permitted by the final rule is consistent with the CAA. In addition, EPA notes that the provision in the final rule that requires each facility that intends to utilize emission averaging to submit an emission averaging plan provides additional assurance that the necessary criteria will be followed. In this emission averaging plan, the facility must include the identification of (1) all units in the averaging group, (2) the control technology installed, (3) the process parameter that will be monitored, (4) the specific control technology or pollution prevention measure to be used, (5) the test plan for the measurement of particulate matter (or selected total metals), hydrogen chloride, or mercury emissions, and (6) the operating parameters to be monitored for each control device. Upon receipt, the regulatory authority will not approve an emission averaging plan containing averaging between emissions of different types of pollutants or between sources in different subcategories.

The final rule excludes new affected sources from the emissions averaging provision. New sources have historically been held to a stricter standard than existing sources because it is most cost effective to integrate state-of-the-art controls into equipment design and to install the technology during construction of new sources. One reason we allow emissions averaging is to give existing sources flexibility to achieve compliance at diverse points with varying degrees of add-on control already in place in the most cost-effective and technically reasonable fashion. This concern does not apply to new sources which can be designed and constructed with compliance in mind.

Only existing large solid fuel units, as defined in the final rule, can be included in the emissions averaging compliance alternative. Of the nine subcategories established for existing sources, existing large solid fuel units is the only subcategory for which multiple HAP emissions limits apply. For the existing small solid fuel subcategory and the six existing gaseous and liquid fuel subcategories, no HAP emissions limits are included in the final rule and, thus, it would not be appropriate to allow these units to average emissions. As for the existing limited use solid fuel subcategory, since these units, as defined in the final rule, operated on a limited basis (capacity factor of less than 10 percent) and are subject only to a less stringent PM emissions limit (as a surrogate for non-mercury metals), it would be inappropriate to allow these units to average emissions.

With concern about the equivalency of emissions reductions from averaging and non-averaging in mind, the EPA Administrator is also imposing under the emission averaging provision caps on the current emissions from each of the sources in the averaging group. The emissions for each unit in the averaging group would be capped at the emission level being achieved on the effective date of the final rule. These caps would ensure that emissions do not increase above the emission levels that sources currently are designed, operated, and maintained to achieve. In the absence of performance tests, in documenting these caps, these sources will documented the type, design, and operating specification of control devices installed on the effective date of the final rule to ensure that existing controls are not removed or lessen. By including this provision in the final rule, the EPA Administrator has taken yet another step to assist in ensuring that emission averaging results in environmental benefits equivalent or better over what would have happened without emission averaging.

The inclusion of emissions averaging into rules and the decision on how to design an emission averaging approach for a particular source category must be evaluated for each source category.

*J. Risk-based Approach*

*Comment:* Multiple commenters supported EPA's incorporation of risk-based concepts into the MACT Program. One commenter stated that providing risk-based applicability criteria for sources whose HAP emissions do not pose a significant risk is appropriate. Several commenters stated that there is clear legal authority in the CAA to construct NESHAP based on risk, and such an approach is very appropriate in the case of the Industrial Boiler MACT. The commenter also noted that the regulatory framework exists within their

State to implement such an approach. Several commenters added that risk-based alternatives will function as indirect emission limits that must be maintained by the facilities to assure that the criteria are met, and, thus, such alternatives for low-risk facilities are supportable by EPA's authority under section 112(d)(4) and 112(c)(9) of the CAA and EPA's inherent *de minimis* authority. Another commenter asserted that there are ways to structure the rule to focus on facilities that pose significant risks and avoid imposition of high costs on facilities that pose little risk. An appropriate approach would be to allow individual facilities to conduct a risk assessment to show that they pose insignificant risks to the public. However, one commenter stated that it is not appropriate for State and local programs to determine which facilities should be exempted from MACT. Several commenters supported a risk-based compliance alternative for HCl.

*Response:* The EPA has determined that it can establish applicable health-based emission standards for HCl and manganese for affected sources in this category pursuant to its authority under section 112(d)(4) of the CAA. As a result, EPA has included such standards in the final rule as alternative compliance requirements. Under this approach, affected sources can choose to comply with either the MACT-based emission limits or the health-based emission limits. Sources which choose to comply with the health-based emission limit(s) will remain subject to those limits, but will need to comply with testing, monitoring and reporting requirements commensurate with the compliance option they have chosen. Such health-based standards are consistent with both the commenters' support for an approach that minimizes the impact on low-risk facilities and EPA's statutory mandate under section 112.

Section 112(d)(4) of the CAA authorizes EPA to consider established health thresholds, with an ample margin of safety, when promulgating emission standards under section 112. Hydrogen chloride and Mn are two pollutants for which health thresholds have been established. Issues concerning our legal authority to establish health-based emission standards under section 112(d)(4) are discussed in detail below.

We are not using CAA section 112(c)(9) for the final rule, and there is no delisting of categories or subcategories, as would be consistent with section 112(c)(9).

The criteria defining how affected sources demonstrate that they meet the threshold emissions levels for the health-based compliance alternative(s) is included in appendix A to the final rule. The criteria in appendix A to the final rule were developed for and apply only to the Boiler and process heater source category and are not applicable to other source categories. The final rule provides two ways that an affected source may demonstrate compliance with the health-based emission limits. The first option is through the use of lookup tables which allow facilities to determine, using a limited number of site-specific input parameters, whether emissions from boilers and process heaters might cause a hazard index (HI) limit for non-carcinogens to be exceeded. The second option is a modeling approach which allows those facilities that do not match the site-specific input parameters on which the lookup tables are based to demonstrate compliance with the health-based emission limits by modeling using site-specific information.

The affected source will have to demonstrate that it meets the criteria established by today's final rule and then assume Federally enforceable limitations, as described in appendix A of the final rule, that ensure their specified HAP emissions do not subsequently increase to exceed levels reflected in their demonstrations.

*Comment:* Multiple commenters are opposed to the risk-based exemptions. Some noted that the proposal to include risk-based exemptions is critically flawed and opposes adoption of the risk-based exemptions.

One commenter stated that the inclusion of case-by-case risk-based exemptions into the first phase of the MACT program will negate the legislative mandate and jeopardize the effectiveness of the national air toxics program to adequately protect public health and the environment and to establish a level playing field. The commenter was very concerned that EPA referenced a fundamentally flawed interpretation of CAA section 112(d)(4) written by an industry (AF&PA) subject to regulation. Of particular concern was AF&PA's unprecedented proposal to include "*de minimis* exemptions" and "cost" in the MACT standard process.

One commenter stated that the use of risk-based concepts to evade MACT applicability is contrary to the intent of the CAA and is based on a flawed interpretation of section 112(d)(4) of the CAA. The commenter added that the CAA requires a technology-based floor level of control and does not provide exclusions for risk or secondary impacts from applying the MACT floor.

One commenter stated that in separate rulemakings and lawsuits, EPA has adopted legal positions and policies that refute and contradict the very risk-based and cost-based approaches contained in the proposals. In these other arenas, the commenter contended that EPA has properly rejected risk assessment to alter the establishment of MACT standards. The EPA also has properly rejected cost in determining MACT floors and in denying a basis for avoiding the MACT floor.

Several commenters stated that the preamble discussion of the risk-based approaches is not sufficient to allow for complete public comment and, therefore, it would not be appropriate for EPA to go directly to a final rule (without reproposal) with any of the approaches outlined in the proposal.

*Response:* We are not identifying and deleting a subcategory of sources in this source category pursuant to the authority of CAA section 112(c)(9). Legal issues associated with the health-based provisions are addressed below and in the comment/response memorandum.

As discussed above, we are, however, including in the final rule alternative health-based emission standards for HCl and TSM based on our authority under CAA section 112(d)(4). Section 112(d)(4) authorizes EPA to consider health thresholds, with an ample margin of safety, in establishing emission standards. The analysis necessary to do this can generally be characterized as a risk analysis. Thus, we disagree with the commenter that we must wait for implementation of CAA section 112(f) before utilizing risk analysis.

*Comment:* Many commenters stated that the proposal to include risk-based exemptions is contrary to the 1990 CAA Amendments (CAAA) which calls for MACT standards based on technology rather than risk as a first step. They added that congress incorporated the residual risk program under CAA section 112(f) to follow the MACT standards (not to replace them). The commenters added that the need for the technology-based approach has been recently reinforced by the results of the National Air Toxics Assessment (NATA), which indicates that exposure to air toxics is very high throughout the country in urban and remote areas. Several commenters added that risk-based approaches will be used separately to augment and improve technology-based standards that do not adequately provide protection to the public. One commenter added that they have been unable to substantiate the basis for EPA's support of the regulatory relief sought by industry through risk-based exemptions and that, in fact, the use of risk assessment at this stage of the

MACT program is directly opposed to title III of the CAA.

*Response:* We disagree that inclusion of health-based compliance alternatives, in the form of emission standards based on the authority of section 112(d)(4) of the CAA, in the final rule is contrary to the 1990 CAAA. The final rule is a technology-based standard developed using the procedures dictated by section 112 of the CAA. The only difference between the final rule and other MACT is that we used our discretion under section 112(d)(4) to base appropriate parts of the final rule on established health thresholds, with an ample margin of safety. The final rule is particularly well-suited for a health-based compliance alternative, established pursuant to the criteria set forth in section 112(d)(4). In addition to the fact that there are established health thresholds for HCl and manganese, EPA has determined that many of the facilities in this source category do not emit these pollutants in amounts that pose a significant risk to the surrounding population. Those sources that can demonstrate that the emissions of acid gases and manganese meet the threshold emission levels will be in compliance with the MACT. The criteria are based on health-protective estimates of risk and the threshold emission levels will provide ample protection of human health and the environment.

Inclusion of health-based compliance alternatives in the final rule does not alter the MACT program. Rather, it merely represents EPA availing itself, in appropriate circumstances, of the authority Congress granted it in section 112(d)(4) of the CAA. We recognize that such provisions are only appropriate for certain HAP, and our decision-making process required source category-specific input from stakeholders.

Although the NATA modeling study may show measurable concentrations of toxic air pollution across the country, these data do not suggest that EPA should not establish health-based emission standards pursuant to its authority under CAA section 112(d)(4) when it determines that it is appropriate to do so. The alternative health-based emission standards included in the final rule will ensure that affected sources which choose to comply with those standards do not emit HCl and/or manganese at levels that are harmful to public health.

*Comment:* Many commenters stated that the proposal to allow risk-based exemptions would divert back to the time-consuming NESHAP development process that existed prior to the CAAA of 1990. The commenters asserted that under this process, which began with a risk assessment step, only eight NESHAP were promulgated during a 20-year period. The commenters continued that if the proposed approaches are inserted into upcoming standards, the commenters fear the MACT program (which is already far behind schedule) would be further delayed. One commenter supported EPA efforts to determine alternative MACT setting methodologies but strongly recommended that these be pursued separately from the final rule. The commenter contended that this will provide for timely issuance of final RICE and Boiler/Process Heater MACT rules relative to the settlement deadline. Two commenters stated that delays could be exacerbated by litigation following legal challenges to the rules, and such delays would trigger the MACT hammer, which would unnecessarily burden the State and local agencies and the industries. The commenters concluded that further delay is unacceptable. The commenters did not want to be in a position of implementing the CAA section 112(j) program and urged EPA to not delay the issuance of any MACT standard. The commenters noted that according to a recently proposed EPA rule regarding section 112(j), the regulated community and State and local agencies would have to proceed with part 2 permit applications, followed by case-by-case MACT, if EPA misses the newly agreed-upon MACT deadlines by as little as 2 months. This would be time consuming, costly, and burdensome for both regulators and the regulated community.

*Response:* We disagree that allowing health-based compliance alternatives in the final rule will alter the MACT program or affect the schedule for promulgation of the remaining MACT standards. We do not anticipate any further delays in completing the remaining MACT standards. The setting of alternative health-based emission standards in the final rule affects only the final rule.

The approach taken in the final rule is particularly well-suited to acid gases and manganese, which are the only pollutants included in the health-based compliance alternatives. For many facilities, these pollutants are currently emitted in amounts that do not expose anyone in surrounding population to concentrations above the established health thresholds. As a result, emissions of HCl and/or manganese at these facilities do not pose a significant risk to the surrounding population. Only those Boiler facilities that demonstrate that their emissions are below the health-based emission standard(s), are eligible for the compliance alternatives.

Including health-based compliance alternatives for boiler sources does not mean that EPA will automatically provide such alternatives for other industries. Rather, as has been the case throughout the MACT rule development process, EPA will undertake in each individual rule to determine whether it is appropriate to exercise its discretion to use its authority under CAA section 112(d)(4) in developing applicable emission standards. The Boilers NESHAP is being promulgated by the February 2004 court-ordered deadline.

*Comment:* Many commenters stated that the risk-based proposal removes the level-playing field that would result from the proper implementation of technology-based MACT standards. The commenters added that establishing a baseline level of control is essential to prevent industry from moving to areas of the country that have the least stringent air toxics programs, which was one of the primary goals of developing a uniform national air toxics program under section 112 of the 1990 CAA amendments. The risk-based approaches would jeopardize future reductions of HAP in a uniform and consistent manner across the nation.

*Response:* Providing health-based compliance alternatives for sources that can meet them in the final rule will assure the application of a uniform set of requirements across the nation. The final rule and its criteria for demonstrating eligibility for the health-based compliance alternatives apply uniformly to boilers across the nation in the large solid fuel-fired subcategories. The final rule establishes a two baseline levels of emission reduction for HCl and manganese, one based on a traditional MACT analysis and the other based on EPA's evaluation of the health threat posed by emissions of these two pollutants. All Boiler facilities must meet one of these baseline levels, and all facilities with boilers in the applicable subcategories have the same opportunity to demonstrate that they can meet the alternative health-based emission standards. The criteria for qualifying to comply with the alternative health-based emission standards are not dependent on local air toxics programs. Therefore, concerns regarding facilities moving to areas of the country with less-stringent air toxics programs should be alleviated.

*Comment:* Multiple commenters stated that section 112(d)(4) of the CAA provides EPA with authority to exclude sources that emit threshold pollutants from regulation. The commenters indicated that section 112(d)(4) allows for discretion in developing MACT standards for HAP with health

thresholds. The commenters added that the use of section 112(d)(4) authority also is supported by CAA's legislative history, which emphasizes that Congress included section 112(d)(4) in the CAA to prevent unnecessary regulation of source categories.

One commenter pointed out that Congress does not differentiate between technology-based "emission standards" set under CAA section 112(d)(3) versus "health threshold" based "emission standards" set under CAA section 112(d)(4). Instead, the statute explicitly treats emission standards promulgated under section 112(d)(3) and 112(d)(4) as equivalent by not distinguishing between those emission standards under the residual risk provisions of CAA section 112(f). One commenter added that EPA is permitted to establish alternative standards as long as it ensures that ambient concentrations are less than the health thresholds plus a margin of safety and the emissions do not cause adverse environmental effects. Multiple commenters pointed out that EPA has exercised such authority and cited the NESHAP for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills. In addition, the commenters added that in that NESHAP, EPA identified circumstances in which they would decline to exercise 112(d)(4) authority-where significant or widespread environmental harm would occur as a result of emissions from the category and the estimated health thresholds are subject to substantial scientific uncertainty. The commenters concluded that EPA determined that these considerations were not relevant to emissions from the pulp and paper source category, and the commenters stated that the same is true for their source categories and that the same treatment is warranted for many facilities within the source categories. The commenters noted that facilities that cannot meet the risk criteria would remain subject to the MACT requirements.

One commenter added that the risk-based approaches are squarely in line with the plain meaning of section CAA 112(d)(4). The commenters cited the Senate report (Sen Rep. No. 228, 101st Congress, 1st Sess 175–6 (1990)) showed that Congress contemplated that sources within the same category or subcategory would be subject to varied regulatory requirements, depending on the risk they pose to public health. The commenters added that nothing in the statutory definition of "emission standard" suggests that the term is limited to a requirement for the installation of control technology. The commenters added that the risk-based compliance alternatives would meet this requirement because they would apply to an entire source category or subcategory. The EPA could create a subcategory for low-risk sources and tailor an emission standard to this subcategory, or apply to all sources in the category a NESHAP containing multiple compliance options, one or more being risk-based.

Multiple commenters stated that the plain meaning of CAA section 112(d)(4) does not allow EPA to make MACT standards for individual sources. Two commenters noted that section 112(d)(4) states that "with respect to pollutants for which a health threshold has been established, the EPA Administrator may consider such threshold level, with ample margin of safety, when establishing emission standards under this subsection."

Several commenters contended that EPA has misinterpreted the provision in CAA section 112(d)(4) in that section 112(d)(4) does not state that EPA can use applicability thresholds "in lieu of" the CAA section 112(d)(3) MACT floor requirements. The commenter interpreted section 112(d)(4) to state that health based thresholds can be considered when establishing the degree of the MACT floor requirements, but it should not be used to supplant the requirements established pursuant to section 112(d)(3).

Many commenters stated that the legislative history of CAA section 112(d)(4) clearly rejects EPA's proposed facility-by-facility MACT exemptions. The commenters noted that Congress considered and rejected the applicability cutoffs upon which EPA now solicits comment. The commenters noted that the House version of the 1990 Amendments allowed States to issue permits that exempted a source from compliance with MACT rules if the source presented sufficient evidence to demonstrate negligible risk, and the Senate version of the 1990 Amendments contained no such provision. In conference, Congress considered both the House and Senate versions and rejected the House bill's exemption for specific facilities in favor of the Senate bill's language.

*Response:* The EPA has properly exercised the authority granted to it pursuant to CAA section 112(d)(4) of the CAA in establishing health-based emission standards for HCl and manganese which are applicable to the large solid fuel-fired subcategory. Section 112(d)(4) authorizes it to by-pass the mandate in section 112(d)(3) in appropriate circumstances. Those circumstances are present in the large solid fuel-fired Boiler subcategories.

Section 112(d)(4) of the CAA provides EPA with authority, at its discretion, to develop health-based emission standards for HAP "for which a health threshold has been established," provided that the standard reflects the health threshold "with an ample margin of safety." (The full text of the section 112(d)(4): "[with respect to pollutants for which a health threshold has been established, the Administrator may consider such threshold level, within an ample margin of safety, when establishing emission standards under this subsection.")

Both the plain language of CAA section 112(d)(4) and the legislative history cited above indicate that EPA has the discretion under section 112(d)(4) to develop health-based standards for some source categories emitting threshold pollutants, and that those standards may be less stringent than the corresponding "floor"-based MACT standard would be. The EPA's use of such standards is not limited to situations where every source in the category or subcategory can comply with them. As is the case with technology-based standards, a particular source's ability to comply with a health-based standard will depend on its individual circumstances, as will what it must do to achieve compliance.

In developing health-based emission standards under CAA section 112(d)(4), EPA seeks to assure that those standards ensure that the concentration of the particular HAP to which an individual exposed at the upper end of the exposure distribution is exposed does not exceed the health threshold. The upper end of the exposure distribution is calculated using the "high end exposure estimate," defined as "a plausible estimate of individual exposure for those persons at the upper end of the exposure distribution, conceptually above the 90th percentile, but not higher than the individual in the population who has the highest exposure" (EPA Exposure Assessment Guidelines, 57 FR 22888, May 29, 1992). Assuring protection to persons at the upper end of the exposure distribution is consistent with the "ample margin of safety" requirement in section 112(d)(4).

We agree that section 112(d)(4) is appropriate for establishing emission standards for HCl and manganese applicable to the large solid fuel-fired subcategories, and, therefore, we have established such standards as an alternate compliance requirement for affected sources in those subcategories. Affected sources in the large solid fuel-fired subcategories which believe that

they can demonstrate compliance with one or both of the health-based emission standards may choose to comply with those standards in lieu of the otherwise applicable MACT-based standard.

For purposes of the final rule, we are not considering background HAP emissions in developing the section CAA 112(d)(4) compliance alternatives. As we indicated in the Residual Risk Report to Congress, however, the Agency intends to consider facility-wide HAP emissions in future CAA section 112(f) residual risk actions.

*Comment:* Many commenters contended that the proposal will place a very intensive resource demand on State and local agencies to review source's risk assessments, and State/local agencies may not have expertise in risk assessment methodology or the resources needed to verify information (*e.g.*, emissions data and stack parameters) submitted with each risk assessment.

Other commenters stated that a risk-based program can be structured and implemented in a manner that does not adversely impact limited State resources. One commenter asserted that EPA should work closely with States and industry to implement the risk-based approach in a non-burdensome manner. Another commenter stated that the risk-based approaches, like other MACT standards, would simply be incorporated into each State's existing title V program. The commenter concluded that because the title V framework already exists, the addition of a risk-based MACT standard would not require States to overhaul existing permitting programs. Another commenter contended that the final MACT rule itself should set forth the applicability criteria—including the threshold levels of exposure—that sources must meet to qualify for a risk-based determination. Each source would have the burden of demonstrating that its exposures are below this limit and, therefore, the States would not be required to develop their own risk assessment guidance or to conduct source-specific risk assessments.

*Response:* The health-based emission limits for HCl and TSM which EPA has adopted in the final rule should not impose significant resource burdens on States. Further, the required compliance demonstration methodology is structured in such a way as to avoid the need for States to have significant expertise in risk assessment methodology. We have considered the commenters' concerns in developing the criteria defining eligibility for these compliance alternatives, and the approach that is included in the final rule provides clear, flexible requirements and enforceable compliance parameters. The final rule provides two ways that a facility may demonstrate eligibility for complying with the alternative health-based emission standard. First, look-up tables, which are included as Tables 2 (HCl) and 3 (manganese) in appendix A of the final rule, allow facilities to determine, using a limited number of site-specific input parameters, whether emissions from their sources might cause a hazard index limit (hazard quotient in the case of manganese) to be exceeded. If a facility cannot demonstrate eligibility using a look-up table, a modeling approach can be followed. Appendix A to the final rule presents the criteria for performing this modeling.

Regarding commenters' concerns with looking for a threshold level for carcinogens, the compliance alternatives only apply to HCl and manganese, which are not currently expected to be carcinogens. Also, the concern expressed by a commenter about exempting a facility based on limited emission data if EPA established a subcategory listing low-risk sources is not relevant here, because we have not used CAA section 112(c)(9) authority to establish a low-risk subcategory for the Industrial/Commercial/Institutional Boilers and Process Heaters source category. With respect to guidance for performing site-specific modeling, all of the procedures for performing such modeling are available in peer-reviewed scientific literature and, therefore, no additional guidance needs to be developed.

Only a portion of the major facilities in the large solid fuel-fired boilers and process heaters subcategory will submit eligibility demonstrations for the compliance alternatives. Of this portion of major sources, most will be able to demonstrate eligibility based on simple analyses (*e.g.*, using the look-up tables provided in appendix A of the final rule). However, it is likely that some facilities will require more detailed modeling. The criteria for demonstrating eligibility for the compliance alternatives are clearly spelled out in the final rule. Because these requirements are clearly spelled out and because any standards or requirements created under CAA section 112 are considered applicable requirements under 40 CFR part 70, the compliance alternatives would be incorporated into title V programs, and States would not have to overhaul existing permitting programs.

Finally, with respect to the burden associated with ongoing assurance that facilities which opt to do so continue to comply with the health-based compliance alternatives, the burden to States will be minimal. In accordance with the provisions of title V of the CAA and part 70 of 40 CFR (collectively "title V"), the owner or operator of any affected source opting to comply with the health-based emission standards will be required to certify compliance with those standards on an annual basis. Additionally, before changing key parameters that may impact an affected source's ability to continue to meet one or both of the health-based emission standards, the affected source is required to evaluate its ability to continue to comply with the health-based emission standard(s) and submit documentation to the permitting authority supporting continued eligibility for the compliance alternative.

The promulgation of specific alternative health-based emission limits and a uniform methodology for demonstrating compliance with those alternatives alleviates any concern regarding the public process required in reviewing/approving the proposed approaches and making substantial changes to existing regulations. It also addresses concerns regarding the costs and resources associated with assuring adequate public participation in the process of reviewing site-specific risk analyses.

To ensure that affected sources which choose to comply with the alternative health-based emission standards continue to comply with those standards after the initial compliance demonstration, specified assessment parameters (*e.g.*, HCl and/or manganese emission rate, boiler heat output, etc.) must be included in their title V permit as enforceable requirements. Draft permits and permit applications must be made available to the public from the State or local agency responsible for issuing the permit, or in the case where EPA is issuing the permit, from the EPA regional office. Members of the public may request that the State or local agency include them on their public notice mailing list, thus providing the public the opportunity to review the appropriateness of these requirements. Every proposed title V permit has a 30-day public comment period and a 45-day EPA review period. If EPA does not object to the permit, any member of the public may petition EPA to object to the permit within 60 days of the end of the EPA review period.

*Comment:* A commenter contended that exempting HCl emissions from control is inappropriate, particularly since EPA proposed HCl as a surrogate measure for all the inorganic HAP

emitted by this source category. Hence, an exemption that excluded HCl emission points from control requirements would also exclude emissions of all the other inorganic HAP that would likely include hydrogen cyanide and hydrogen fluoride.

*Response:* Facilities attempting to utilize the health-based compliance alternative for HCl will not be required to evaluate emissions of other inorganic HAP except for chlorine. We conducted an assessment of boiler emissions and determined that, of the acid gas HAP controlled by scrubbing technology, chlorine is responsible for the great majority of risk and HCl is responsible for the next largest portion of the total risk. The contributions of other HAP, including hydrogen fluoride, to the total risk were negligible. Therefore, facilities attempting to demonstrate eligibility for the health-based compliance alternative for HCl, either by conducting a lookup table analysis or by conducting a site-specific compliance demonstration, must include emission rates of chlorine and HCl from their boilers. We do not expect hydrogen cyanide emissions from boilers covered under the final rule.

*Comment:* Commenters stated that the proposal does not address ecological risk that may result from uncontrolled HAP emissions, especially in those areas with sensitive habitats but few people nearby to be exposed and that EPA provided inadequate discussion of how environmental risks will be evaluated.

*Response:* To identify HAP with potential to cause multimedia and/or environmental effects, the EPA has identified HAP with significant potential to persist in the environment and to bioaccumulate. This list does not include HCl or manganese which are the only HAP with health-based compliance alternatives in the final rule. Additionally, a screening level analysis conducted by the EPA indicates that acute impacts of these HAP from industrial boiler facilities are highly unlikely. For these reasons we do not believe that emissions of HCl or manganese from industrial boiler facilities will pose a significant risk to the environment and facilities attempting to comply with the health-based alternatives for these HAP are not required to perform an ecological assessment.

## V. Impacts of the Final Rule

### *A. What Are the Air Impacts?*

Nationwide emissions of selected HAP (*i.e.*, HCl, hydrogen fluoride, lead, and nickel) will be reduced by 58,500 tpy for existing units and 73 tpy for new units. Depending on the number of facilities demonstrating eligibility for the health-based compliance alternatives, the total HAP reduction for existing units could be 50,600 tpy. Emissions of HCl will be reduced by 42,000 tpy for existing units and 72 tpy for new units. Depending on the number of facilities demonstrating eligibility for the health-based compliance alternatives, the total HCl emissions reduction for existing units could be 36,400 tpy. Emissions of mercury will be reduced by 1.9 tpy for existing units and 0.006 tpy for new units. Emissions of PM will be reduced by 565,000 tpy for existing units and 480 tpy for new units. Depending on the number of facilities demonstrating eligibility for the health-based compliance alternatives, the total PM emissions reduction for existing units could be 547,000 tpy. Emissions of total selected nonmercury metals (*i.e.*, arsenic, beryllium, cadmium, chromium, lead, manganese, nickel, and selenium) will be reduced by 1,100 tpy for existing units and will be reduced by 1.4 tpy for new units. Depending on the number of facilities demonstrating eligibility for the health-based compliance alternatives, the total nonmercury metals emissions reduction for existing units could be 950 tpy. In addition, emissions of sulfur dioxide ($SO_2$) are established to be reduced by 113,000 tpy for existing sources and 110 tpy for new sources. Depending on the number of facilities demonstrating eligibility for the health-based compliance alternatives, the total $SO_2$ emissions reduction for existing units could be 49,000 tpy.

As noted above, use of the health-based compliance alternatives by eligible facilities will affect reductions in HAP, PM (and total non-mercury metals that are generally controlled along with PM), and $SO_2$. Nevertheless, our analysis indicates that the difference in emissions of HCl and manganese with and without the compliance alternatives will not affect health risks because the compliance alternative is available only to those facilities that demonstrate that their emissions pose little risks. Emissions of PM and $SO_2$ will still be reduced by the implementation of other provisions of the Clean Air Act, such as attainment of the health-based National Ambient Air Quality Standards, which include mechanisms to control such emissions.

A discussion of the methodology used to estimate emissions and emissions reductions is presented in "Estimation of Baseline Emissions and Emissions Reductions for Industrial, Commercial, and Institutional Boilers and Process Heaters" in the docket. To estimate the potential impacts of the health-based compliance alternatives, we performed a preliminary "rough" assessment of the large solid fuel subcategory to determine the extent to which facilities might become eligible for the health-based compliance alternatives. Based on the results of this rough assessment, 448 coal-fired boilers could potentially be eligible for the HCl compliance alternative and 386 biomass-fired boilers could be potentially eligible for the TSM compliance alternative.

### *B. What Are the Water and Solid Waste Impacts?*

The EPA estimates the additional water usage that would result from the MACT floor level of control to be 110 million gallons per year for existing sources and 0.6 million gallons per year for new sources. In addition to the increased water usage, an additional 3.7 million gallons per year of wastewater will be produced for existing sources and 0.6 million gallons per year for new sources. The costs of treating the additional wastewater are $18,000 for existing sources and $2,300 for new sources, in advance of any facility demonstrating eligibility for the health-based compliance alternatives. These costs are accounted for in the control costs estimates.

The EPA estimates the additional solid waste that would result from the MACT floor level of control to be 102,000 tpy for existing sources and 1 tpy for new sources. The estimated costs of handling the additional solid waste generated are $1.5 million for existing sources and $17,000 for new sources, in advance of any facility demonstrating eligibility for the health-based compliance alternatives. These costs are also accounted for in the control costs estimates.

A discussion of the methodology used to estimate impacts is presented in "Estimation of Impacts for Industrial, Commercial, and Institutional Boilers and Process Heaters NESHAP" in the docket.

### *C. What Are the Energy Impacts?*

The EPA expects an increase of approximately 1,130 million kilowatt hours (kWh) in national annual energy usage as a result of the final rule, in advance of any facility demonstrating eligibility for the health-based compliance alternatives. Of this amount, 1,120 million kWh is estimated from existing sources and 13 million kWh is estimated from new sources. The increase results from the electricity required to operate control devices

installed to meet the final rule, such as wet scrubbers and fabric filters.

*D. What Are the Control Costs?*

To estimate the national cost impacts of the final rule for existing sources, EPA developed several model boilers and process heaters and determined the cost of control equipment for these model boilers. The EPA assigned a model boiler or heater to each existing unit in the database based on the fuel, size, design, and current controls. The analysis considered all air pollution control equipment currently in operation at existing boilers and process heaters. Model costs were then assigned to all existing units that could not otherwise meet the proposed emission limits. The resulting total national cost impact of the final rule is $1,790 million in capital expenditures and $860 million per year in total annual costs. Depending on the number of facilities demonstrating eligibility for the health-based compliance alternatives, these costs could be $1,440 million in capital expenditures and $690 million per year in total annual costs. The total capital and annual costs include costs for testing, monitoring, and recordkeeping and reporting. Costs include testing and monitoring costs, but not recordkeeping and reporting costs.

Using Department of Energy projections on fuel expenditures, EPA estimated the number of additional boilers that could be potentially constructed. The resulting total national cost impact of the final rule in the 5th year is $58 million in capital expenditures and $18.6 million per year in total annual costs, in advance of any facility demonstrating eligibility for the health-based provisions. Costs are mainly for testing and monitoring.

A discussion of the methodology used to estimate cost impacts is presented in "Methodology for Estimating Control Cost for the Industrial, Commercial, and Institutional Boilers and Process Heaters National Emission Standards for Hazardous Air Pollutants" in the docket.

*E. What Are the Economic Impacts?*

The economic impact analysis shows that the expected price increase for output in the 40 affected industries would be no more than 0.04 percent as a result of the final rule for industrial boilers and process heaters. The expected change in production of affected output is a reduction of only 0.03 percent or less in the same industries. In addition, impacts to affected energy markets show that prices of petroleum, natural gas, electricity and coal should increase by no more than 0.05 percent as a result of implementation of the final rule, and output of these types of energy should decrease by no more than 0.01 percent. These impacts are generated in advance of any facility demonstrating eligibility for the health-based compliance alternatives. Depending on the number of affected facilities demonstrating eligibility for the health-based compliance alternatives, these impacts on product prices could fall to a 0.03 percent increase, and a decrease in output of the energy types mentioned previously of less than 0.01 percent. Therefore, it is likely that there is no adverse impact expected to occur for those industries that produce output affected by the final rule, such as lumber and wood products, chemical manufacturers, petroleum refining, and furniture manufacturing.

*F. What Are the Social Costs and Benefits of the Final Rule?*

Our assessment of costs and benefits of the final rule is detailed in the "Regulatory Impact Analysis for the Final Industrial, Commercial, and Institutional Boilers and Process Heaters MACT." The Regulatory Impact Analysis (RIA) is located in the Docket.

It is estimated that 3 years after implementation of the final rule, HAP will be reduced by 58,500 tpy (53,200 megagrams per year (Mg/yr)) due to reductions in arsenic, beryllium, HCl, and several other HAP from existing affected emission sources. Of these reductions, 42,000 tpy (38,200 Mg/yr) are of HCl. In addition to these reductions, there are 73 tpy (66 Mg/yr) of HAP reductions expected from new sources. Of these reductions, virtually all of them are of HCl. The health effects associated with these HAP are discussed earlier in this preamble. While it is beneficial to society to reduce these HAP, we are unable to quantify and provide a monetized estimate of the benefits at this time.

Despite our inability to quantify and provide monetized benefit estimates from HAP reductions, it is possible to derive rough estimates for one of the more important benefit categories, *i.e.*, the potential number of cancer cases avoided and cancer risk reduced as a result of the imposition of the MACT level of control on this source category. Our analysis suggests that imposition of the MACT level of control would reduce cancer cases at worst case baseline assumptions by possibly tens of cases per year, on average, starting some years after implementation of the final rule. This risk reduction estimate is uncertain, is likely to overestimate benefits, and should be regarded as an extremely rough estimate. Furthermore, the estimate should be viewed in the context of the full spectrum of unquantified noncancer effects associated with the HAP reductions. Noncancer effects associated with the HAP are presented earlier in this preamble.

The control technologies used to reduce the level of HAP emitted from affected sources are also expected to reduce emissions of PM ($PM_{10}$, $PM_{2.5}$), and sulfur dioxide ($SO_2$). It is estimated that $PM_{10}$ emissions reductions total approximately 562,000 tpy (510,000 Mg/yr), $PM_{2.5}$ emissions reductions total approximately 159,000 tpy (145,000 Mg/yr), and $SO_2$ emissions reductions total approximately 113,000 tpy (102,670 Mg/yr). These estimated reductions occur from existing sources in operation 3 years after the implementation of the requirements of the final rule and are expected to continue throughout the life of the sources.

In general, exposure to high concentrations of PM may aggravate existing respiratory and cardiovascular disease including asthma, bronchitis and emphysema, especially in children and the elderly. $SO_2$ is also a contributor to acid deposition, or acid rain, which causes acidification of lakes and streams and can damage trees, crops, historic buildings and statues. Exposure to $PM_{2.5}$ can lead to decreased lung function, and alterations in lung tissue and structure and in respiratory tract defense mechanisms which may then lead to, increased respiratory symptoms and disease, or in more severe cases, premature death or increased hospital admissions and emergency room visits. Children, the elderly, and people with cardiopulmonary disease, such as asthma, are most at risk from these health effects. Fine PM can also form a haze that reduces the visibility of scenic areas, can cause acidification of water bodies, and have other impacts on soil, plants, and materials. As $SO_2$ emissions transform into PM, they can lead to the same health and welfare effects listed above.

For $PM_{10}$ and $PM_{2.5}$ (including $SO_2$ contributions to ambient concentrations of $PM_{2.5}$), we provide a monetary estimate for the benefits associated with the reduction in emissions associated with the final rule. To do so, we conducted an air quality assessment to determine the change in ambient concentrations of $PM_{10}$ and $PM_{2.5}$ that result from reductions of PM and $SO_2$ at existing affected facilities. Unfortunately, our data are not able to define the exact location of the reductions for every affected boiler and process heater. Because of this

limitation, the benefits assessment is conducted in two phases. First, an air quality analysis was conducted for emissions reductions from those emissions sources that have an known link to a specific control device, which represents approximately 50 percent of the total emissions reductions mentioned above. Using this subset of information, we determined the air quality change nationwide. The results of the air quality assessment served as input to a model that estimates the total monetary value of benefits of the health effects listed above. Total benefits associated with this portion of the analysis (in phase one) are $8.2 billion in the year 2005 (presented in 1999 dollars).

In the second phase of our analysis, for those emissions reductions from affected sources that do not have a known link to a specific control device, the results of the air quality analysis in phase one serve as a reasonable approximation of air quality changes to transfer to the remaining emissions reductions of the final rule. Because there is not a reasonable way to apportion the total benefits of the combined impact of the PM and $SO_2$ reductions from the air quality and benefit analyses completed above, we performed two additional air quality analyses. One analysis was performed to evaluate the impact on air quality of the PM reductions alone (holding $SO_2$ unchanged), and one to evaluate the impact on air quality from the $SO_2$ reductions alone (holding PM unchanged). With independent PM and $SO_2$ air quality assessments, we can determine the total benefit associated with each component of total pollutant reductions. The total benefit associated with the PM and $SO_2$ reductions with unspecified location (in phase two) are $7.9 billion.

The benefit estimates derived from the air quality modeling in the first phase of our analysis uses an analytical structure and sequence similar to that used in the benefits analyses for the proposed Nonroad Diesel rule and proposed Integrated Air Quality Rule (IAQR) and in the "section 812 studies" analysis of the total benefits and costs of the Clean Air Act. We used many of the same models and assumptions used in the Nonroad Diesel and IAQR analyses as well as other Regulatory Impact Analyses (RIAs) prepared by the Office of Air and Radiation. By adopting the major design elements, models, and assumptions developed for the section 812 studies and other RIAs, we have largely relied on methods which have already received extensive review by the independent Science Advisory Board (SAB), the National Academies of Sciences, by the public, and by other federal agencies.

The benefits transfer method used in the second phase of the analysis is similar to that used to estimate benefits at the proposal of the rule, and in the proposed Reciprocating Internal Combustion Engines NESHAP. A similar method has also been used in recent benefits analyses for the proposed Nonroad Large Spark-Ignition Engines and Recreational Engines standards (67 FR 68241, November 8, 2002).

The sum of benefits from the two phases of analysis provide an estimate of the total benefits of the rule. Total benefits of the final rule are approximately $16.3 billion (1999$). This economic benefit is associated with approximately 2,270 avoided premature mortalities, 5,100 avoided cases of chronic bronchitis, thousands of avoided hospital and emergency room visits for respiratory and cardiovascular diseases, tens of thousands of avoided days with respiratory symptoms, and millions of avoided work loss and restricted activity days. This estimate is generated in advance of any facility demonstrating eligibility for the health-based compliance alternatives.

Every benefit-cost analysis examining the potential effects of a change in environmental protection requirements is limited, to some extent, by data gaps, limitations in model capabilities (such as geographic coverage), and uncertainties in the underlying scientific and economic studies used to configure the benefit and cost models. Deficiencies in the scientific literature often result in the inability to estimate changes in health and environmental effects. Deficiencies in the economics literature often result in the inability to assign economic values even to those health and environmental outcomes that can be quantified. While these general uncertainties in the underlying scientific and economics literatures are discussed in detail in the RIA and its supporting documents and references, the key uncertainties which have a bearing on the results of the benefit-cost analysis of today's action are the following:

1. The exclusion of potentially significant benefit categories (*e.g.*, health and ecological benefits of reduction in hazardous air pollutants emissions);

2. Errors in measurement and projection for variables such as population growth;

3. Uncertainties in the estimation of future year emissions inventories and air quality;

4. Uncertainties associated with the extrapolation of air quality monitoring data to some unmonitored areas required to better capture the effects of the standards on the affected population;

5. Variability in the estimated relationships of health and welfare effects to changes in pollutant concentrations; and

6. Uncertainties associated with the benefit transfer approach.

7. Uncertainties in the size of the effect estimates linking air pollution and health endpoints.

8. Uncertainties about relative toxicity of different components within the complex mixture.

Despite these uncertainties, we believe the benefit-cost analysis provides a reasonable indication of the expected economic benefits of the final rule under a given set of assumptions.

Based on estimated compliance costs (control + administrative costs associated with Paperwork Reduction Act requirements associated with the rule and predicted changes in the price and output of electricity), the estimated annualized social costs of the Industrial, Commercial, and Institutional Boilers and Process Heaters NESHAP are $863 million (1999$). Depending on the number of affected facilities demonstrating eligibility for the health-based compliance alternatives, these annualized social costs could fall to $746 million. Social costs are different from compliance costs in that social costs take into account the interactions between affected producers and the consumers of affected products in response to the imposition of the compliance costs.

As explained above, we estimate $16.3 billion in benefits from the final rule, compared to $863 million in costs. It is important to put the results of this analysis in the proper context. The large benefit estimate is not attributable to reducing human and environmental exposure to the HAPs that are reduced by this rule. It arises from ancillary reductions in PM and $SO_2$ that result from controls aimed at complying with the NESHAP. Although consideration of ancillary benefits is reasonable, we note that these benefits are not uniquely attributable to the regulation. The Agency believes nonetheless that the key rationale for controlling arsenic, beryllium, HCl, and the other HAPs associated with this rule is to reduce public and environmental exposure to these HAPs, thereby reducing risk to public health and wildlife. Although the available science does not support quantification of these benefits at this time, the Agency believes the qualitative

benefits are large enough to justify substantial investment in these emission reductions.

It should be recognized, however, that this analysis does not account for many of the potential benefits that may result from these actions. Thus, our estimate of total benefits also includes a "B" to represent those additional health and environmental benefits which could not be expressed in quantitative incidence and/or economic value terms. The net benefits would be greater if all the benefits of the other pollutant reductions could be quantified. Notable omissions to the net benefits include all benefits of HAP reductions, including reduced cancer incidences, toxic morbidity effects, and cardiovascular and CNS effects, and all welfare effects from reduction of ambient PM and $SO_2$. A full appreciation of the overall economic consequences of the industrial boiler and process heater standards requires consideration of all benefits and costs expected to result from the final rule, not just those benefits and costs that could be expressed here in dollar terms. A full listing of the benefit categories that could not be quantified or monetized in our base estimate are provided in Table 2 of this preamble.

TABLE 2.—UNQUANTIFIED BENEFIT CATEGORIES

| | Unquantified benefit categories associated with HAP eductions | Unquantified benefit categories associated with PM eductions |
|---|---|---|
| Health Categories | —Airway responsiveness<br>—Pulmonary inflammation<br>—Susceptibility to respiratory infection<br>—Acute inflammation and respiratory cell damage<br>—Chronic respiratory damage/Premature aging of lungs<br>—Emergency room visits for asthma | —Changes in pulmonary function.<br>—Morphological changes. Altered host defense mechanisms.<br>—Other chronic respiratory disease.<br>—Emergency room visits for asthma.<br>—Emergency visits for non-asthma respiratory and cardiovascular causes.<br>—Lower and upper respiratory systems.<br>—Acute bronchitis.<br>—Shortness of breath. |
| Welfare Categories | —Ecosystem and vegetation effects<br>—Damage to urban ornamentals (e.g., grass, flowers, shrubs, and trees in urban areas).<br>—Commercial field crops<br>—Fruit and vegetable crops<br>—Yields of tree seedlings, commercial and non-commercial forests.<br>—Damage to ecosystems<br>—Materials damage | —School absence rates.<br>—Materials damage.<br>—Damage to ecosystems (e.g., acid sulfate deposition).<br>—Nitrates in drinking water.<br>—Visibility in recreational and residential areas. |

Using the results of the benefit analysis, we can use benefit-cost comparison (or net benefits) as another tool to evaluate the reallocation of society's resources needed to address the pollution externality created by the operation of industrial boilers and process heaters. The additional costs of internalizing the pollution produced at major sources of emissions from industrial boilers and process heaters are compared to the improvement in society's well-being from a cleaner and healthier environment. Comparing benefits of the final rule to the costs imposed by alternative ways to control emissions optimally identifies a strategy that results in the highest net benefit to society. In the final rule, we include only one option, the minimal level of control mandated by the CAA, or the MACT floor. Other alternatives that lead to higher levels of control (or beyond-the-floor alternatives) lead to higher estimates of benefits net of costs, but also lead to additional economic impacts, including more substantial impacts to small entities. For more details, please refer to the RIA for the final rule.

Based on estimated compliance costs associated with the final rule and the predicted change in prices and production in the affected industries, the estimated annualized social costs of the final rule are $863 million (1999 dollars). This estimate of social cost is generated in advance of any facility demonstrating eligibility for the health-based compliance alternatives. Depending on the number of affected facilities demonstrating eligibility for the health-based compliance alternatives, these annualized social costs could fall to $746 million. Social costs are different from compliance costs in that social costs take into account the interactions of consumers and producers of affected products in response to the imposition of the compliance costs. Therefore, the Agency's estimate of monetized benefits net of costs is $15.4 billion + B (1999 dollars) in 2005.

## VI. Statutory and Executive Order Reviews

### *A. Executive Order 12866: Regulatory Planning and Review*

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the EPA must determine whether a regulatory action is "significant" and, therefore, subject to review by the OMB and the requirements of the Executive Order. The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligation of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, the EPA has determined that the final rule is a "significant regulatory action" because it has an annual effect on the economy of over $100 million. As such, the final rule was submitted to OMB for review.

*B. Paperwork Reduction Act*

The information collection requirements in the final rule have been submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq*. The information collection requirements are not enforceable until OMB approves them.

The information requirements are based on notification, recordkeeping, and reporting requirements in the NESHAP General Provisions (40 CFR part 63, subpart A), which are mandatory for all operators subject to national emission standards. These recordkeeping and reporting requirements are specifically authorized by section 114 of the CAA (42 U.S.C. 7414). All information submitted to EPA pursuant to the recordkeeping and reporting requirements for which a claim of confidentiality is made is safeguarded according to Agency policies set forth in 40 CFR part 2, subpart B.

The final rule requires maintenance inspections of the control devices, but does not require any notifications or reports beyond those required by the General Provisions. The recordkeeping requirements require only the specific information needed to determine compliance.

The annual monitoring, reporting, and recordkeeping burden for this collection (averaged over the first 3 years after the effective date of the final rule) is estimated to be $91 million. This includes 1.2 million labor hours per year at a total labor cost of $67 million per year, and total non-labor capital costs of $24 million per year. This estimate includes a one-time performance test, semiannual excess emission reports, maintenance inspections, notifications, and recordkeeping. The total burden for the Federal government (averaged over the first 3 years after the effective date of the final rule) is estimated to be 346,000 hours per year at a total labor cost of $14 million per year. Table 3 of this preamble shows the average annualized burden for monitoring, reporting, and recordkeeping for each subcategory.

TABLE 3.—SUMMARY OF THE AVERAGE REPORTING AND RECORDKEEPING COSTS

| Subcategory | Total labor costs ($) | Total capital costs ($) | Total costs ($) |
|---|---|---|---|
| Large Solid Fuel Units | 56,253,000 | 12,488,000 | 68,741,000 |
| Limited Use Solid Fuel Units | 2,565,000 | 2,267,000 | 4,832,000 |
| Small Solid Fuel Units | 627,000 | 111,000 | 738,000 |
| Large Liquid Fuel Units | 498,000 | 491,000 | 989,000 |
| Limited Use Liquid Fuel Units | 214,000 | 264,000 | 478,000 |
| Small Liquid Fuel Units | 442,000 | 0 | 442,000 |
| Large Gaseous Fuel Units | 3,673,000 | 6,615,000 | 10,288,000 |
| Limited Use Gaseous Fuel Units | 663,000 | 1,209,000 | 1,872,000 |
| Small Gaseous Fuel Units | 2,413,000 | 0 | 2,413,000 |

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9. When this ICR is approved by OMB, the Agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in this final rule.

The EPA requested comments on the need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques.

*C. Regulatory Flexibility Act*

The EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with the final rule. We have also determined that the final rule will not have a significant impact on a substantial number of small entities.

For purposes of assessing the impacts of the final rule on small entities, small entity is defined as:

(1) A small business according to Small Business Administration size standards by the North American Industry Classification System (NAICS) category of the owning entity. The range of small business size standards for the 40 affected industries ranges from 500 to 1,000 employees, except for petroleum refining and electric utilities. In these latter two industries, the size standard is 1,500 employees and a mass throughput of 75,000 barrels/day or less, and 4 million kilowatt-hours of production or less, respectively;

(2) A small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and

(3) A small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impact of the final rule on small entities, we have determined that the final rule will not have a significant economic impact on a substantial number of small entities. Based on SBA size definitions for the affected industries and reported sales and employment data, EPA identified 185 of the 576 entities, or 32 percent, owning affected facilities as small entities. Although small entities represent 32 percent of the entities within the source category, they are expected to incur only 4 percent of the total compliance costs of $862.7 million (1998 dollars). There are only ten small entities with compliance costs equal to or greater than 3 percent of their sales. In addition, there are only 24 small entities with cost-to-sales ratios between 1 and 3 percent.

An economic impact analysis was performed to estimate the changes in product price and production quantities for the final rule. As mentioned in the summary of economic impacts earlier in this preamble, the estimated changes in prices and output for affected entities is no more than 0.05 percent. For more information, consult the docket for the final rule.

It should be noted that these small entity impacts are in advance of any facility demonstrating eligibility for the health-based compliance alternatives. Depending on the number of affected facilities demonstrating eligibility for the health-based compliance alternatives, the estimated small entity impacts could fall to eight small entities with compliance costs equal to or greater than 3 percent of their sales, and 14 small entities with compliance costs between 1 and 3 percent of their sales.

The final rule will not have a significant economic impact on a substantial number of small entities as a result of several decisions EPA made regarding the development of the rule, which resulted in limiting the impact of the rule on small entities. First, as mentioned earlier in this preamble, EPA identified small units (heat input of 10 MMBtu/hr or less) and limited use boilers (operate less than 10 percent of the time) as separate subcategories different from large units. Many small and limited use units are located at small entities. As also discussed earlier, the results of the MACT floor analysis for these subcategories of existing sources was that no MACT floor could be identified except for the limited use solid fuel subcategory, which is less stringent than the MACT floor for large units. Furthermore, the results of the beyond-the-floor analysis for these subcategories indicated that the costs would be too high to consider them feasible options. Consequently, the final rule contains no emission limitations for any of the existing small and limited use subcategories except the existing limited use solid fuel subcategory. In addition, the alternative metals emission limit resulted in minimizing the impacts on small entities since some of the potential entities burning a fuel containing very little metals are small entities.

*D. Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, we generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any 1 year. Before promulgating a rule for which a written statement is needed, section 205 of the UMRA generally requires us to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows us to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the EPA Administrator publishes with the final rule an explanation why that alternative was not adopted. Before we establish any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, we must develop a small government agency plan under section 203 of the UMRA. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of regulatory promulgation with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We determined that the final rule contains a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any 1 year. Accordingly, we have prepared a written statement (titled "Unfunded Mandates Reform Act Analysis for the Industrial Boilers and Process Heaters NESHAP)" under section 202 of the UMRA, which is summarized below.

Statutory Authority

As discussed in this preamble, the statutory authority for the final rulemaking is section 112 of the CAA. Title III of the CAA Amendments was enacted to reduce nationwide air toxic emissions. Section 112(b) of the CAA lists the 188 chemicals, compounds, or groups of chemicals deemed by Congress to be HAP. These toxic air pollutants are to be regulated by NESHAP.

Section 112(d) of the CAA directs us to develop NESHAP, which require existing and new major sources to control emissions of HAP using MACT based standards. The final rule applies to all industrial, commercial, and institutional boilers and process heaters located at major sources of HAP emissions.

In compliance with section 205(a) of the UMRA, we identified and considered a reasonable number of regulatory alternatives. Additional information on the costs and environmental impacts of these regulatory alternatives is presented in the docket.

The regulatory alternative upon which the final rule is based represents the MACT floor for industrial boilers and process heaters and, as a result, it is the least costly and least burdensome alternative.

Social Costs and Benefits

The regulatory impact analysis prepared for the final rule including the EPA's assessment of costs and benefits, is detailed in the "Regulatory Impact Analysis for the Industrial Boilers and Process Heaters MACT" in the docket. Based on estimated compliance costs associated with the final rule and the predicted change in prices and production in the affected industries, the estimated social costs of the final rule are $863 million (1999 dollars). Depending on the number of affected facilities demonstrating eligibility for the health-based compliance alternatives, these annualized social costs could fall to $746 million.

It is estimated that 5 years after implementation of the final rule, HAP will be reduced by 58,500 tpy due to reductions in arsenic, beryllium, dioxin, hydrochloric acid, and several other HAP from industrial boilers and process heaters. Studies have determined a relationship between exposure to these HAP and the onset of cancer, however, there are some questions remaining on how cancers that may result from exposure to these HAP can be quantified in terms of dollars. Therefore, the EPA is unable to provide a monetized estimate of the benefits of the HAP reduced by the final rule at this time. However, there are significant reductions in PM and in $SO_2$ that occur. Reductions of 560,000 tons of PM with a diameter of less than or equal to 10 micrometers ($PM_{10}$), 159,000 tons of PM with a diameter of less than or equal to 2.5 micrometers ($PM_{2.5}$), and 112,000 tons of $SO_2$ are expected to occur. These reductions occur from existing sources in operation 5 years after the implementation of the regulation and are expected to continue throughout the life of the affected sources. The major health effect that results from these PM

and $SO_2$ emissions reductions is a reduction in premature mortality. Other health effects that occur are reductions in chronic bronchitis, asthma attacks, and work-lost days (*i.e.*, days when employees are unable to work).

While we are unable to monetize the benefits associated with the HAP emissions reductions, we are able to monetize the benefits associated with the PM and $SO_2$ emissions reductions. For $SO_2$ and PM, we estimated the benefits associated with health effects of PM, but were unable to quantify all categories of benefits (particularly those associated with ecosystem and environmental effects). Unquantified benefits are noted with "B" in the estimates presented below. Our primary estimate of the monetized benefits in 2005 associated with the implementation of the proposed alternative is $16.3 billion + B (1999 dollars). This estimate is about $15.3 billion + B (1999 dollars) higher than the estimated social costs shown earlier in this section. These benefit estimates are in advance of any facility demonstrating eligibility for the health-based compliance alternatives. Depending on the number of affected facilities demonstrating eligibility for the health-based compliance alternatives, the benefit estimate presuming the health-based compliance alternatives is $14.5 billion + B, which is $1.7 billion lower than the estimate for the final rule. This estimate is $13.8 billion + B higher than the estimated social costs presuming the health-based compliance alternatives. The general approach to calculating monetized benefits is discussed in more detail earlier in this preamble. For more detailed information on the benefits estimated for the final rule, refer to the RIA in the docket.

Future and Disproportionate Costs

The Unfunded Mandates Act requires that we estimate, where accurate estimation is reasonably feasible, future compliance costs imposed by the rule and any disproportionate budgetary effects. Our estimates of the future compliance costs of the final rule are discussed previously in this preamble.

We do not feel that there will be any disproportionate budgetary effects of the final rule on any particular areas of the country, State or local governments, types of communities (*e.g.*, urban, rural), or particular industry segments. This is true for the 257 facilities owned by 54 different government bodies, and this is borne out by the results of the "Economic Impact Analysis of the Industrial Boilers and Process Heaters NESHAP," the results of which are discussed previously in this preamble.

Effects on the National Economy

The Unfunded Mandates Act requires that we estimate the effect of the final rule on the national economy. To the extent feasible, we must estimate the effect on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness of the U.S. goods and services, if we determine that accurate estimates are reasonably feasible and that such effect is relevant and material.

The nationwide economic impact of the final rule is presented in the "Economic Impact Analysis for the Industrial Boilers and Process Heaters MACT" in the docket. This analysis provides estimates of the effect of the final rule on some of the categories mentioned above. The results of the economic impact analysis are summarized previously in this preamble. The results show that there will be little impact on prices and output from the affected industries, and little impact on communities that may be affected by the final rule. In addition, there should be little impact on energy markets (in this case, coal, natural gas, petroleum products, and electricity). Hence, the potential impacts on the categories mentioned above should be minimal.

Consultation With Government Officials

The Unfunded Mandates Act requires that we describe the extent of the EPA's prior consultation with affected State, local, and tribal officials, summarize the officials' comments or concerns, and summarize our response to those comments or concerns. In addition, section 203 of the UMRA requires that we develop a plan for informing and advising small governments that may be significantly or uniquely impacted by a rule. Although the final rule does not significantly affect any State, local, or Tribal governments, we have consulted with State and local air pollution control officials. We also have held meetings on the final rule with many of the stakeholders from numerous individual companies, environmental groups, consultants and vendors, labor unions, and other interested parties. We have added materials to the docket to document these meetings.

In addition, we have determined that the final rule contains no regulatory requirements that might significantly or uniquely affect small governments. While some small governments may have some sources affected by the final rule, the impacts are not expected to be significant. Therefore, the final rule is not subject to the requirements of section 203 of the UMRA. However, EPA did complete a report containing analyses called for in the UMRA as a response to comments from many municipal utilities regarding the final rule and its potential impacts. This report, "Unfunded Mandates Reform Act Analysis for the Industrial Boilers and Process Heaters NESHAP," is in the docket.

*E. Executive Order 13132: Federalism*

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" are 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.

The final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132.

The agency is required by section 112 of the CAA, to establish the standards in the final rule. The final rule primarily affects private industry, and does not impose significant economic costs on State or local governments. The final rule does not include an express provision preempting State or local regulations. Thus, the requirements of section 6 of the Executive Order do not apply to the final rule.

Although section 6 of Executive Order 13132 does not apply to the final rule, we consulted with representatives of State and local governments to enable them to provide meaningful and timely input into the development of the final rule. This consultation took place during the ICCR Federal Advisory Committee Act (FACA) committee meetings where members representing State and local governments participated in developing recommendations for EPA's combustion-related rulemakings, including the final rule. The concerns raised by representatives of State and local governments were considered during the development of the final rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to

promote communications between EPA and State and local governments, EPA specifically solicited comment on the final rule from State and local officials.

*F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

Executive Order 13175 (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." The final rule does not have tribal implications, as specified in Executive Order 13175.

The final rule does not significantly or uniquely affect the communities of Indian tribal governments. We do not know of any industrial-commercial-institutional boilers or process heaters owned or operated by Indian tribal governments. However, if there are any, the effect of these rules on communities of tribal governments would not be unique or disproportionate to the effect on other communities. Thus, Executive Order 13175 does not apply to the final rule. The EPA specifically solicited additional comment on the final rule from tribal officials, but received none.

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

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any regulation that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children.

If the regulatory action meets both criteria, the EPA must evaluate the environmental health or safety effects of the planned regulation on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the EPA.

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. The final rule is not subject to Executive Order 13045 because it is based on technology performance and not on health or safety risks.

*H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

Executive Order 13211 (66 FR 28355, May 22, 2001) provides that agencies shall prepare and submit to the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, a Statement of Energy Effects for certain actions identified as "significant energy actions." Section 4(b) of Executive Order 13211 defines "significant energy actions" as "any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of final rulemaking, and notices of final rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a "significant energy action." The final rule is not a "significant energy action" because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The basis for the determination is as follows.

The reduction in petroleum product output, which includes reductions in fuel production, is estimated at only 0.001 percent, or about 68 barrels per day based on 2000 U.S. fuel production nationwide. That is a minimal reduction in nationwide petroleum product output. The reduction in coal production is estimated at only 0.014 percent, or about 3.5 million tpy (or less than 1,000 tons per day) based on 2000 U.S. coal production nationwide. The combination of the increase in electricity usage estimated with the effect of the increased price of affected output yields an increase in electricity output estimated at only 0.012 percent, or about 0.72 billion kilowatt-hours per year based on 2000 U.S. electricity production nationwide. All energy price changes estimated show no increase in price more than 0.05 percent nationwide, and a similar result occurs for energy distribution costs. We also expect that there will be no discernable impact on the import of foreign energy supplies, and no other adverse outcomes are expected to occur with regards to energy supplies. All of the results presented above account for the pass through of costs to consumers, as well as the cost impact to producers. For more information on the estimated energy effects, please refer to the economic impact analysis for the final rule. The analysis is available in the public docket. It should be noted that these energy impact estimates are in advance of any facility demonstrating eligibility for the health-based compliance alternatives.

Depending on the number of affected facilities demonstrating eligibility for the health-based compliance alternatives, the reduction in petroleum product output, which includes reductions in fuel production, could fall to 65 barrels per day, or only 0.001 percent. The reduction in coal production could fall to only 0.010 percent, or about 2.5 million tpy based on 2000 U.S. coal production nationwide. The combination of the increase in electricity usage estimated with the effect of the increased price of affected output could yield an increase in electricity output could fall to only 0.0067 percent, or about 0.40 billion kilowatt-hours per year based on 2000 U.S. electricity production nationwide. All energy price changes estimated could now fall to increases of no more than 0.04 percent nationwide, and a similar result occurs for energy distribution costs. There should be no discernable impact on import of foreign energy supplies, and no other adverse outcomes are expected to occur with regards to energy supplies. All of the results presented with presumption of the health-based compliance alternatives also account for the pass through of costs to consumers as well as the cost impact to producers.

Therefore, we conclude that the final rule when implemented is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) of 1995 (Pub. L. 104–113; 15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards in their regulatory and procurement activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, business practices) developed or adopted by one or more voluntary consensus bodies. The NTTAA directs EPA to provide Congress, through annual reports to the OMB, with explanations when an agency does not use available and applicable voluntary consensus standards.

The final rule involves technical standards. The EPA cites the following standards in the final rule: EPA Methods 1, 2, 2F, 2G, 3A, 3B, 4, 5, 5D, 17, 19, 26, 26A, 29 of 40 CFR part 60. Consistent with the NTTAA, EPA conducted searches to identify voluntary consensus standards in addition to these EPA methods. No applicable voluntary consensus standards were identified for EPA Methods 2F, 2G, 5D, and 19. The search and review results have been documented and are placed in the docket for the final rule.

The three voluntary consensus standards described below were identified as acceptable alternatives to EPA test methods for the purposes of the final rule.

The voluntary consensus standard ASME PTC 19–10–1981–Part 10, "Flue and Exhaust Gas Analyses," is cited in the final rule for its manual method for measuring the oxygen, carbon dioxide, and carbon monoxide content of exhaust gas. This part of ASME PTC 19–10–1981–Part 10 is an acceptable alternative to Method 3B.

The voluntary consensus standard ASTM D6522–00, "Standard Test Method for the Determination of Nitrogen Oxides, Carbon Monoxide, and Oxygen Concentrations in Emissions from Natural Gas-Fired Reciprocating Engines, Combustion Turbines, Boilers and Process Heaters Using Portable Analyzers" is an acceptable alternative to EPA Methods 3A and 10 for identifying carbon monoxide and oxygen concentrations for the final rule when the fuel is natural gas.

The voluntary consensus standard ASTM Z65907, "Standard Method for Both Speciated and Elemental Mercury Determination," is an acceptable alternative to EPA Method 29 (portion for mercury only) for the purpose of the final rule. This standard can be used in the final rule to determine the mercury concentration in stack gases for boilers with rated heat input capacities of greater than 250 MMBtu per hour.

In addition to the voluntary consensus standards EPA uses in the final rule, the search for emissions measurement procedures identified 15 other voluntary consensus standards. The EPA determined that 13 of these 15 standards identified for measuring emissions of the HAP or surrogates subject to the emission standards were impractical alternatives to EPA test methods for the purposes of the final rule. Therefore, EPA does not intend to adopt these standards for this purpose. (See Docket ID No. OAR–2002–0058 for further information on the methods.)

Two of the 15 voluntary consensus standards identified in this search were not available at the time the review was conducted for the purposes of the final rule because they are under development by a voluntary consensus body: ASME/BSR MFC 13M, "Flow Measurement by Velocity Traverse," for EPA Method 2 (and possibly 1); and ASME/BSR MFC 12M, "Flow in Closed Conduits Using Multiport Averaging Pitot Primary Flowmeters," for EPA Method 2.

Section 63.7520 and Tables 4A through 4D of the final rule list the EPA testing methods. Under § 63.7(f) and § 63.8(f) of subpart A, 40 CFR part 63, of the General Provisions, a source may apply to EPA for permission to use alternative test methods or alternative monitoring requirements in place of any of the EPA testing methods, performance specifications, or procedures.

*J. 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. The EPA will submit a report containing the final rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to publication of the final 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 a "major rule" as defined by 5 U.S.C. section 804(2). The rule will be effective on November 12, 2004.

**List of Subjects in 40 CFR Part 63**

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: February 26, 2004.

**Michael O. Leavitt,**

*Administrator.*

■ For the reasons stated in the preamble, title 40, chapter I, part 63 of the Code of Federal Regulations is amended as follows:

## PART 63—[AMENDED]

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

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

## Subpart A—[Amended]

■ 2. Section 63.14 is amended by revising paragraph (b)(27) and paragraph (i)(3) and adding paragraph (b)(35) and paragraphs (b)(39) through (53) to read as follows:

**§ 63.14 Incorporations by reference.**

* * * * *

(b) * * *

(27) ASTM D6522–00, Standard Test Method for Determination of Nitrogen Oxides, Carbon Monoxide, and Oxygen Concentrations in Emissions from Natural Gas Fired Reciprocating Engines, Combustion Turbines, Boilers, and Process Heaters Using Portable Analyzers,[1] IBR approved for § 63.9307(c)(2), Table 4 of Subpart ZZZZ, and Table 5 to Subpart DDDDD of this part.

* * * * *

(35) ASTM D6784–02, Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury in Flue Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method),[1] IBR approved for Table 5 to Subpart DDDDD of this part.

* * * * *

(39) ASTM Method D388–99,$^{\epsilon 1}$ Standard Classification of Coals by Rank,[1] IBR approved for § 63.7575.

(40) ASTM D396–02a, Standard Specification for Fuel Oils,[1] IBR approved for § 63.7575.

(41) ASTM D1835–03a, Standard Specification for Liquified Petroleum (LP) Gases,[1] IBR approved for § 63.7575.

(42) ASTM D2013–01, Standard Practice for Preparing Coal Samples for Analysis,[1] IBR approved for Table 6 to Subpart DDDDD of this part.

(43) ASTM D2234–00, $^{\epsilon 1}$ Standard Practice for Collection of a Gross Sample of Coal,[1] IBR approved for Table 6 to Subpart DDDDD of this part.

(44) ASTM D3173–02, Standard Test Method for Moisture in the Analysis Sample of Coal and Coke,[1] IBR approved for Table 6 to Subpart DDDDD of this part.

(45) ASTM D3683–94 (Reapproved 2000), Standard Test Method for Trace Elements in Coal and Coke Ash Absorption,[1] IBR approved for Table 6 to Subpart DDDDD of this part.

(46) ASTM D3684–01, Standard Test Method for Total Mercury in Coal by the Oxygen Bomb Combustion/Atomic Absorption Method,[1] IBR approved for Table 6 to Subpart DDDDD of this part.

(47) ASTM D5198–92 (Reapproved 2003), Standard Practice for Nitric Acid Digestion of Solid Waste,[1] IBR approved for Table 6 to Subpart DDDDD of this part.

(48) ASTM D5865–03a, Standard Test Method for Gross Calorific Value of Coal and Coke,[1] IBR approved for Table 6 to Subpart DDDDD of this part.

(49) ASTM D6323–98 (Reapproved 2003), Standard Guide for Laboratory Subsampling of Media Related to Waste Management Activities,[1] IBR approved for Table 6 to Subpart DDDDD of this part.

(50) ASTM E711–87 (Reapproved 1996), Standard Test Method for Gross Calorific Value of Refuse-Derived Fuel by the Bomb Calorimeter,[1] IBR approved for Table 6 to Subpart DDDDD of this part.

(51) ASTM E776–87 (Reapproved 1996), Standard Test Method for Forms of Chlorine in Refuse-Derived Fuel,[1] IBR approved for Table 6 to Subpart DDDDD of this part.

(52) ASTM E871–82 (Reapproved 1998), Standard Method of Moisture Analysis of Particulate Wood Fuels,[1] IBR approved for Table 6 to Subpart DDDDD of this part.

(53) ASTM E885–88 (Reapproved 1996), Standard Test Methods for Analyses of Metals in Refuse-Derived Fuel by Atomic Absorption Spectroscopy,[1] IBR approved for Table 6 to Subpart DDDDD of this part 63.

* * * * *

(i) * * *

(3) ANSI/ASME PTC 19.10–1981, "Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus]," IBR approved for §§ 63.865(b), 63.3166(a), 63.3360(e)(1)(iii), 63.3545(a)(3), 63.3555(a)(3), 63.4166(a)(3), 63.4362(a)(3), 63.4766(a)(3), 63.4965(a)(3), 63.5160(d)(1)(iii), 63.9307(c)(2), 63.9323(a)(3), and Table 5 to Subpart DDDDD of this part.

* * * * *

■ 3. Part 63 is amended by adding subpart DDDDD to read as follows:

## Subpart DDDDD—National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers and Process Heaters

Sec.



## Subpart DDDDD—National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers and Process Heaters

### What This Subpart Covers

#### § 63.7480 What is the purpose of this subpart?

This subpart establishes national emission limits and work practice standards for hazardous air pollutants (HAP) emitted from industrial, commercial, and institutional boilers and process heaters. This subpart also establishes requirements to demonstrate initial and continuous compliance with the emission limits and work practice standards.

#### § 63.7485 Am I subject to this subpart?

You are subject to this subpart if you own or operate an industrial, commercial, or institutional boiler or process heater as defined in § 63.7575 that is located at, or is part of, a major source of HAP as defined in § 63.2 or § 63.761 (40 CFR part 63, subpart HH, National Emission Standards for Hazardous Air Pollutants from Oil and Natural Gas Production Facilities), except as specified in § 63.7491.

#### § 63.7490 What is the affected source of this subpart?

(a) This subpart applies to new, reconstructed, or existing affected sources as described in paragraphs (a)(1) and (2) of this section.

(1) The affected source of this subpart is the collection of all existing industrial, commercial, and institutional boilers and process heaters within a subcategory located at a major source as defined in § 63.7575.

(2) The affected source of this subpart is each new or reconstructed industrial, commercial, or institutional boiler or

process heater located at a major source as defined in § 63.7575.

(b) A boiler or process heater is new if you commence construction of the boiler or process heater after January 13, 2003, and you meet the applicability criteria at the time you commence construction.

(c) A boiler or process heater is reconstructed if you meet the reconstruction criteria as defined in § 63.2, you commence reconstruction after January 13, 2003, and you meet the applicability criteria at the time you commence reconstruction.

(d) A boiler or process heater is existing if it is not new or reconstructed.

**§ 63.7491 Are any boilers or process heaters not subject to this subpart?**

The types of boilers and process heaters listed in paragraphs (a) through (o) of this section are not subject to this subpart.

(a) A municipal waste combustor covered by 40 CFR part 60, subpart AAAA, subpart BBBB, subpart Cb or subpart Eb.

(b) A hospital/medical/infectious waste incinerator covered by 40 CFR part 60, subpart Ce or subpart Ec.

(c) An electric utility steam generating unit that is a fossil fuel-fired combustion unit of more than 25 megawatts that serves a generator that produces electricity for sale. A fossil fuel-fired unit that cogenerates steam and electricity, and supplies more than one-third of its potential electric output capacity, and more than 25 megawatts electrical output to any utility power distribution system for sale is considered an electric utility steam generating unit.

(d) A boiler or process heater required to have a permit under section 3005 of the Solid Waste Disposal Act or covered by 40 CFR part 63, subpart EEE (*e.g.*, hazardous waste boilers).

(e) A commercial and industrial solid waste incineration unit covered by 40 CFR part 60, subpart CCCC or subpart DDDD.

(f) A recovery boiler or furnace covered by 40 CFR part 63, subpart MM.

(g) A boiler or process heater that is used specifically for research and development. This does not include units that only provide heat or steam to a process at a research and development facility.

(h) A hot water heater as defined in this subpart.

(i) A refining kettle covered by 40 CFR part 63, subpart X.

(j) An ethylene cracking furnace covered by 40 CFR part 63, subpart YY.

(k) Blast furnace stoves as described in the EPA document, entitled "National Emission Standards for Hazardous Air Pollutants (NESHAP) for Integrated Iron and Steel Plants—Background Information for Proposed Standards," (EPA–453/R–01–005).

(l) Any boiler and process heater specifically listed as an affected source in another standard(s) under 40 CFR part 63.

(m) Any boiler and process heater specifically listed as an affected source in another standard(s) established under section 129 of the Clean Air Act (CAA).

(n) Temporary boilers as defined in this subpart.

(o) Blast furnace gas fuel-fired boilers and process heaters as defined in this subpart.

**§ 63.7495 When do I have to comply with this subpart?**

(a) If you have a new or reconstructed boiler or process heater, you must comply with this subpart by November 12, 2004 or upon startup of your boiler or process heater, whichever is later.

(b) If you have an existing boiler or process heater, you must comply with this subpart no later than September 13, 2007.

(c) If you have an area source that increases its emissions or its potential to emit such that it becomes a major source of HAP, paragraphs (c)(1) and (2) of this section apply to you.

(1) Any new or reconstructed boiler or process heater at the existing facility must be in compliance with this subpart upon startup.

(2) Any existing boiler or process heater at the existing facility must be in compliance with this subpart within 3 years after the facility becomes a major source.

(d) You must meet the notification requirements in § 63.7545 according to the schedule in § 63.7545 and in subpart A of this part. Some of the notifications must be submitted before you are required to comply with the emission limits and work practice standards in this subpart.

## Emission Limits and Work Practice Standards

**§ 63.7499 What are the subcategories of boilers and process heaters?**

The subcategories of boilers and process heaters are large solid fuel, limited use solid fuel, small solid fuel, large liquid fuel, limited use liquid fuel, small liquid fuel, large gaseous fuel, limited use gaseous fuel, and small gaseous fuel. Each subcategory is defined in § 63.7575.

**§ 63.7500 What emission limits, work practice standards, and operating limits must I meet?**

(a) You must meet the requirements in paragraphs (a)(1) and (2) of this section.

(1) You must meet each emission limit and work practice standard in Table 1 to this subpart that applies to your boiler or process heater, except as provided under § 63.7507.

(2) You must meet each operating limit in Tables 2 through 4 to this subpart that applies to your boiler or process heater. If you use a control device or combination of control devices not covered in Tables 2 through 4 to this subpart, or you wish to establish and monitor an alternative operating limit and alternative monitoring parameters, you must apply to the United States Environmental Protection Agency (EPA) Administrator for approval of alternative monitoring under § 63.8(f).

(b) As provided in § 63.6(g), EPA may approve use of an alternative to the work practice standards in this section.

## General Compliance Requirements

**§ 63.7505 What are my general requirements for complying with this subpart?**

(a) You must be in compliance with the emission limits (including operating limits) and the work practice standards in this subpart at all times, except during periods of startup, shutdown, and malfunction.

(b) You must always operate and maintain your affected source, including air pollution control and monitoring equipment, according to the provisions in § 63.6(e)(1)(i).

(c) You can demonstrate compliance with any applicable emission limit using fuel analysis if the emission rate calculated according to § 63.7530(d) is less than the applicable emission limit. Otherwise, you must demonstrate compliance using performance testing.

(d) If you demonstrate compliance with any applicable emission limit through performance testing, you must develop a site-specific monitoring plan according to the requirements in paragraphs (d)(1) through (4) of this section. This requirement also applies to you if you petition the EPA Administrator for alternative monitoring parameters under § 63.8(f).

(1) For each continuous monitoring system (CMS) required in this section, you must develop and submit to the EPA Administrator for approval a site-specific monitoring plan that addresses paragraphs (d)(1)(i) through (iii) of this section. You must submit this site-specific monitoring plan at least 60 days

before your initial performance evaluation of your CMS.

(i) Installation of the CMS sampling probe or other interface at a measurement location relative to each affected process unit such that the measurement is representative of control of the exhaust emissions (*e.g.*, on or downstream of the last control device);

(ii) Performance and equipment specifications for the sample interface, the pollutant concentration or parametric signal analyzer, and the data collection and reduction systems; and

(iii) Performance evaluation procedures and acceptance criteria (*e.g.*, calibrations).

(2) In your site-specific monitoring plan, you must also address paragraphs (d)(2)(i) through (iii) of this section.

(i) Ongoing operation and maintenance procedures in accordance with the general requirements of § 63.8(c)(1), (c)(3), and (c)(4)(ii);

(ii) Ongoing data quality assurance procedures in accordance with the general requirements of § 63.8(d); and

(iii) Ongoing recordkeeping and reporting procedures in accordance with the general requirements of § 63.10(c), (e)(1), and (e)(2)(i).

(3) You must conduct a performance evaluation of each CMS in accordance with your site-specific monitoring plan.

(4) You must operate and maintain the CMS in continuous operation according to the site-specific monitoring plan.

(e) If you have an applicable emission limit or work practice standard, you must develop and implement a written startup, shutdown, and malfunction plan (SSMP) according to the provisions in § 63.6(e)(3).

**§ 63.7506 Do any boilers or process heaters have limited requirements?**

(a) New or reconstructed boilers and process heaters in the large liquid fuel subcategory or the limited use liquid fuel subcategory that burn only fossil fuels and other gases and do not burn any residual oil are subject to the emission limits and applicable work practice standards in Table 1 to this subpart. You are not required to conduct a performance test to demonstrate compliance with the emission limits. You are not required to set and maintain operating limits to demonstrate continuous compliance with the emission limits. However, you must meet the requirements in paragraphs (a)(1) and (2) of this section and meet the CO work practice standard in Table 1 to this subpart.

(1) To demonstrate initial compliance, you must include a signed statement in the Notification of Compliance Status report required in § 63.7545(e) that indicates you burn only liquid fossil fuels other than residual oils, either alone or in combination with gaseous fuels.

(2) To demonstrate continuous compliance with the applicable emission limits, you must also keep records that demonstrate that you burn only liquid fossil fuels other than residual oils, either alone or in combination with gaseous fuels. You must also include a signed statement in each semiannual compliance report required in § 63.7550 that indicates you burned only liquid fossil fuels other than residual oils, either alone or in combination with gaseous fuels, during the reporting period.

(b) The affected boilers and process heaters listed in paragraphs (b)(1) through (3) of this section are subject to only the initial notification requirements in § 63.9(b) (*i.e.*, they are not subject to the emission limits, work practice standards, performance testing, monitoring, SSMP, site-specific monitoring plans, recordkeeping and reporting requirements of this subpart or any other requirements in subpart A of this part).

(1) Existing large and limited use gaseous fuel units.

(2) Existing large and limited use liquid fuel units.

(3) New or reconstructed small liquid fuel units that burn only gaseous fuels or distillate oil. New or reconstructed small liquid fuel boilers and process heaters that commence burning of any other type of liquid fuel must comply with all applicable requirements of this subpart and subpart A of this part upon startup of burning the other type of liquid fuel.

(c) The affected boilers and process heaters listed in paragraphs (c)(1) through (4) of this section are not subject to the initial notification requirements in § 63.9(b) and are not subject to any requirements in this subpart or in subpart A of this part (*i.e.*, they are not subject to the emission limits, work practice standards, performance testing, monitoring, SSM plans, site-specific monitoring plans, recordkeeping and reporting requirements of this subpart, or any other requirements in subpart A of this part.

(1) Existing small solid fuel boilers and process heaters.

(2) Existing small liquid fuel boilers and process heaters.

(3) Existing small gaseous fuel boilers and process heaters.

(4) New or reconstructed small gaseous fuel units.

**§ 63.7507 What are the health-based compliance alternatives for the hydrogen chloride (HCl) and total selected metals (TSM) standards?**

(a) As an alternative to the requirement for large solid fuel boilers located at a single facility to demonstrate compliance with the HCl emission limit in Table 1 to this subpart, you may demonstrate eligibility for the health-based compliance alternative for HCl emissions under the procedures prescribed in appendix A to this subpart.

(b) In lieu of complying with the TSM emission standards in Table 1 to this subpart based on the sum of emissions for the eight selected metals, you may demonstrate eligibility for complying with the TSM emission standards in Table 1 based on the sum of emissions for seven selected metals (by excluding manganese emissions from the summation of TSM emissions) under the procedures prescribed in appendix A to this subpart.

**Testing, Fuel Analyses, and Initial Compliance Requirements**

**§ 63.7510 What are my initial compliance requirements and by what date must I conduct them?**

(a) For affected sources that elect to demonstrate compliance with any of the emission limits of this subpart through performance testing, your initial compliance requirements include conducting performance tests according to § 63.7520 and Table 5 to this subpart, conducting a fuel analysis for each type of fuel burned in your boiler or process heater according to § 63.7521 and Table 6 to this subpart, establishing operating limits according to § 63.7530 and Table 7 to this subpart, and conducting CMS performance evaluations according to § 63.7525.

(b) For affected sources that elect to demonstrate compliance with the emission limits for HCl, mercury, or TSM through fuel analysis, your initial compliance requirement is to conduct a fuel analysis for each type of fuel burned in your boiler or process heater according to § 63.7521 and Table 6 to this subpart and establish operating limits according to § 63.7530 and Table 8 to this subpart.

(c) For affected sources that have an applicable work practice standard, your initial compliance requirements depend on the subcategory and rated capacity of your boiler or process heater. If your boiler or process heater is in any of the limited use subcategories or has a heat input capacity less than 100 MMBtu per hour, your initial compliance demonstration is conducting a performance test for carbon monoxide

according to Table 5 to this subpart. If your boiler or process heater is in any of the large subcategories and has a heat input capacity of 100 MMBtu per hour or greater, your initial compliance demonstration is conducting a performance evaluation of your continuous emission monitoring system for carbon monoxide according to § 63.7525(a).

(d) For existing affected sources, you must demonstrate initial compliance no later than 180 days after the compliance date that is specified for your source in § 63.7495 and according to the applicable provisions in § 63.7(a)(2) as cited in Table 10 to this subpart.

(e) If your new or reconstructed affected source commenced construction or reconstruction between January 13, 2003 and November 12, 2004, you must demonstrate initial compliance with either the proposed emission limits and work practice standards or the promulgated emission limits and work practice standards no later than 180 days after November 12, 2004 or within 180 days after startup of the source, whichever is later, according to § 63.7(a)(2)(ix).

(f) If your new or reconstructed affected source commenced construction or reconstruction between January 13, 2003, and November 12, 2004, and you chose to comply with the proposed emission limits and work practice standards when demonstrating initial compliance, you must conduct a second compliance demonstration for the promulgated emission limits and work practice standards within 3 years after November 12, 2004 or within 3 years after startup of the affected source, whichever is later.

(g) If your new or reconstructed affected source commences construction or reconstruction after November 12, 2004, you must demonstrate initial compliance with the promulgated emission limits and work practice standards no later than 180 days after startup of the source.

**§ 63.7515 When must I conduct subsequent performance tests or fuel analyses?**

(a) You must conduct all applicable performance tests according to § 63.7520 on an annual basis, unless you follow the requirements listed in paragraphs (b) through (d) of this section. Annual performance tests must be completed between 10 and 12 months after the previous performance test, unless you follow the requirements listed in paragraphs (b) through (d) of this section.

(b) You can conduct performance tests less often for a given pollutant if your performance tests for the pollutant (particulate matter, HCl, mercury, or TSM) for at least 3 consecutive years show that you comply with the emission limit. In this case, you do not have to conduct a performance test for that pollutant for the next 2 years. You must conduct a performance test during the third year and no more than 36 months after the previous performance test.

(c) If your boiler or process heater continues to meet the emission limit for particulate matter, HCl, mercury, or TSM, you may choose to conduct performance tests for these pollutants every third year, but each such performance test must be conducted no more than 36 months after the previous performance test.

(d) If a performance test shows noncompliance with an emission limit for particulate matter, HCl, mercury, or TSM, you must conduct annual performance tests for that pollutant until all performance tests over a consecutive 3-year period show compliance.

(e) If you have an applicable work practice standard for carbon monoxide and your boiler or process heater is in any of the limited use subcategories or has a heat input capacity less than 100 MMBtu per hour, you must conduct annual performance tests for carbon monoxide according to § 63.7520. Each annual performance test must be conducted between 10 and 12 months after the previous performance test.

(f) You must conduct a fuel analysis according to § 63.7521 for each type of fuel burned no later than 5 years after the previous fuel analysis for each fuel type. If you burn a new type of fuel, you must conduct a fuel analysis before burning the new type of fuel in your boiler or process heater. You must still meet all applicable continuous compliance requirements in § 63.7540.

(g) You must report the results of performance tests and fuel analyses within 60 days after the completion of the performance tests or fuel analyses. This report should also verify that the operating limits for your affected source have not changed or provide documentation of revised operating parameters established according to § 63.7530 and Table 7 to this subpart, as applicable. The reports for all subsequent performance tests and fuel analyses should include all applicable information required in § 63.7550.

**§ 63.7520 What performance tests and procedures must I use?**

(a) You must conduct all performance tests according to § 63.7(c), (d), (f), and (h). You must also develop a site-specific test plan according to the requirements in § 63.7(c) if you elect to demonstrate compliance through performance testing.

(b) You must conduct each performance test according to the requirements in Table 5 to this subpart.

(c) New or reconstructed boilers or process heaters in one of the liquid fuel subcategories that burn only fossil fuels and other gases and do not burn any residual oil must demonstrate compliance according to § 63.7506(a).

(d) You must conduct each performance test under the specific conditions listed in Tables 5 and 7 to this subpart. You must conduct performance tests at the maximum normal operating load while burning the type of fuel or mixture of fuels that have the highest content of chlorine, mercury, and total selected metals, and you must demonstrate initial compliance and establish your operating limits based on these tests. These requirements could result in the need to conduct more than one performance test.

(e) You may not conduct performance tests during periods of startup, shutdown, or malfunction.

(f) You must conduct three separate test runs for each performance test required in this section, as specified in § 63.7(e)(3). Each test run must last at least 1 hour.

(g) To determine compliance with the emission limits, you must use the F-Factor methodology and equations in sections 12.2 and 12.3 of EPA Method 19 of appendix A to part 60 of this chapter to convert the measured particulate matter concentrations, the measured HCl concentrations, the measured TSM concentrations, and the measured mercury concentrations that result from the initial performance test to pounds per million Btu heat input emission rates using F-factors.

**§ 63.7521 What fuel analyses and procedures must I use?**

(a) You must conduct fuel analyses according to the procedures in paragraphs (b) through (e) of this section and Table 6 to this subpart, as applicable.

(b) You must develop and submit a site-specific fuel analysis plan to the EPA Administrator for review and approval according to the following procedures and requirements in paragraphs (b)(1) and (2) of this section.

(1) You must submit the fuel analysis plan no later than 60 days before the date that you intend to demonstrate compliance.

(2) You must include the information contained in paragraphs (b)(2)(i)

through (vi) of this section in your fuel analysis plan.

(i) The identification of all fuel types anticipated to be burned in each boiler or process heater.

(ii) For each fuel type, the notification of whether you or a fuel supplier will be conducting the fuel analysis.

(iii) For each fuel type, a detailed description of the sample location and specific procedures to be used for collecting and preparing the composite samples if your procedures are different from paragraph (c) or (d) of this section. Samples should be collected at a location that most accurately represents the fuel type, where possible, at a point prior to mixing with other dissimilar fuel types.

(iv) For each fuel type, the analytical methods, with the expected minimum detection levels, to be used for the measurement of selected total metals, chlorine, or mercury.

(v) If you request to use an alternative analytical method other than those required by Table 6 to this subpart, you must also include a detailed description of the methods and procedures that will be used.

(vi) If you will be using fuel analysis from a fuel supplier in lieu of site-specific sampling and analysis, the fuel supplier must use the analytical methods required by Table 6 to this subpart.

(c) At a minimum, you must obtain three composite fuel samples for each fuel type according to the procedures in paragraph (c)(1) or (2) of this section.

(1) If sampling from a belt (or screw) feeder, collect fuel samples according to paragraphs (c)(1)(i) and (ii) of this section.

(i) Stop the belt and withdraw a 6-inch wide sample from the full cross-section of the stopped belt to obtain a minimum two pounds of sample. Collect all the material (fines and coarse) in the full cross-section. Transfer the sample to a clean plastic bag.

(ii) Each composite sample will consist of a minimum of three samples collected at approximately equal intervals during the testing period.

(2) If sampling from a fuel pile or truck, collect fuel samples according to paragraphs (c)(2)(i) through (iii) of this section.

(i) For each composite sample, select a minimum of five sampling locations uniformly spaced over the surface of the pile.

(ii) At each sampling site, dig into the pile to a depth of 18 inches. Insert a clean flat square shovel into the hole and withdraw a sample, making sure that large pieces do not fall off during sampling.

(iii) Transfer all samples to a clean plastic bag for further processing.

(d) Prepare each composite sample according to the procedures in paragraphs (d)(1) through (7) of this section.

(1) Throughly mix and pour the entire composite sample over a clean plastic sheet.

(2) Break sample pieces larger than 3 inches into smaller sizes.

(3) Make a pie shape with the entire composite sample and subdivide it into four equal parts.

(4) Separate one of the quarter samples as the first subset.

(5) If this subset is too large for grinding, repeat the procedure in paragraph (d)(3) of this section with the quarter sample and obtain a one-quarter subset from this sample.

(6) Grind the sample in a mill.

(7) Use the procedure in paragraph (d)(3) of this section to obtain a one-quarter subsample for analysis. If the quarter sample is too large, subdivide it further using the same procedure.

(e) Determine the concentration of pollutants in the fuel (mercury, chlorine, and/or total selected metals) in units of pounds per million Btu of each composite sample for each fuel type according to the procedures in Table 6 to this subpart.

**§ 63.7522 Can I use emission averaging to comply with this subpart?**

(a) As an alternative to meeting the requirements of § 63.7500, if you have more than one existing large solid fuel boiler located at your facility, you may demonstrate compliance by emission averaging according to the procedures in this section in a State that does not choose to exclude emission averaging.

(b) For each existing large solid fuel boiler in the averaging group, the emission rate achieved during the initial compliance test for the HAP being averaged must not exceed the emission level that was being achieved on November 12, 2004 or the control technology employed during the initial compliance test must not be less effective for the HAP being averaged than the control technology employed on November 12, 2004.

(c) You may average particulate matter or TSM, HCl, and mercury emissions from existing large solid fuel boilers to demonstrate compliance with the limits in Table 1 to this subpart if you satisfy the requirements in paragraphs (d), (e), and (f) of this section.

(d) The weighted average emissions from the existing large solid fuel boilers participating in the emissions averaging option must be in compliance with the limits in Table 1 to this subpart at all times following the compliance date specified in § 63.7495.

(e) You must demonstrate initial compliance according to paragraphs (e)(1) or (2) of this section.

(1) You must use Equation 1 of this section to demonstrate that the particulate matter or TSM, HCl, and mercury emissions from all existing large solid fuel boilers participating in the emissions averaging option do not exceed the emission limits in Table 1 to this subpart.

$$\text{AveWeighted Emissions} = \sum_{i=1}^{n}(\text{Er} \times \text{Hm}) \div \sum_{i=1}^{n}\text{Hm} \qquad \text{(Eq. 1)}$$

Where:

AveWeighted = Average weighted emissions for particulate matter or TSM, HCl, or mercury, in units of pounds per million Btu of heat input.

Er = Emission rate (as calculated according to Table 5 to this subpart) or fuel analysis (as calculated by the applicable equation in § 63.7530(d)) for boiler, i, for particulate matter or TSM, HCl, or mercury, in units of pounds per million Btu of heat input.

Hm = Maximum rated heat input capacity of boiler, i, in units of million Btu per hour.

n = Number of large solid fuel boilers participating in the emissions averaging option.

(2) If you are not capable of monitoring heat input, you can use Equation 2 of this section as an alternative to using equation 1 of this section to demonstrate that the particulate matter or TSM, HCl, and mercury emissions from all existing large solid fuel boilers participating in the emissions averaging option do not exceed the emission limits in Table 1 to this subpart.

$$\text{AveWeighted Emissions} = \sum_{i=1}^{n}(\text{Er} \times \text{Sm} \times \text{Cf}) \div \sum_{i=1}^{n}\text{Sm} \times \text{Cf} \qquad \text{(Eq. 2)}$$

Where:

AveWeighted = Average weighted emission level for PM or TSM, HCl, or mercury, in units of pounds per million Btu of heat input.

Er = Emission rate (as calculated according to Table 5 to this subpart) or fuel analysis (as calculated by the applicable equation in § 63.7530(d)) for boiler, i, for particulate matter or TSM, HCl, or mercury, in units of pounds per million Btu of heat input.

Sm = Maximum steam generation by boiler, i, in units of pounds.

Cf = Conversion factor, calculated from the most recent compliance test, in units of million Btu of heat input per pounds of steam generated.

(f) You must demonstrate continuous compliance on a 12-month rolling average basis determined at the end of every month (12 times per year) according to paragraphs (f)(1) and (2). The first 12-month rolling-average period begins on the compliance date specified in § 63.7495.

(1) For each calendar month, you must use Equation 3 of this section to calculate the 12-month rolling average weighted emission limit using the actual heat capacity for each existing large solid fuel boiler participating in the emissions averaging option.

$$\text{AveWeighted Emissions} = \sum_{i=1}^{n}(\text{Er} \times \text{Hb}) \div \sum_{i=1}^{n}\text{Hb} \qquad \text{(Eq. 3)}$$

Where:

AveWeighted Emissions = 12-month rolling average weighted emission level for particulate matter or TSM, HCl, or mercury, in units of pounds per million Btu of heat input.

Er = Emission rate, calculated during the most recent compliance test, (as calculated according to Table 5 to this subpart) or fuel analysis (as calculated by the applicable equation in § 63.7530(d)) for boiler, i, for particulate matter or TSM, HCl, or mercury, in units of pounds per million Btu of heat input.

Hb = The average heat input for each calendar month of boiler, i, in units of million Btu.

n = Number of large solid fuel boilers participating in the emissions averaging option.

(2) If you are not capable of monitoring heat input, you can use Equation 4 of this section as an alternative to using Equation 3 of this section to calculate the 12-month rolling average weighted emission limit using the actual steam generation from the large solid fuel boilers participating in the emissions averaging option.

$$\text{AveWeighted Emissions} = \sum_{i=1}^{n}(\text{Er} \times \text{Sa} \times \text{Cf}) \div \sum_{i=1}^{n}\text{Sa} \times \text{Cf} \qquad \text{(Eq. 4)}$$

Where:

AveWeighted Emissions = 12-month rolling average weighted emission level for PM or TSM, HCl, or mercury, in units of pounds per million Btu of heat input.

Er = Emission rate, calculated during the most recent compliance test (as calculated according to Table 5 to this subpart) or fuel analysis (as calculated by the applicable equation in § 63.7530(d)) for boiler, i, for particulate matter or TSM, HCl, or mercury, in units of pounds per million Btu of heat input.

Sa = Actual steam generation for each calender month by boiler, i, in units of pounds.

Cf = Conversion factor, as calculated during the most recent compliance test, in units of million Btu of heat input per pounds of steam generated.

(g) You must develop and submit an implementation plan for emission averaging to the applicable regulatory authority for review and approval according to the following procedures and requirements in paragraphs (g)(1) through (4).

(1) You must submit the implementation plan no later than 180 days before the date that the facility intends to demonstrate compliance using the emission averaging option.

(2) You must include the information contained in paragraphs (g)(2)(i) through (vii) of this section in your implementation plan for all emission sources included in an emissions average:

(i) The identification of all existing large solid fuel boilers in the averaging group, including for each either the applicable HAP emission level or the control technology installed on;

(ii) The process parameter (heat input or steam generated) that will be monitored for each averaging group of large solid fuel boilers;

(iii) The specific control technology or pollution prevention measure to be used for each emission source in the averaging group and the date of its installation or application. If the pollution prevention measure reduces or eliminates emissions from multiple sources, the owner or operator must identify each source;

(iv) The test plan for the measurement of particulate matter (or TSM), HCl, or mercury emissions in accordance with the requirements in § 63.7520;

(v) The operating parameters to be monitored for each control system or device and a description of how the operating limits will be determined;

(vi) If you request to monitor an alternative operating parameter pursuant to § 63.7525, you must also include:

(A) A description of the parameter(s) to be monitored and an explanation of the criteria used to select the parameter(s); and

(B) A description of the methods and procedures that will be used to demonstrate that the parameter indicates proper operation of the control device; the frequency and content of monitoring, reporting, and recordkeeping requirements; and a demonstration, to the satisfaction of the applicable regulatory authority, that the proposed monitoring frequency is sufficient to represent control device operating conditions; and

(vii) A demonstration that compliance with each of the applicable emission limit(s) will be achieved under representative operating conditions.

(3) Upon receipt, the regulatory authority shall review and approve or disapprove the plan according to the following criteria:

(i) Whether the content of the plan includes all of the information specified in paragraph (g)(2) of this section; and

(ii) Whether the plan presents sufficient information to determine that compliance will be achieved and maintained.

(4) The applicable regulatory authority shall not approve an emission averaging implementation plan containing any of the following provisions:

(i) Any averaging between emissions of differing pollutants or between differing sources; or

(ii) The inclusion of any emission source other than an existing large solid fuel boiler.

**§ 63.7525 What are my monitoring, installation, operation, and maintenance requirements?**

(a) If you have an applicable work practice standard for carbon monoxide, and your boiler or process heater is in any of the large subcategories and has a heat input capacity of 100 MMBtu per hour or greater, you must install, operate, and maintain a continuous emission monitoring system (CEMS) for carbon monoxide according to the procedures in paragraphs (a)(1) through (6) of this section by the compliance date specified in § 63.7495.

(1) Each CEMS must be installed, operated, and maintained according to Performance Specification (PS) 4A of 40 CFR part 60, appendix B, and according to the site-specific monitoring plan developed according to § 63.7505(d).

(2) You must conduct a performance evaluation of each CEMS according to the requirements in § 63.8 and according to PS 4A of 40 CFR part 60, appendix B.

(3) Each CEMS must complete a minimum of one cycle of operation (sampling, analyzing, and data recording) for each successive 15-minute period.

(4) The CEMS data must be reduced as specified in § 63.8(g)(2).

(5) You must calculate and record a 30-day rolling average emission rate on a daily basis. A new 30-day rolling average emission rate is calculated as the average of all of the hourly CO emission data for the preceding 30 operating days.

(6) For purposes of calculating data averages, you must not use data recorded during periods of monitoring malfunctions, associated repairs, out-of-control periods, required quality assurance or control activities, or when your boiler or process heater is operating at less than 50 percent of its rated capacity. You must use all the data collected during all other periods in assessing compliance. Any period for which the monitoring system is out of control and data are not available for required calculations constitutes a deviation from the monitoring requirements.

(b) If you have an applicable opacity operating limit, you must install, operate, certify and maintain each continuous opacity monitoring system (COMS) according to the procedures in paragraphs (b)(1) through (7) of this section by the compliance date specified in § 63.7495.

(1) Each COMS must be installed, operated, and maintained according to PS 1 of 40 CFR part 60, appendix B.

(2) You must conduct a performance evaluation of each COMS according to the requirements in §63.8 and according to PS 1 of 40 CFR part 60, appendix B.

(3) As specified in § 63.8(c)(4)(i), each COMS must complete a minimum of one cycle of sampling and analyzing for each successive 10-second period and one cycle of data recording for each successive 6-minute period.

(4) The COMS data must be reduced as specified in § 63.8(g)(2).

(5) You must include in your site-specific monitoring plan procedures and acceptance criteria for operating and maintaining each COMS according to the requirements in § 63.8(d). At a minimum, the monitoring plan must include a daily calibration drift assessment, a quarterly performance audit, and an annual zero alignment audit of each COMS.

(6) You must operate and maintain each COMS according to the requirements in the monitoring plan and the requirements of § 63.8(e). Identify periods the COMS is out of control including any periods that the COMS fails to pass a daily calibration drift assessment, a quarterly performance audit, or an annual zero alignment audit.

(7) You must determine and record all the 6-minute averages (and 1-hour block averages as applicable) collected for periods during which the COMS is not out of control.

(c) If you have an operating limit that requires the use of a CMS, you must install, operate, and maintain each continuous parameter monitoring system (CPMS) according to the procedures in paragraphs (c)(1) through (5) of this section by the compliance date specified in § 63.7495.

(1) The CPMS must complete a minimum of one cycle of operation for each successive 15-minute period. You must have a minimum of four successive cycles of operation to have a valid hour of data.

(2) Except for monitoring malfunctions, associated repairs, and required quality assurance or control

activities (including, as applicable, calibration checks and required zero and span adjustments), you must conduct all monitoring in continuous operation at all times that the unit is operating. A monitoring malfunction is any sudden, infrequent, not reasonably preventable failure of the monitoring to provide valid data. Monitoring failures that are caused in part by poor maintenance or careless operation are not malfunctions.

(3) For purposes of calculating data averages, you must not use data recorded during monitoring malfunctions, associated repairs, out of control periods, or required quality assurance or control activities. You must use all the data collected during all other periods in assessing compliance. Any period for which the monitoring system is out-of-control and data are not available for required calculations constitutes a deviation from the monitoring requirements.

(4) Determine the 3-hour block average of all recorded readings, except as provided in paragraph (c)(3) of this section.

(5) Record the results of each inspection, calibration, and validation check.

(d) If you have an operating limit that requires the use of a flow measurement device, you must meet the requirements in paragraphs (c) and (d)(1) through (4) of this section.

(1) Locate the flow sensor and other necessary equipment in a position that provides a representative flow.

(2) Use a flow sensor with a measurement sensitivity of 2 percent of the flow rate.

(3) Reduce swirling flow or abnormal velocity distributions due to upstream and downstream disturbances.

(4) Conduct a flow sensor calibration check at least semiannually.

(e) If you have an operating limit that requires the use of a pressure measurement device, you must meet the requirements in paragraphs (c) and (e)(1) through (6) of this section.

(1) Locate the pressure sensor(s) in a position that provides a representative measurement of the pressure.

(2) Minimize or eliminate pulsating pressure, vibration, and internal and external corrosion.

(3) Use a gauge with a minimum tolerance of 1.27 centimeters of water or a transducer with a minimum tolerance of 1 percent of the pressure range.

(4) Check pressure tap pluggage daily.

(5) Using a manometer, check gauge calibration quarterly and transducer calibration monthly.

(6) Conduct calibration checks any time the sensor exceeds the manufacturer's specified maximum operating pressure range or install a new pressure sensor.

(f) If you have an operating limit that requires the use of a pH measurement device, you must meet the requirements in paragraphs (c) and (f)(1) through (3) of this section.

(1) Locate the pH sensor in a position that provides a representative measurement of scrubber effluent pH.

(2) Ensure the sample is properly mixed and representative of the fluid to be measured.

(3) Check the pH meter's calibration on at least two points every 8 hours of process operation.

(g) If you have an operating limit that requires the use of equipment to monitor voltage and secondary current (or total power input) of an electrostatic precipitator (ESP), you must use voltage and secondary current monitoring equipment to measure voltage and secondary current to the ESP.

(h) If you have an operating limit that requires the use of equipment to monitor sorbent injection rate (*e.g.*, weigh belt, weigh hopper, or hopper flow measurement device), you must meet the requirements in paragraphs (c) and (h)(1) through (3) of this section.

(1) Locate the device in a position(s) that provides a representative measurement of the total sorbent injection rate.

(2) Install and calibrate the device in accordance with manufacturer's procedures and specifications.

(3) At least annually, calibrate the device in accordance with the manufacturer's procedures and specifications.

(i) If you elect to use a fabric filter bag leak detection system to comply with the requirements of this subpart, you must install, calibrate, maintain, and continuously operate a bag leak detection system as specified in paragraphs (i)(1) through (8) of this section.

(1) You must install and operate a bag leak detection system for each exhaust stack of the fabric filter.

(2) Each bag leak detection system must be installed, operated, calibrated, and maintained in a manner consistent with the manufacturer's written specifications and recommendations and in accordance with the guidance provided in EPA–454/R–98–015, September 1997.

(3) The bag leak detection system must be certified by the manufacturer to be capable of detecting particulate matter emissions at concentrations of 10 milligrams per actual cubic meter or less.

(4) The bag leak detection system sensor must provide output of relative or absolute particulate matter loadings.

(5) The bag leak detection system must be equipped with a device to continuously record the output signal from the sensor.

(6) The bag leak detection system must be equipped with an alarm system that will sound automatically when an increase in relative particulate matter emissions over a preset level is detected. The alarm must be located where it is easily heard by plant operating personnel.

(7) For positive pressure fabric filter systems that do not duct all compartments of cells to a common stack, a bag leak detection system must be installed in each baghouse compartment or cell.

(8) Where multiple bag leak detectors are required, the system's instrumentation and alarm may be shared among detectors.

**§ 63.7530 How do I demonstrate initial compliance with the emission limits and work practice standards?**

(a) You must demonstrate initial compliance with each emission limit and work practice standard that applies to you by either conducting initial performance tests and establishing operating limits, as applicable, according to § 63.7520, paragraph (c) of this section, and Tables 5 and 7 to this subpart OR conducting initial fuel analyses to determine emission rates and establishing operating limits, as applicable, according to § 63.7521, paragraph (d) of this section, and Tables 6 and 8 to this subpart.

(b) New or reconstructed boilers or process heaters in one of the liquid fuel subcategories that burn only fossil fuels and other gases and do not burn any residual oil must demonstrate compliance according to § 63.7506(a).

(c) If you demonstrate compliance through performance testing, you must establish each site-specific operating limit in Tables 2 through 4 to this subpart that applies to you according to the requirements in § 63.7520, Table 7 to this subpart, and paragraph (c)(4) of this section, as applicable. You must also conduct fuel analyses according to § 63.7521 and establish maximum fuel pollutant input levels according to paragraphs (c)(1) through (3) of this section, as applicable.

(1) You must establish the maximum chlorine fuel input ($C_{input}$) during the initial performance testing according to the procedures in paragraphs (c)(1)(i) through (iii) of this section.

(i) You must determine the fuel type or fuel mixture that you could burn in

your boiler or process heater that has the highest content of chlorine.

(ii) During the performance testing for HCl, you must determine the fraction of the total heat input for each fuel type burned ($Q_i$) based on the fuel mixture that has the highest content of chlorine, and the average chlorine concentration of each fuel type burned ($C_i$).

(iii) You must establish a maximum chlorine input level using Equation 5 of this section.

$$Cl_{input} = \sum_{i=1}^{n}\left[(C_i)(Q_i)\right] \quad \text{(Eq. 5)}$$

Where:

$Cl_{input}$ = Maximum amount of chlorine entering the boiler or process heater through fuels burned in units of pounds per million Btu.

$C_i$ = Arithmetic average concentration of chlorine in fuel type, i, analyzed according to § 63.7521, in units of pounds per million Btu.

$Q_i$ = Fraction of total heat input from fuel type, i, based on the fuel mixture that has the highest content of chlorine. If you do not burn multiple fuel types during the performance testing, it is not necessary to determine the value of this term. Insert a value of "1" for $Q_i$.

n = Number of different fuel types burned in your boiler or process heater for the mixture that has the highest content of chlorine.

(2) If you choose to comply with the alternative TSM emission limit instead of the particulate matter emission limit, you must establish the maximum TSM fuel input level ($TSM_{input}$) during the initial performance testing according to the procedures in paragraphs (c)(2)(i) through (iii) of this section.

(i) You must determine the fuel type or fuel mixture that you could burn in your boiler or process heater that has the highest content of TSM.

(ii) During the performance testing for TSM, you must determine the fraction of total heat input from each fuel burned ($Q_i$) based on the fuel mixture that has the highest content of total selected metals, and the average TSM concentration of each fuel type burned ($M_i$).

(iii) You must establish a baseline TSM input level using Equation 6 of this section.

$$TSM_{input} = \sum_{i=1}^{n}\left[(M_i)(Q_i)\right] \quad \text{(Eq. 6)}$$

Where:

$TSM_{input}$ = Maximum amount of TSM entering the boiler or process heater through fuels burned in units of pounds per million Btu.

$M_i$ = Arithmetic average concentration of TSM in fuel type, i, analyzed according to § 63.7521, in units of pounds per million Btu.

$Q_i$ = Fraction of total heat input from based fuel type, i, based on the fuel mixture that has the highest content of TSM. If you do not burn multiple fuel types during the performance test, it is not necessary to determine the value of this term. Insert a value of "1" for $Q_i$.

n = Number of different fuel types burned in your boiler or process heater for the mixture that has the highest content of TSM.

(3) You must establish the maximum mercury fuel input level ($Mercury_{input}$) during the initial performance testing using the procedures in paragraphs (c)(3)(i) through (iii) of this section.

(i) You must determine the fuel type or fuel mixture that you could burn in your boiler or process heater that has the highest content of mercury.

(ii) During the compliance demonstration for mercury, you must determine the fraction of total heat input for each fuel burned ($Q_i$) based on the fuel mixture that has the highest content of mercury, and the average mercury concentration of each fuel type burned ($HG_i$).

(iii) You must establish a maximum mercury input level using Equation 7 of this section.

$$Mercury_{input} = \sum_{i=1}^{n}\left[(HG_i)(Q_i)\right] \quad \text{(Eq. 7)}$$

Where:

$Mercury_{input}$ = Maximum amount of mercury entering the boiler or process heater through fuels burned in units of pounds per million Btu.

$HG_i$ = Arithmetic average concentration of mercury in fuel type, i, analyzed according to § 63.7521, in units of pounds per million Btu.

$Q_i$ = Fraction of total heat input from fuel type, i, based on the fuel mixture that has the highest mercury content. If you do not burn multiple fuel types during the performance test, it is not necessary to determine the value of this term. Insert a value of "1" for $Q_i$.

n = Number of different fuel types burned in your boiler or process heater for the mixture that has the highest content of mercury.

(4) You must establish parameter operating limits according to paragraphs (c)(4)(i) through (iv) of this section.

(i) For a wet scrubber, you must establish the minimum scrubber effluent pH, liquid flowrate, and pressure drop as defined in § 63.7575, as your operating limits during the three-run performance test. If you use a wet scrubber and you conduct separate performance tests for particulate matter, HCl, and mercury emissions, you must establish one set of minimum scrubber effluent pH, liquid flowrate, and pressure drop operating limits. The minimum scrubber effluent pH operating limit must be established during the HCl performance test. If you conduct multiple performance tests, you must set the minimum liquid flowrate and pressure drop operating limits at the highest minimum values established during the performance tests.

(ii) For an electrostatic precipitator, you must establish the minimum voltage and secondary current (or total power input), as defined in § 63.7575, as your operating limits during the three-run performance test.

(iii) For a dry scrubber, you must establish the minimum sorbent injection rate, as defined in § 63.7575, as your operating limit during the three-run performance test.

(iv) The operating limit for boilers or process heaters with fabric filters that choose to demonstrate continuous compliance through bag leak detection systems is that a bag leak detection system be installed according to the requirements in § 63.7525, and that each fabric filter must be operated such that the bag leak detection system alarm does not sound more than 5 percent of the operating time during a 6-month period.

(d) If you elect to demonstrate compliance with an applicable emission limit through fuel analysis, you must conduct fuel analyses according to § 63.7521 and follow the procedures in paragraphs (d)(1) through (5) of this section.

(1) If you burn more than one fuel type, you must determine the fuel mixture you could burn in your boiler or process heater that would result in the maximum emission rates of the pollutants that you elect to demonstrate compliance through fuel analysis.

(2) You must determine the 90th percentile confidence level fuel pollutant concentration of the composite samples analyzed for each fuel type using the one-sided z-statistic test described in Equation 8 of this section.

$$P_{90} = \text{mean} + (SD \times t) \quad \text{(Eq. 8)}$$

Where:

$P_{90}$ = 90th percentile confidence level pollutant concentration, in pounds per million Btu.

mean = Arithmetic average of the fuel pollutant concentration in the fuel samples analyzed according to § 63.7521, in units of pounds per million Btu.

SD = Standard deviation of the pollutant concentration in the fuel samples analyzed according to § 63.7521, in units of pounds per million Btu.

t = t distribution critical value for 90th percentile (0.1) probability for the appropriate degrees of freedom (number of samples minus one) as obtained from a Distribution Critical Value Table.

(3) To demonstrate compliance with the applicable emission limit for HCl, the HCl emission rate that you calculate for your boiler or process heater using Equation 9 of this section must be less than the applicable emission limit for HCl.

$$HCl = \sum_{i=1}^{n}\left[(C_{i90})(Q_i)(1.028)\right] \qquad \text{(Eq. 9)}$$

Where:

HCl = HCl emission rate from the boiler or process heater in units of pounds per million Btu.

$C_{i90}$ = 90th percentile confidence level concentration of chlorine in fuel type, i, in units of pounds per million Btu as calculated according to Equation 8 of this section.

$Q_i$ = Fraction of total heat input from fuel type, i, based on the fuel mixture that has the highest content of chlorine. If you do not burn multiple fuel types, it is not necessary to determine the value of this term. Insert a value of "1" for $Q_i$.

n = Number of different fuel types burned in your boiler or process heater for the mixture that has the highest content of chlorine.

1.028 = Molecular weight ratio of HCl to chlorine.

(4) To demonstrate compliance with the applicable emission limit for TSM, the TSM emission rate that you calculate for your boiler or process heater using Equation 10 of this section must be less than the applicable emission limit for TSM.

$$TSM = \sum_{i=1}^{n}\left[(M_{i90})(Q_i)\right] \qquad \text{(Eq. 10)}$$

Where:

TSM = TSM emission rate from the boiler or process heater in units of pounds per million Btu.

$M_{i90}$ = 90th percentile confidence level concentration of TSM in fuel, i, in units of pounds per million Btu as calculated according to Equation 8 of this section.

$Q_i$ = Fraction of total heat input from fuel type, i, based on the fuel mixture that has the highest content of total selected metals. If you do not burn multiple fuel types, it is not necessary to determine the value of this term. Insert a value of "1" for $Q_i$.

n = Number of different fuel types burned in your boiler or process heater for the mixture that has the highest content of TSM.

(5) To demonstrate compliance with the applicable emission limit for mercury, the mercury emission rate that you calculate for your boiler or process heater using Equation 11 of this section must be less than the applicable emission limit for mercury.

$$Mercury = \sum_{i=1}^{n}\left[(HG_{i90})(Q_i)\right] \qquad \text{(Eq. 11)}$$

Where:

Mercury = Mercury emission rate from the boiler or process heater in units of pounds per million Btu.

$HG_{i90}$ = 90th percentile confidence level concentration of mercury in fuel, i, in units of pounds per million Btu as calculated according to Equation 8 of this section.

$Q_i$ = Fraction of total heat input from fuel type, i, based on the fuel mixture that has the highest mercury content. If you do not burn multiple fuel types, it is not necessary to determine the value of this term. Insert a value of "1" for $Q_i$.

n = Number of different fuel types burned in your boiler or process heater for the mixture that has the highest mercury content.

(e) You must submit the Notification of Compliance Status containing the results of the initial compliance demonstration according to the requirements in § 63.7545(e).

## Continuous Compliance Requirements

### § 63.7535 How do I monitor and collect data to demonstrate continuous compliance?

(a) You must monitor and collect data according to this section and the site-specific monitoring plan required by § 63.7505(d).

(b) Except for monitor malfunctions, associated repairs, and required quality assurance or control activities (including, as applicable, calibration checks and required zero and span adjustments), you must monitor continuously (or collect data at all required intervals) at all times that the affected source is operating.

(c) You may not use data recorded during monitoring malfunctions, associated repairs, or required quality assurance or control activities in data averages and calculations used to report emission or operating levels. You must use all the data collected during all other periods in assessing the operation of the control device and associated control system. Boilers and process heaters that have an applicable carbon monoxide work practice standard and are required to install and operate a CEMS, may not use data recorded during periods when the boiler or process heater is operating at less than 50 percent of its rated capacity.

### § 63.7540 How do I demonstrate continuous compliance with the emission limits and work practice standards?

(a) You must demonstrate continuous compliance with each emission limit, operating limit, and work practice standard in Tables 1 through 4 to this subpart that applies to you according to the methods specified in Table 8 to this subpart and paragraphs (a)(1) through (10) of this section.

(1) Following the date on which the initial performance test is completed or is required to be completed under §§ 63.7 and 63.7510, whichever date comes first, you must not operate above any of the applicable maximum operating limits or below any of the applicable minimum operating limits listed in Tables 2 through 4 to this subpart at all times except during periods of startup, shutdown and malfunction. Operating limits do not apply during performance tests. Operation above the established maximum or below the established minimum operating limits shall constitute a deviation of established operating limits.

(2) You must keep records of the type and amount of all fuels burned in each boiler or process heater during the reporting period to demonstrate that all fuel types and mixtures of fuels burned would either result in lower emissions of TSM, HCl, and mercury, than the applicable emission limit for each pollutant (if you demonstrate compliance through fuel analysis), or result in lower fuel input of TSM, chlorine, and mercury than the maximum values calculated during the last performance tests (if you demonstrate compliance through performance testing).

(3) If you demonstrate compliance with an applicable HCl emission limit through fuel analysis and you plan to burn a new type of fuel, you must recalculate the HCl emission rate using Equation 9 of § 63.7530 according to paragraphs (a)(3)(i) through (iii) of this section.

(i) You must determine the chlorine concentration for any new fuel type in units of pounds per million Btu, based on supplier data or your own fuel analysis, according to the provisions in your site-specific fuel analysis plan developed according to § 63.7521(b).

(ii) You must determine the new mixture of fuels that will have the highest content of chlorine.

(iii) Recalculate the HCl emission rate from your boiler or process heater under these new conditions using Equation 9 of § 63.7530. The recalculated HCl emission rate must be less than the applicable emission limit.

(4) If you demonstrate compliance with an applicable HCl emission limit through performance testing and you plan to burn a new type of fuel type or a new mixture of fuels, you must recalculate the maximum chlorine input using Equation 5 of § 63.7530. If the results of recalculating the maximum chlorine input using Equation 5 of § 63.7530 are higher than the maximum chlorine input level established during the previous performance test, then you must conduct a new performance test within 60 days of burning the new fuel type or fuel mixture according to the procedures in § 63.7520 to demonstrate that the HCl emissions do not exceed the emission limit. You must also establish new operating limits based on this performance test according to the procedures in § 63.7530(c).

(5) If you demonstrate compliance with an applicable TSM emission limit through fuel analysis, and you plan to burn a new type of fuel, you must recalculate the TSM emission rate using Equation 10 of § 63.7530 according to the procedures specified in paragraphs (a)(5)(i) through (iii) of this section.

(i) You must determine the TSM concentration for any new fuel type in units of pounds per million Btu, based on supplier data or your own fuel analysis, according to the provisions in your site-specific fuel analysis plan developed according to § 63.7521(b).

(ii) You must determine the new mixture of fuels that will have the highest content of TSM.

(iii) Recalculate the TSM emission rate from your boiler or process heater under these new conditions using Equation 10 of § 63.7530. The recalculated TSM emission rate must be less than the applicable emission limit.

(6) If you demonstrate compliance with an applicable TSM emission limit through performance testing, and you plan to burn a new type of fuel or a new mixture of fuels, you must recalculate the maximum TSM input using Equation 6 of § 63.7530. If the results of recalculating the maximum total selected metals input using Equation 6 of § 63.7530 are higher than the maximum TSM input level established during the previous performance test, then you must conduct a new performance test within 60 days of burning the new fuel type or fuel mixture according to the procedures in § 63.7520 to demonstrate that the TSM emissions do not exceed the emission limit. You must also establish new operating limits based on this performance test according to the procedures in § 63.7530(c).

(7) If you demonstrate compliance with an applicable mercury emission limit through fuel analysis, and you plan to burn a new type of fuel, you must recalculate the mercury emission rate using Equation 11 of § 63.7530 according to the procedures specified in paragraphs (a)(7)(i) through (iii) of this section.

(i) You must determine the mercury concentration for any new fuel type in units of pounds per million Btu, based on supplier data or your own fuel analysis, according to the provisions in your site-specific fuel analysis plan developed according to § 63.7521(b).

(ii) You must determine the new mixture of fuels that will have the highest content of mercury.

(iii) Recalculate the mercury emission rate from your boiler or process heater under these new conditions using Equation 11 of § 63.7530. The recalculated mercury emission rate must be less than the applicable emission limit.

(8) If you demonstrate compliance with an applicable mercury emission limit through performance testing, and you plan to burn a new type of fuel or a new mixture of fuels, you must recalculate the maximum mercury input using Equation 7 of § 63.7530. If the results of recalculating the maximum mercury input using Equation 7 of § 63.7530 are higher than the maximum mercury input level established during the previous performance test, then you must conduct a new performance test within 60 days of burning the new fuel type or fuel mixture according to the procedures in § 63.7520 to demonstrate that the mercury emissions do not exceed the emission limit. You must also establish new operating limits based on this performance test according to the procedures in § 63.7530(c).

(9) If your unit is controlled with a fabric filter, and you demonstrate continuous compliance using a bag leak detection system, you must initiate corrective action within 1 hour of a bag leak detection system alarm and complete corrective actions according to your SSMP, and operate and maintain the fabric filter system such that the alarm does not sound more than 5 percent of the operating time during a 6-month period. You must also keep records of the date, time, and duration of each alarm, the time corrective action was initiated and completed, and a brief description of the cause of the alarm and the corrective action taken. You must also record the percent of the operating time during each 6-month period that the alarm sounds. In calculating this operating time percentage, if inspection of the fabric filter demonstrates that no corrective action is required, no alarm time is counted. If corrective action is required, each alarm shall be counted as a minimum of 1 hour. If you take longer than 1 hour to initiate corrective action, the alarm time shall be counted as the actual amount of time taken to initiate corrective action.

(10) If you have an applicable work practice standard for carbon monoxide, and you are required to install a CEMS according to § 63.7525(a), then you must meet the requirements in paragraphs (a)(10)(i) through (iii) of this section.

(i) You must continuously monitor carbon monoxide according to §§ 63.7525(a) and 63.7535.

(ii) Maintain a carbon monoxide emission level below your applicable carbon monoxide work practice standard in Table 1 to this subpart at all times except during periods of startup, shutdown, malfunction, and when your boiler or process heater is operating at less than 50 percent of rated capacity.

(iii) Keep records of carbon monoxide levels according to § 63.7555(b).

(b) You must report each instance in which you did not meet each emission limit, operating limit, and work practice standard in Tables 1 through 4 to this subpart that apply to you. You must also report each instance during a startup, shutdown, or malfunction when you did not meet each applicable emission limit, operating limit, and work practice standard. These instances are deviations from the emission limits and work practice standards in this subpart. These deviations must be reported according to the requirements in § 63.7550.

(c) During periods of startup, shutdown, and malfunction, you must operate in accordance with the SSMP as required in § 63.7505(e).

(d) Consistent with §§ 63.6(e)and 63.7(e)(1), deviations that occur during a period of startup, shutdown, or malfunction are not violations if you demonstrate to the EPA Administrator's satisfaction that you were operating in accordance with your SSMP. The EPA Administrator will determine whether

deviations that occur during a period of startup, shutdown, or malfunction are violations, according to the provisions in § 63.6(e).

**§ 63.7541 How do I demonstrate continuous compliance under the emission averaging provision?**

(a) Following the compliance date, the owner or operator must demonstrate compliance with this subpart on a continuous basis by meeting the requirements of paragraphs (a)(1) through (4) of this section.

(1) For each calendar month, demonstrate compliance with the average weighted emissions limit for the existing large solid fuel boilers participating in the emissions averaging option as determined in § 63.7522(f) and (g);

(2) For each existing solid fuel boiler participating in the emissions averaging option that is equipped with a dry control system, maintain opacity at or below the applicable limit;

(3) For each existing solid fuel boiler participating in the emissions averaging option that is equipped with a wet scrubber, maintain the 3-hour average parameter values at or below the operating limits established during the most recent performance test; and

(4) For each existing solid fuel boiler participating in the emissions averaging option that has an approved alternative operating plan, maintain the 3-hour average parameter values at or below the operating limits established in the most recent performance test.

(b) Any instance where the owner or operator fails to comply with the continuous monitoring requirements in paragraphs (a)(1) through (4) of this section, except during periods of startup, shutdown, and malfunction, is a deviation.

## Notification, Reports, and Records

**§ 63.7545 What notifications must I submit and when?**

(a) You must submit all of the notifications in §§ 63.7(b) and (c), 63.8 (e), (f)(4) and (6), and 63.9 (b) through (h) that apply to you by the dates specified.

(b) As specified in § 63.9(b)(2), if you startup your affected source before November 12, 2004, you must submit an Initial Notification not later than 120 days after November 12, 2004. The Initial Notification must include the information required in paragraphs (b)(1) and (2) of this section, as applicable.

(1) If your affected source has an annual capacity factor of greater than 10 percent, your Initial Notification must include the information required by § 63.9(b)(2).

(2) If your affected source has a federally enforceable permit that limits the annual capacity factor to less than or equal to 10 percent such that the unit is in one of the limited use subcategories (the limited use solid fuel subcategory, the limited use liquid fuel subcategory, or the limited use gaseous fuel subcategory), your Initial Notification must include the information required by § 63.9(b)(2) and also a signed statement indicating your affected source has a federally enforceable permit that limits the annual capacity factor to less than or equal to 10 percent.

(c) As specified in § 63.9(b)(4) and (b)(5), if you startup your new or reconstructed affected source on or after November 12, 2004, you must submit an Initial Notification not later than 15 days after the actual date of startup of the affected source.

(d) If you are required to conduct a performance test you must submit a Notification of Intent to conduct a performance test at least 30 days before the performance test is scheduled to begin.

(e) If you are required to conduct an initial compliance demonstration as specified in § 63.7530(a), you must submit a Notification of Compliance Status according to § 63.9(h)(2)(ii). For each initial compliance demonstration, you must submit the Notification of Compliance Status, including all performance test results and fuel analyses, before the close of business on the 60th day following the completion of the performance test and/or other initial compliance demonstrations according to § 63.10(d)(2). The Notification of Compliance Status report must contain all the information specified in paragraphs (e)(1) through (9), as applicable.

(1) A description of the affected source(s) including identification of which subcategory the source is in, the capacity of the source, a description of the add-on controls used on the source description of the fuel(s) burned, and justification for the fuel(s) burned during the performance test.

(2) Summary of the results of all performance tests, fuel analyses, and calculations conducted to demonstrate initial compliance including all established operating limits.

(3) Identification of whether you are complying with the particulate matter emission limit or the alternative total selected metals emission limit.

(4) Identification of whether you plan to demonstrate compliance with each applicable emission limit through performance testing or fuel analysis.

(5) Identification of whether you plan to demonstrate compliance by emissions averaging.

(6) A signed certification that you have met all applicable emission limits and work practice standards.

(7) A summary of the carbon monoxide emissions monitoring data and the maximum carbon monoxide emission levels recorded during the performance test to show that you have met any applicable work practice standard in Table 1 to this subpart.

(8) If your new or reconstructed boiler or process heater is in one of the liquid fuel subcategories and burns only liquid fossil fuels other than residual oil either alone or in combination with gaseous fuels, you must submit a signed statement certifying this in your Notification of Compliance Status report.

(9) If you had a deviation from any emission limit or work practice standard, you must also submit a description of the deviation, the duration of the deviation, and the corrective action taken in the Notification of Compliance Status report.

**§ 63.7550 What reports must I submit and when?**

(a) You must submit each report in Table 9 to this subpart that applies to you.

(b) Unless the EPA Administrator has approved a different schedule for submission of reports under § 63.10(a), you must submit each report by the date in Table 9 to this subpart and according to the requirements in paragraphs (b)(1) through (5) of this section.

(1) The first compliance report must cover the period beginning on the compliance date that is specified for your affected source in § 63.7495 and ending on June 30 or December 31, whichever date is the first date that occurs at least 180 days after the compliance date that is specified for your source in § 63.7495.

(2) The first compliance report must be postmarked or delivered no later than July 31 or January 31, whichever date is the first date following the end of the first calendar half after the compliance date that is specified for your source in § 63.7495.

(3) Each subsequent compliance report must cover the semiannual reporting period from January 1 through June 30 or the semiannual reporting period from July 1 through December 31.

(4) Each subsequent compliance report must be postmarked or delivered

no later than July 31 or January 31, whichever date is the first date following the end of the semiannual reporting period.

(5) For each affected source that is subject to permitting regulations pursuant to 40 CFR part 70 or 40 CFR part 71, and if the permitting authority has established dates for submitting semiannual reports pursuant to 40 CFR 70.6(a)(3)(iii)(A) or 40 CFR 71.6(a)(3)(iii)(A), you may submit the first and subsequent compliance reports according to the dates the permitting authority has established instead of according to the dates in paragraphs (b)(1) through (4) of this section.

(c) The compliance report must contain the information required in paragraphs (c)(1) through (11) of this section.

(1) Company name and address.

(2) Statement by a responsible official with that official's name, title, and signature, certifying the truth, accuracy, and completeness of the content of the report.

(3) Date of report and beginning and ending dates of the reporting period.

(4) The total fuel use by each affected source subject to an emission limit, for each calendar month within the semiannual reporting period, including, but not limited to, a description of the fuel and the total fuel usage amount with units of measure.

(5) A summary of the results of the annual performance tests and documentation of any operating limits that were reestablished during this test, if applicable.

(6) A signed statement indicating that you burned no new types of fuel. Or, if you did burn a new type of fuel, you must submit the calculation of chlorine input, using Equation 5 of § 63.7530, that demonstrates that your source is still within its maximum chlorine input level established during the previous performance testing (for sources that demonstrate compliance through performance testing) or you must submit the calculation of HCl emission rate using Equation 9 of § 63.7530 that demonstrates that your source is still meeting the emission limit for HCl emissions (for boilers or process heaters that demonstrate compliance through fuel analysis). If you burned a new type of fuel, you must submit the calculation of TSM input, using Equation 6 of § 63.7530, that demonstrates that your source is still within its maximum TSM input level established during the previous performance testing (for sources that demonstrate compliance through performance testing), or you must submit the calculation of TSM emission rate using Equation 10 of § 63.7530 that demonstrates that your source is still meeting the emission limit for TSM emissions (for boilers or process heaters that demonstrate compliance through fuel analysis). If you burned a new type of fuel, you must submit the calculation of mercury input, using Equation 7 of § 63.7530, that demonstrates that your source is still within its maximum mercury input level established during the previous performance testing (for sources that demonstrate compliance through performance testing), or you must submit the calculation of mercury emission rate using Equation 11 of § 63.7530 that demonstrates that your source is still meeting the emission limit for mercury emissions (for boilers or process heaters that demonstrate compliance through fuel analysis).

(7) If you wish to burn a new type of fuel and you can not demonstrate compliance with the maximum chlorine input operating limit using Equation 5 of § 63.7530, the maximum TSM input operating limit using Equation 6 of § 63.7530, or the maximum mercury input operating limit using Equation 7 of § 63.7530, you must include in the compliance report a statement indicating the intent to conduct a new performance test within 60 days of starting to burn the new fuel.

(8) The hours of operation for each boiler and process heater that is subject to an emission limit for each calendar month within the semiannual reporting period. This requirement applies only to limited use boilers and process heaters.

(9) If you had a startup, shutdown, or malfunction during the reporting period and you took actions consistent with your SSMP, the compliance report must include the information in § 63.10(d)(5)(i).

(10) If there are no deviations from any emission limits or operating limits in this subpart that apply to you, and there are no deviations from the requirements for work practice standards in this subpart, a statement that there were no deviations from the emission limits, operating limits, or work practice standards during the reporting period.

(11) If there were no periods during which the CMSs, including CEMS, COMS, and CPMS, were out of control as specified in § 63.8(c)(7), a statement that there were no periods during which the CMSs were out of control during the reporting period.

(d) For each deviation from an emission limit or operating limit in this subpart and for each deviation from the requirements for work practice standards in this subpart that occurs at an affected source where you are not using a CMSs to comply with that emission limit, operating limit, or work practice standard, the compliance report must contain the information in paragraphs (c)(1) through (10) of this section and the information required in paragraphs (d)(1) through (4) of this section. This includes periods of startup, shutdown, and malfunction.

(1) The total operating time of each affected source during the reporting period.

(2) A description of the deviation and which emission limit, operating limit, or work practice standard from which you deviated.

(3) Information on the number, duration, and cause of deviations (including unknown cause), as applicable, and the corrective action taken.

(4) A copy of the test report if the annual performance test showed a deviation from the emission limit for particulate matter or the alternative TSM limit, a deviation from the HCl emission limit, or a deviation from the mercury emission limit.

(e) For each deviation from an emission limitation and operating limit or work practice standard in this subpart occurring at an affected source where you are using a CMS to comply with that emission limit, operating limit, or work practice standard, you must include the information in paragraphs (c) (1) through (10) of this section and the information required in paragraphs (e) (1) through (12) of this section. This includes periods of startup, shutdown, and malfunction and any deviations from your site-specific monitoring plan as required in § 63.7505(d).

(1) The date and time that each malfunction started and stopped and description of the nature of the deviation (*i.e.*, what you deviated from).

(2) The date and time that each CMS was inoperative, except for zero (low-level) and high-level checks.

(3) The date, time, and duration that each CMS was out of control, including the information in § 63.8(c)(8).

(4) The date and time that each deviation started and stopped, and whether each deviation occurred during a period of startup, shutdown, or malfunction or during another period.

(5) A summary of the total duration of the deviation during the reporting period and the total duration as a percent of the total source operating time during that reporting period.

(6) A breakdown of the total duration of the deviations during the reporting period into those that are due to startup, shutdown, control equipment problems,

process problems, other known causes, and other unknown causes.

(7) A summary of the total duration of CMSs downtime during the reporting period and the total duration of CMS downtime as a percent of the total source operating time during that reporting period.

(8) An identification of each parameter that was monitored at the affected source for which there was a deviation, including opacity, carbon monoxide, and operating parameters for wet scrubbers and other control devices.

(9) A brief description of the source for which there was a deviation.

(10) A brief description of each CMS for which there was a deviation.

(11) The date of the latest CMS certification or audit for the system for which there was a deviation.

(12) A description of any changes in CMSs, processes, or controls since the last reporting period for the source for which there was a deviation.

(f) Each affected source that has obtained a title V operating permit pursuant to 40 CFR part 70 or 40 CFR part 71 must report all deviations as defined in this subpart in the semiannual monitoring report required by 40 CFR 70.6(a)(3)(iii)(A) or 40 CFR 71.6(a)(3)(iii)(A). If an affected source submits a compliance report pursuant to Table 9 to this subpart along with, or as part of, the semiannual monitoring report required by 40 CFR 70.6(a)(3)(iii)(A) or 40 CFR 71.6(a)(3)(iii)(A), and the compliance report includes all required information concerning deviations from any emission limit, operating limit, or work practice requirement in this subpart, submission of the compliance report satisfies any obligation to report the same deviations in the semiannual monitoring report. However, submission of a compliance report does not otherwise affect any obligation the affected source may have to report deviations from permit requirements to the permit authority.

(g) If you operate a new gaseous fuel unit that is subject to the work practice standard specified in Table 1 to this subpart, and you intend to use a fuel other than natural gas or equivalent to fire the affected unit, you must submit a notification of alternative fuel use within 48 hours of the declaration of a period of natural gas curtailment or supply interruption, as defined in § 63.7575. The notification must include the information specified in paragraphs (g)(1) through (5) of this section.

(1) Company name and address.

(2) Identification of the affected unit.

(3) Reason you are unable to use natural gas or equivalent fuel, including the date when the natural gas curtailment was declared or the natural gas supply interruption began.

(4) Type of alternative fuel that you intend to use.

(5) Dates when the alternative fuel use is expected to begin and end.

**§ 63.7555 What records must I keep?**

(a) You must keep records according to paragraphs (a)(1) through (3) of this section.

(1) A copy of each notification and report that you submitted to comply with this subpart, including all documentation supporting any Initial Notification or Notification of Compliance Status or semiannual compliance report that you submitted, according to the requirements in § 63.10(b)(2)(xiv).

(2) The records in § 63.6(e)(3)(iii) through (v) related to startup, shutdown, and malfunction.

(3) Records of performance tests, fuel analyses, or other compliance demonstrations, performance evaluations, and opacity observations as required in § 63.10(b)(2)(viii).

(b) For each CEMS, CPMS, and COMS, you must keep records according to paragraphs (b)(1) through (5) of this section.

(1) Records described in § 63.10(b)(2)(vi) through (xi).

(2) Monitoring data for continuous opacity monitoring system during a performance evaluation as required in § 63.6(h)(7)(i) and (ii).

(3) Previous (*i.e.*, superseded) versions of the performance evaluation plan as required in § 63.8(d)(3).

(4) Request for alternatives to relative accuracy test for CEMS as required in § 63.8(f)(6)(i).

(5) Records of the date and time that each deviation started and stopped, and whether the deviation occurred during a period of startup, shutdown, or malfunction or during another period.

(c) You must keep the records required in Table 8 to this subpart including records of all monitoring data and calculated averages for applicable operating limits such as opacity, pressure drop, carbon monoxide, and pH to show continuous compliance with each emission limit, operating limit, and work practice standard that applies to you.

(d) For each boiler or process heater subject to an emission limit, you must also keep the records in paragraphs (d)(1) through (5) of this section.

(1) You must keep records of monthly fuel use by each boiler or process heater, including the type(s) of fuel and amount(s) used.

(2) You must keep records of monthly hours of operation by each boiler or process heater. This requirement applies only to limited-use boilers and process heaters.

(3) A copy of all calculations and supporting documentation of maximum chlorine fuel input, using Equation 5 of § 63.7530, that were done to demonstrate continuous compliance with the HCl emission limit, for sources that demonstrate compliance through performance testing. For sources that demonstrate compliance through fuel analysis, a copy of all calculations and supporting documentation of HCl emission rates, using Equation 9 of § 63.7530, that were done to demonstrate compliance with the HCl emission limit. Supporting documentation should include results of any fuel analyses and basis for the estimates of maximum chlorine fuel input or HCl emission rates. You can use the results from one fuel analysis for multiple boilers and process heaters provided they are all burning the same fuel type. However, you must calculate chlorine fuel input, or HCl emission rate, for each boiler and process heater.

(4) A copy of all calculations and supporting documentation of maximum TSM fuel input, using Equation 6 of § 63.7530, that were done to demonstrate continuous compliance with the TSM emission limit for sources that demonstrate compliance through performance testing. For sources that demonstrate compliance through fuel analysis, a copy of all calculations and supporting documentation of TSM emission rates, using Equation 10 of § 63.7530, that were done to demonstrate compliance with the TSM emission limit. Supporting documentation should include results of any fuel analyses and basis for the estimates of maximum TSM fuel input or TSM emission rates. You can use the results from one fuel analysis for multiple boilers and process heaters provided they are all burning the same fuel type. However, you must calculate TSM fuel input, or TSM emission rates, for each boiler and process heater.

(5) A copy of all calculations and supporting documentation of maximum mercury fuel input, using Equation 7 of § 63.7530, that were done to demonstrate continuous compliance with the mercury emission limit for sources that demonstrate compliance through performance testing. For sources that demonstrate compliance through fuel analysis, a copy of all calculations and supporting documentation of mercury emission rates, using Equation 11 of § 63.7530, that were done to demonstrate compliance with the mercury emission limit. Supporting documentation should

include results of any fuel analyses and basis for the estimates of maximum mercury fuel input or mercury emission rates. You can use the results from one fuel analysis for multiple boilers and process heaters provided they are all burning the same fuel type. However, you must calculate mercury fuel input, or mercury emission rates, for each boiler and process heater.

(e) If your boiler or process heater is subject to an emission limit or work practice standard in Table 1 to this subpart and has a federally enforceable permit that limits the annual capacity factor to less than or equal to 10 percent such that the unit is in one of the limited use subcategories, you must keep the records in paragraphs (e)(1) and (2) of this section.

(1) A copy of the federally enforceable permit that limits the annual capacity factor of the source to less than or equal to 10 percent.

(2) Fuel use records for the days the boiler or process heater was operating.

**§ 63.7560 In what form and how long must I keep my records?**

(a) Your records must be in a form suitable and readily available for expeditious review, according to § 63.10(b)(1).

(b) As specified in § 63.10(b)(1), you must keep each record for 5 years following the date of each occurrence, measurement, maintenance, corrective action, report, or record.

(c) You must keep each record on site for at least 2 years after the date of each occurrence, measurement, maintenance, corrective action, report, or record, according to § 63.10(b)(1). You can keep the records off site for the remaining 3 years.

## Other Requirements and Information

**§ 63.7565 What parts of the General Provisions apply to me?**

Table 10 to this subpart shows which parts of the General Provisions in §§ 63.1 through 63.15 apply to you.

**§ 63.7570 Who implements and enforces this subpart?**

(a) This subpart can be implemented and enforced by U.S. EPA, or a delegated authority such as your State, local, or tribal agency. If the EPA Administrator has delegated authority to your State, local, or tribal agency, then that agency (as well as the U.S. EPA) has the authority to implement and enforce this subpart. You should contact your EPA Regional Office to find out if this subpart is delegated to your State, local, or tribal agency.

(b) In delegating implementation and enforcement authority of this subpart to a State, local, or tribal agency under 40 CFR part 63, subpart E, the authorities listed in paragraphs (b)(1) through (5) of this section are retained by the EPA Administrator and are not transferred to the State, local, or tribal agency, however, the U.S. EPA retains oversight of this subpart and can take enforcement actions, as appropriate.

(1) Approval of alternatives to the non-opacity emission limits and work practice standards in § 63.7500(a) and (b) under § 63.6(g).

(2) Approval of alternative opacity emission limits in § 63.7500(a) under § 63.6(h)(9).

(3) Approval of major change to test methods in Table 5 to this subpart under § 63.7(e)(2)(ii) and (f) and as defined in § 63.90.

(4) Approval of major change to monitoring under § 63.8(f) and as defined in § 63.90.

(5) Approval of major change to recordkeeping and reporting under § 63.10(f) and as defined in § 63.90.

**§ 63.7575 What definitions apply to this subpart?**

Terms used in this subpart are defined in the CAA, in § 63.2 (the General Provisions), and in this section as follows:

*Annual capacity factor* means the ratio between the actual heat input to a boiler or process heater from the fuels burned during a calendar year, and the potential heat input to the boiler or process heater had it been operated for 8,760 hours during a year at the maximum steady state design heat input capacity.

*Bag leak detection system* means an instrument that is capable of monitoring particulate matter loadings in the exhaust of a fabric filter (*i.e.*, baghouse) in order to detect bag failures. A bag leak detection system includes, but is not limited to, an instrument that operates on electrodynamic, triboelectric, light scattering, light transmittance, or other principle to monitor relative particulate matter loadings.

*Biomass fuel* means unadulterated wood as defined in this subpart, wood residue, and wood products (*e.g.*, trees, tree stumps, tree limbs, bark, lumber, sawdust, sanderdust, chips, scraps, slabs, millings, and shavings); animal litter; vegetative agricultural and silvicultural materials, such as logging residues (slash), nut and grain hulls and chaff (*e.g.*, almond, walnut, peanut, rice, and wheat), bagasse, orchard prunings, corn stalks, coffee bean hulls and grounds.

*Blast furnace gas fuel-fired boiler or process heater* means an industrial/commercial/institutional boiler or process heater that receives 90 percent or more of its total heat input (based on an annual average) from blast furnace gas.

*Boiler* means an enclosed device using controlled flame combustion and having the primary purpose of recovering thermal energy in the form of steam or hot water. Waste heat boilers are excluded from this definition.

*Coal* means all solid fuels classifiable as anthracite, bituminous, subbituminous, or lignite by the American Society for Testing and Materials in ASTM D388–991$^{\epsilon 1}$, "Standard Specification for Classification of Coals by Rank [1]" (incorporated by reference, see § 63.14(b)), coal refuse, and petroleum coke. Synthetic fuels derived from coal for the purpose of creating useful heat including but not limited to, solvent-refined coal, coal-oil mixtures, and coal-water mixtures, for the purposes of this subpart. Coal derived gases are excluded from this definition.

*Coal refuse* means any by-product of coal mining or coal cleaning operations with an ash content greater than 50 percent (by weight) and a heating value less than 13,900 kilojoules per kilogram (6,000 Btu per pound) on a dry basis.

*Commercial/institutional boiler* means a boiler used in commercial establishments or institutional establishments such as medical centers, research centers, institutions of higher education, hotels, and laundries to provide electricity, steam, and/or hot water.

*Construction/demolition material* means waste building material that result from the construction or demolition operations on houses and commercial and industrial buildings.

*Deviation.* (1) Deviation means any instance in which an affected source subject to this subpart, or an owner or operator of such a source:

(i) Fails to meet any requirement or obligation established by this subpart including, but not limited to, any emission limit, operating limit, or work practice standard;

(ii) Fails to meet any term or condition that is adopted to implement an applicable requirement in this subpart and that is included in the operating permit for any affected source required to obtain such a permit; or

(iii) Fails to meet any emission limit, operating limit, or work practice standard in this subpart during startup, shutdown, or malfunction, regardless or whether or not such failure is permitted by this subpart.

(2) A deviation is not always a violation. The determination of whether a deviation constitutes a violation of the

standard is up to the discretion of the entity responsible for enforcement of the standards.

*Distillate oil* means fuel oils, including recycled oils, that comply with the specifications for fuel oil numbers 1 and 2, as defined by the American Society for Testing and Materials in ASTM D396–02a, "Standard Specifications for Fuel Oils" (incorporated by reference, see § 63.14(b)).

*Dry scrubber* means an add-on air pollution control system that injects dry alkaline sorbent (dry injection) or sprays an alkaline sorbent (spray dryer) to react with and neutralize acid gas in the exhaust stream forming a dry powder material. Sorbent injection systems in fluidized bed boilers and process heaters are included in this definition.

*Electric utility steam generating unit* means a fossil fuel-fired combustion unit of more than 25 megawatts that serves a generator that produces electricity for sale. A fossil fuel-fired unit that cogenerates steam and electricity and supplies more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale is considered an electric utility steam generating unit.

*Electrostatic precipitator* means an add-on air pollution control device used to capture particulate matter by charging the particles using an electrostatic field, collecting the particles using a grounded collecting surface, and transporting the particles into a hopper.

*Fabric filter* means an add-on air pollution control device used to capture particulate matter by filtering gas streams through filter media, also known as a baghouse.

*Federally enforceable* means all limitations and conditions that are enforceable by the EPA Administrator, including the requirements of 40 CFR parts 60 and 61, requirements within any applicable State implementation plan, and any permit requirements established under 40 CFR 52.21 or under 40 CFR 51.18 and 40 CFR 51.24.

*Firetube boiler* means a boiler in which hot gases of combustion pass through the tubes and water contacts the outside surfaces of the tubes.

*Fossil fuel* means natural gas, petroleum, coal, and any form of solid, liquid, or gaseous fuel derived from such materials.

*Fuel type* means each category of fuels that share a common name or classification. Examples include, but are not limited to, bituminous coal, subbituminous coal, lignite, anthracite, biomass, construction/demolition material, salt water laden wood, creosote treated wood, tires, residual oil. Individual fuel types received from different suppliers are not considered new fuel types except for construction/demolition material.

*Gaseous fuel* includes, but is not limited to, natural gas, process gas, landfill gas, coal derived gas, refinery gas, and biogas. Blast furnace gas is exempted from this definition.

*Heat input* means heat derived from combustion of fuel in a boiler or process heater and does not include the heat input from preheated combustion air, recirculated flue gases, or exhaust gases from other sources such as gas turbines, internal combustion engines, kilns, etc.

*Hot water heater* means a closed vessel with a capacity of no more than 120 U.S. gallons in which water is heated by combustion of gaseous or liquid fuel and is withdrawn for use external to the vessel at pressures not exceeding 160 psig, including the apparatus by which the heat is generated and all controls and devices necessary to prevent water temperatures from exceeding 210°F (99°C).

*Industrial boiler* means a boiler used in manufacturing, processing, mining, and refining or any other industry to provide steam, hot water, and/or electricity.

*Large gaseous fuel subcategory* includes any watertube boiler or process heater that burns gaseous fuels not combined with any solid fuels, burns liquid fuel only during periods of gas curtailment or gas supply emergencies, has a rated capacity of greater than 10 MMBtu per hour heat input, and has an annual capacity factor of greater than 10 percent.

*Large liquid fuel subcategory* includes any watertube boiler or process heater that does not burn any solid fuel and burns any liquid fuel either alone or in combination with gaseous fuels, has a rated capacity of greater than 10 MMBtu per hour heat input, and has an annual capacity factor of greater than 10 percent. Large gaseous fuel boilers and process heaters that burn liquid fuel during periods of gas curtailment or gas supply emergencies are not included in this definition.

*Large solid fuel subcategory* includes any watertube boiler or process heater that burns any amount of solid fuel either alone or in combination with liquid or gaseous fuels, has a rated capacity of greater than 10 MMBtu per hour heat input, and has an annual capacity factor of greater than 10 percent.

*Limited use gaseous fuel subcategory* includes any watertube boiler or process heater that burns gaseous fuels not combined with any liquid or solid fuels, burns liquid fuel only during periods of gas curtailment or gas supply emergencies, has a rated capacity of greater than 10 MMBtu per hour heat input, and has a federally enforceable annual average capacity factor of equal to or less than 10 percent.

*Limited use liquid fuel subcategory* includes any watertube boiler or process heater that does not burn any solid fuel and burns any liquid fuel either alone or in combination with gaseous fuels, has a rated capacity of greater than 10 MMBtu per hour heat input, and has a federally enforceable annual average capacity factor of equal to or less than 10 percent. Limited use gaseous fuel boilers and process heaters that burn liquid fuel during periods of gas curtailment or gas supply emergencies are not included in this definition.

*Limited use solid fuel subcategory* includes any watertube boiler or process heater that burns any amount of solid fuel either alone or in combination with liquid or gaseous fuels, has a rated capacity of greater than 10 MMBtu per hour heat input, and has a federally enforceable annual average capacity factor of equal to or less than 10 percent.

*Liquid fossil fuel* means petroleum, distillate oil, residual oil and any form of liquid fuel derived from such material.

*Liquid fuel* includes, but is not limited to, distillate oil, residual oil, waste oil, and process liquids.

*Minimum pressure drop* means 90 percent of the lowest test-run average pressure drop measured according to Table 7 to this subpart during the most recent performance test demonstrating compliance with the applicable emission limit.

*Minimum scrubber effluent pH* means 90 percent of the lowest test-run average effluent pH measured at the outlet of the wet scrubber according to Table 7 to this subpart during the most recent performance test demonstrating compliance with the applicable hydrogen chloride emission limit.

*Minimum scrubber flow rate* means 90 percent of the lowest test-run average flow rate measured according to Table 7 to this subpart during the most recent performance test demonstrating compliance with the applicable emission limit.

*Minimum sorbent flow rate* means 90 percent of the lowest test-run average sorbent (or activated carbon) flow rate measured according to Table 7 to this subpart during the most recent performance test demonstrating compliance with the applicable emission limits.

*Minimum voltage or amperage* means 90 percent of the lowest test-run average voltage or amperage to the electrostatic precipitator measured according to Table 7 to this subpart during the most recent performance test demonstrating compliance with the applicable emission limits.

*Natural gas* means:

(1) A naturally occurring mixture of hydrocarbon and nonhydrocarbon gases found in geologic formations beneath the earth's surface, of which the principal constituent is methane; or

(2) Liquid petroleum gas, as defined by the American Society for Testing and Materials in ASTM D1835–03a, "Standard Specification for Liquid Petroleum Gases" (incorporated by reference, see § 63.14(b)).

*Opacity* means the degree to which emissions reduce the transmission of light and obscure the view of an object in the background.

*Particulate matter* means any finely divided solid or liquid material, other than uncombined water, as measured by the test methods specified under this subpart, or an alternative method.

*Period of natural gas curtailment or supply interruption* means a period of time during which the supply of natural gas to an affected facility is halted for reasons beyond the control of the facility. An increase in the cost or unit price of natural gas does not constitute a period of natural gas curtailment or supply interruption.

*Process heater* means an enclosed device using controlled flame, that is not a boiler, and the unit's primary purpose is to transfer heat indirectly to a process material (liquid, gas, or solid) or to a heat transfer material for use in a process unit, instead of generating steam. Process heaters are devices in which the combustion gases do not directly come into contact with process materials. Process heaters do not include units used for comfort heat or space heat, food preparation for on-site consumption, or autoclaves.

*Residual oil* means crude oil, and all fuel oil numbers 4, 5 and 6, as defined by the American Society for Testing and Materials in ASTM D396–02a, "Standard Specifications for Fuel Oils [1]" (incorporated by reference, see § 63.14(b)).

*Responsible official* means responsible official as defined in 40 CFR 70.2.

*Small gaseous fuel subcategory* includes any firetube boiler that burns gaseous fuels not combined with any solid fuels and burns liquid fuel only during periods of gas curtailment or gas supply emergencies, and any boiler or process heater that burns gaseous fuels not combined with any solid fuels, burns liquid fuel only during periods of gas curtailment or gas supply emergencies, and has a rated capacity of less than or equal to 10 MMBtu per hour heat input.

*Small liquid fuel subcategory* includes any firetube boiler that does not burn any solid fuel and burns any liquid fuel either alone or in combination with gaseous fuels, and any boiler or process heater that does not burn any solid fuel and burns any liquid fuel either alone or in combination with gaseous fuels, and has a rated capacity of less than or equal to 10 MMBtu per hour heat input. Small gaseous fuel boilers and process heaters that burn liquid fuel during periods of gas curtailment or gas supply emergencies are not included in this definition.

*Small solid fuel subcategory* includes any firetube boiler that burns any amount of solid fuel either alone or in combination with liquid or gaseous fuels, and any other boiler or process heater that burns any amount of solid fuel either alone or in combination with liquid or gaseous fuels and has a rated capacity of less than or equal to 10 MMBtu per hour heat input.

*Solid fuel* includes, but is not limited to, coal, wood, biomass, tires, plastics, and other nonfossil solid materials.

*Temporary boiler* means any gaseous or liquid fuel boiler that is designed to, and is capable of, being carried or moved from one location to another. A temporary boiler that remains at a location for more than 180 consecutive days is no longer considered to be a temporary boiler. Any temporary boiler that replaces a temporary boiler at a location and is intended to perform the same or similar function will be included in calculating the consecutive time period.

*Total selected metals* means the combination of the following metallic HAP: arsenic, beryllium, cadmium, chromium, lead, manganese, nickel and selenium.

*Unadulterated wood* means wood or wood products that have not been painted, pigment-stained, or pressure treated with compounds such as chromate copper arsenate, pentachlorophenol, and creosote. Plywood, particle board, oriented strand board, and other types of wood products bound by glues and resins are included in this definition.

*Waste heat boiler* means a device that recovers normally unused energy and converts it to usable heat. Waste heat boilers incorporating duct or supplemental burners that are designed to supply 50 percent or more of the total rated heat input capacity of the waste heat boiler are not considered waste heat boilers, but are considered boilers. Waste heat boilers are also referred to as heat recovery steam generators.

*Watertube boiler* means a boiler in which water passes through the tubes and hot gases of combustion pass over the outside surfaces of the tubes.

*Wet scrubber* means any add-on air pollution control device that mixes an aqueous stream or slurry with the exhaust gases from a boiler or process heater to control emissions of particulate matter and/or to absorb and neutralize acid gases, such as hydrogen chloride.

*Work practice standard* means any design, equipment, work practice, or operational standard, or combination thereof, that is promulgated pursuant to section 112(h) of the CAA.

**Tables to Subpart DDDDD of Part 63**

TABLE 1 TO SUBPART DDDDD OF PART 63.—EMISSION LIMITS AND WORK PRACTICE STANDARDS

As stated in § 63.7500, you must comply with the following applicable emission limits and work practice standards:

| If your boiler or process heater is in this subcategory . . . | For the following pollutants . . . | You must meet the following emission limits and work practice standards . . . |
|---|---|---|
| 1. New or reconstructed large solid fuel | a. Particulate Matter (or Total Selected Metals). | 0.025 lb per MMBtu of heat input; or (0.0003 lb per MMBtu of heat input). |
| | b. Hydrogen Chloride | 0.02 lb per MMBtu of heat input. |
| | c. Mercury | 0.000003 lb per MMBtu of heat input. |
| | d. Carbon Monoxide | 400 ppm by volume on a dry basis corrected to 7 percent oxygen (30-day rolling average for units 100 MMBtu/hr or greater, 3-run average for units less than 100 MMBtu/hr). |

TABLE 1 TO SUBPART DDDDD OF PART 63.—EMISSION LIMITS AND WORK PRACTICE STANDARDS—Continued

As stated in §63.7500, you must comply with the following applicable emission limits and work practice standards:

| If your boiler or process heater is in this subcategory . . . | For the following pollutants . . . | You must meet the following emission limits and work practice standards . . . |
|---|---|---|
| 2. New or reconstructed limited use solid fuel ... | a. Particulate Matter (or Total Selected Metals). | 0.025 lb per MMBtu of heat input; or (0.0003 lb per MMBtu of heat input). |
| | b. Hydrogen Chloride | 0.02 lb per MMBtu of heat input. |
| | c. Mercury | 0.000003 lb per MMBtu of heat input. |
| | d. Carbon Monoxide | 400 ppm by volume on a dry basis corrected to 7 percent oxygen (3-run average). |
| 3. New or reconstructed small solid fuel | a. Particulate Matter (or Total Selected Metals). | 0.025 lb per MMBtu of heat input; or (0.0003 lb per MMBtu of heat input). |
| | b. Hydrogen Chloride | 0.02 lb per MMBtu of heat input. |
| | c. Mercury | 0.000003 lb per MMBtu of heat input. |
| 4. New reconstructed large liquid fuel | a. Particulate Matter | 0.03 lb per MMBtu of heat input. |
| | b. Hydrogen Chloride | 0.0005 lb per MMBtu of heat input. |
| | c. Carbon Monoxide | 400 ppm by volume on a dry basis corrected to 3 percent oxygen (30-day rolling average for units 100 MMBtu/hr or greater, 3-run average for units less than 100 MMBtu/hr). |
| 5. New or reconstructed limited use liquid fuel .. | a. Particulate Matter | 0.03 lb per MMBtu of heat input. |
| | b. Hydrogen Chloride | 0.0009 lb per MMBtu of heat input. |
| | c. Carbon Monoxide | 400 ppm by volume on a dry basis liquid corrected to 3 percent oxygen (3-run average). |
| 6. New or reconstructed small liquid fuel | a. Particulate Matter | 0.03 lb per MMBtu of heat input. |
| | b. Hydrogen Chloride | 0.0009 lb per MMBtu of heat input. |
| 7. New reconstructed large gaseous fuel | Carbon Monoxide | 400 ppm by volume on a dry basis corrected to 3 percent oxygen (30-day rolling average for units 100 MMBtu/hr or greater, 3-run average for units less than 100 MMBtu/hr). |
| 8. New or reconstructed limited use gaseous fuel. | Carbon Monoxide | 400 ppm by volume on a dry basis corrected to 3 percent oxygen (3-run average). |
| 9. Existing large solid fuel | a. Particulate Matter (or Total Selected Metals). | 0.07 lb per MMBtu of heat input; or (0.001 lb per MMBtu of heat input). |
| | b. Hydrogen Chloride | 0.09 lb per MMBtu of heat input. |
| | c. Mercury | 0.000009 lb per MMBtu of heat input. |
| 10. Existing limited use solid fuel | Particulate Matter (or Total Selected Metals) .. | 0.21 lb per MMBtu of heat input; or (0.004 lb per MMBtu of heat input). |

TABLE 2 TO SUBPART DDDDD OF PART 63.—OPERATING LIMITS FOR BOILERS AND PROCESS HEATERS WITH PARTICULATE MATTER EMISSION LIMITS

As stated in §63.7500, you must comply with the applicable operating limits:

| If you demonstrate compliance with applicable particulate matter emission limits using . . . | You must meet these operating limits . . . |
|---|---|
| 1. Wet scrubber control | a. Maintain the minimum pressure drop and liquid flow-rate at or above the operating levels established during the performance test according to §63.7530(c) and Table 7 to this subpart that demonstrated compliance with the applicable emission limit for particulate matter. |
| 2. Fabric filter control | a. Install and operate a bag leak detection system according to §63.7525 and operate the fabric filter such that the bag leak detection system alarm does not sound more than 5 percent of the operating time during each 6-month period; or |
| | b. This option is for boilers and process heaters that operate dry control systems. Existing boilers and process heaters must maintain opacity to less than or equal to 20 percent (6-minute average) except for one 6-minute period per hour of not more than 27 percent. New boilers and process heaters must maintain opacity to less than or equal to 10 percent opacity (1-hour block average). |
| 3. Electrostatic precipitator control | a. This option is for boilers and process heaters that operate dry control systems. Existing boilers and process heaters must maintain opacity to less than or equal to 20 percent (6-minute average) except for one 6-minute period per hour of not more than 27 percent. New boilers and process heaters must maintain opacity to less than or equal to 10 percent opacity (1-hour block average); or |

TABLE 2 TO SUBPART DDDDD OF PART 63.—OPERATING LIMITS FOR BOILERS AND PROCESS HEATERS WITH PARTICULATE MATTER EMISSION LIMITS—Continued

As stated in § 63.7500, you must comply with the applicable operating limits:

| If you demonstrate compliance with applicable particulate matter emission limits using . . . | You must meet these operating limits . . . |
|---|---|
| | b. This option is only for boilers and process heaters that operate additional wet control systems. Maintain the minimum voltage and secondary current or total power input of the electrostatic precipitator at or above the operating limits established during the performance test according to § 63.7530(c) and Table 7 to this subpart that demonstrated compliance with the applicable emission limit for particulate matter. |
| 4. Any other control type | This option is for boilers and process heaters that operate dry control systems. Existing boilers and process heaters must maintain opacity to less than or equal to 20 percent (6-minute average) except for one 6-minute period per hour of not more than 27 percent. New boilers and process heaters must maintain opacity to less than or equal to 10 percent opacity (1-hour block average). |

TABLE 3 TO SUBPART DDDDD OF PART 63.—OPERATING LIMITS FOR BOILERS AND PROCESS HEATERS WITH MERCURY EMISSION LIMITS AND BOILERS AND PROCESS HEATERS THAT CHOOSE TO COMPLY WITH THE ALTERNATIVE TOTAL SELECTED METALS EMISSION LIMITS

As stated in § 63.7500, you must comply with the applicable operating limits:

| If you demonstrate compliance with applicable mercury and/or total selected metals emission limits using . . . | You must meet these operating limits . . . |
|---|---|
| 1. Wet scrubber control | Maintain the minimum pressure drop and liquid flow-rate at or above the operating levels established during the performance test according to § 63.7530(c) and Table 7 to this subpart that demonstrated compliance with the applicable emission limits for mercury and/or total selected metals. |
| 2. Fabric filter control | a. Install and operate a bag leak detection system according to § 63.7525 and operate the fabric filter such that the bag leak detection system alarm does not sound more than 5 percent of the operating time during a 6-month period; or |
| | b. This option is for boilers and process heaters that operate dry control systems. Existing sources must maintain opacity to less than or equal to 20 percent (6-minute average) except for one 6-minute period per hour of not more than 27 percent. New sources must maintain opacity to less than or equal to 10 percent opacity (1-hour block average). |
| 3. Electrostatic precipitator control | a. This option is for boilers and process heaters that operate dry control systems. Existing sources must maintain opacity to less than or equal to 20 percent (6-minute average) except for one 6-minute period per hour of not more than 27 percent. New sources must maintain opacity to less than or equal to 10 percent opacity (1-hour block average); or |
| | b. This option is only for boilers and process heaters that operate additional wet control systems. Maintain the minimum voltage and secondary current or total power input of the electrostatic precipitator at or above the operating limits established during the performance test according to § 63.7530(c) and Table 7 to this subpart that demonstrated compliance with the applicable emission limits for mercury and/or total selected metals. |
| 4. Dry scrubber or carbon injection control | Maintain the minimum sorbent or carbon injection rate at or above the operating levels established during the performance test according to § 63.7530(c) and Table 7 to this subpart that demonstrated compliance with the applicable emission limit for mercury. |
| 5. Any other control type | This option is only for boilers and process heaters that operate dry control systems. Existing sources must maintain opacity to less than or equal to 20 percent (6-minute average) except for one 6-minute period per hour of not more than 27 percent. New sources must maintain opacity to less than or equal to 10 percent opacity (1-hour block average). |
| 6. Fuel analysis | Maintain the fuel type or fuel mixture such that the mercury and/or total selected metals emission rates calculated according to § 63.7530(d)(4) and/or (5) is less than the applicable emission limits for mercury and/or total selected metals. |

TABLE 4 TO SUBPART DDDDD OF PART 63.—OPERATING LIMITS FOR BOILERS AND PROCESS HEATERS WITH HYDROGEN CHLORIDE EMISSION LIMITS

As stated in § 63.7500, you must comply with the following applicable operating limits:

| If you demonstrate compliance with applicable hydrogen chloride emission limits using . . . | You must meet these operating limits . . . |
|---|---|
| 1. Wet scrubber control | Maintain the minimum scrubber effluent pH, pressure drop, and liquid flow-rate at or above the operating levels established during the performance test according to § 63.7530(c) and Table 7 to this subpart that demonstrated compliance with the applicable emission limit for hydrogen chloride. |
| 2. Dry scrubber control | Maintain the minimum sorbent injection rate at or above the operating levels established during the performance test according to § 63.7530(c) and Table 7 to this subpart that demonstrated compliance with the applicable emission limit for hydrogen chloride. |
| 3. Fuel analysis | Maintain the fuel type or fuel mixture such that the hydrogen chloride emission rate calculated according to § 63.7530(d)(3) is less than the applicable emission limit for hydrogen chloride. |

TABLE 5 TO SUBPART DDDDD OF PART 63.—PERFORMANCE TESTING REQUIREMENTS

As stated in § 63.7520, you must comply with the following requirements for performance test for existing, new or reconstructed affected sources:

| To conduct a performance test for the following pollutant . . . | You must . . . | Using . . . |
|---|---|---|
| 1. Particulate Matter | a. Select sampling ports location and the number of traverse points. | Method 1 in appendix A to part 60 of this chapter. |
| | b. Determine velocity and volumetric flow-rate of the stack gas. | Method 2, 2F, or 2G in appendix A to part 60 of this chapter. |
| | c. Determine oxygen and carbon dioxide concentrations of the stack gas. | Method 3A or 3B in appendix A to part 60 of this chapter, or ASME PTC 19, Part 10 (1981) (IBR, see § 63.14(i)). |
| | d. Measure the moisture content of the stack gas. | Method 4 in appendix A to part 60 of this chapter. |
| | e. Measure the particulate matter emission concentration. | Method 5 or 17 (positive pressure fabric filters must use Method 5D) in appendix A to part 60 of this chapter. |
| | f. Convert emissions concentration to lb per MMBtu emission rates. | Method 19 F-factor methodology in appendix A to part 60 of this chapter. |
| 2. Total selected metals | a. Select sampling ports location and the number of traverse points. | Method 1 in appendix A to part 60 of this chapter. |
| | b. Determine velocity and volumetric flow-rate of the stack gas. | Method 2, 2F, or 2G in appendix A to part 60 of this chapter. |
| | c. Determine oxygen and carbon dioxide concentrations of the stack gas. | Method 3A or 3B in appendix A to part 60 of this chapter, or ASME PTC 19, Part 10 (1981) (IBR, see § 63.14(i)). |
| | d. Measure the moisture content of the stack gas. | Method 4 in appendix A to part 60 of this chapter. |
| | e. Measure the total selected metals emission concentration. | Method 29 in appendix A to part 60 of this chapter. |
| | f. Convert emissions concentration to lb per MMBtu emission rates. | Method 19 F-factor methodology in appendix A to part 60 of this chapter. |
| 3. Hydrogen chloride | a. Select sampling ports location and the number of traverse points. | Method 1 in appendix A to part 60 of this chapter. |
| | b. Determine velocity and volumetric flow-rate of the stack gas. | Method 2, 2F, or 2G in appendix A to part 60 of this chapter. |
| | c. Determine oxygen and carbon dioxide concentrations of the stack gas. | Method 3A or 3B in appendix A to part 60 of this chapter, or ASME PTC 19, Part 10 (1981) (IBR, see § 63.14(i)). |
| | d. Measure the moisture content of the stack gas. | Method 4 in appendix A to part 60 of this chapter. |
| | e. Measure the hydrogen chloride emission concentration. | Method 26 or 26A in appendix A to part 60 of this chapter. |
| | f. Convert emissions concentration to lb per MMBtu emission rates. | Method 19 F-factor methodology in appendix A to part 60 of this chapter. |
| 4. Mercury | a. Select sampling ports location and the number of traverse points. | Method 1 in appendix A to part 60 of this chapter. |
| | b. Determine velocity and volumetric flow-rate of the stack gas. | Method 2, 2F, or 2G in appendix A to part 60 of this chapter. |
| | c. Determine oxygen and carbon dioxide concentrations of the stack gas. | Method 3A or 3B in appendix A to part 60 of this chapter, or ASME PTC 19, Part 10 (1981) (IBR, see § 62.14(i)). |

TABLE 5 TO SUBPART DDDDD OF PART 63.—PERFORMANCE TESTING REQUIREMENTS—Continued

As stated in § 63.7520, you must comply with the following requirements for performance test for existing, new or reconstructed affected sources:

| To conduct a performance test for the following pollutant . . . | You must . . . | Using . . . |
|---|---|---|
| | d. Measure the moisture content of the stack gas. | Method 4 in appendix A to part 60 of this chapter. |
| | e. Measure the mercury emission concentration. | Method 29 in appendix A to part 60 of this chapter or Method 101A in appendix B to part 61 of this chapter or ASTM Method D6784–02 (IBR, see § 63.14(b)). |
| | f. Convert emissions concentration to lb per MMBtu emission rates. | Method 19 F-factor methodology in appendix A to part 60 of this chapter. |
| 5. Carbon Monoxide | a. Select the sampling ports location and the number of traverse points. | Method 1 in appendix A to part 60 of this chapter. |
| | b. Determine oxygen and carbon dioxide concentrations of the stack gas. | Method 3A or 3B in appendix A to part 60 of this chapter, or ASTM D6522–00 (IBR, see § 63.14(b)), or ASME PTC 19, Part 10 (1981) (IBR, see § 63.14(i)). |
| | c. Measure the moisture content of the stack gas. | Method 4 in appendix A to part 60 of this chapter. |
| | d. Measure the carbon monoxide emission concentration. | Method 10, 10A, or 10B in appendix A to part 60 of this chapter, or ASTM D6522–00 (IBR, see § 63.14(b)) when the fuel is natural gas. |

TABLE 6 TO SUBPART DDDDD OF PART 63.—FUEL ANALYSIS REQUIREMENTS

As stated in § 63.7521, you must comply with the following requirements for fuel analysis testing for existing, new or reconstructed affected sources:

| To conduct a fuel analysis for the following pollutant . . . | You must . . . | Using . . . |
|---|---|---|
| 1. Mercury | a. Collect fuel samples | Procedure in § 63.7521(c) or ASTM D2234–00$^{\epsilon 1}$ (for coal)(IBR, see § 63.14(b)) or ASTM D6323–98 (2003)(for biomass)(IBR, see § 63.14(b)) or equivalent. |
| | b. Composite fuel samples | Procedure in § 63.7521(d) or equivalent. |
| | c. Prepare composited fuel samples | SW–846–3050B (for solid samples) or SW–846–3020A (for liquid samples) or ASTM D2013–01 (for coal) (IBR, see § 63.14(b)) or ASTM D5198–92 (2003) (for biomass)(IBR, see § 63.14(b)) or equivalent. |
| | d. Determine heat content of the fuel type | ASTM D5865–03a (for coal)(IBR, see § 63.14(b)) or ASTM E711–87 (1996) (for biomass)(IBR, see § 63.14(b)) or equivalent. |
| | e. Determine moisture content of the fuel type | ASTM D3173–02 (IBR, see § 63.14(b)) or ASTM E871–82 (1998)(IBR, see § 63.14(b)) or equivalent. |
| | f. Measure mercury concentration in fuel sample. | ASTM D3684–01 (for coal)(IBR, see § 63.14(b)) or SW–846–7471A (for solid samples) or SW–846 7470A (for liquid samples). |
| | g. Convert concentrations into units of pounds of pollutant per MMBtu of heat content. | |
| 2. Total selected metals | a. Collect fuel samples | Procedure in § 63.7521(c) or ASTM D2234–00$^{\epsilon 1}$ (for coal)(IBR, see § 63.14(b)) or ASTM D6323–98 (2003) (for biomass)(IBR, see § 63.14(b)) or equivalent. |
| | b. Composite fuel samples | Procedure in § 63.7521(d) or equivalent. |
| | c. Prepare composited fuel samples | SW–846–3050B (for solid samples) or SW–846–3020A (for liquid samples) or ASTM D2013–01 (for coal)(IBR, see § 63.14(b)) or ASTM D5198–92 (2003)(for biomass)(IBR, see § 63.14(b)) or equivalent. |
| | d. Determine heat content of the fuel type | ASTM D5865–03a (for coal)(IBR, see § 63.14(b)) or ASTM E 711–87 (for biomass)(IBR, see § 63.14(b)) or equivalent. |
| | e. Determine moisture content of the fuel type | ASTM D3173–02 (IBR, see § 63.14(b)) or ASTM E871 (IBR, see § 63.14(b)) or equivalent. |

TABLE 6 TO SUBPART DDDDD OF PART 63.—FUEL ANALYSIS REQUIREMENTS—Continued

As stated in § 63.7521, you must comply with the following requirements for fuel analysis testing for existing, new or reconstructed affected sources:

| To conduct a fuel analysis for the following pollutant . . . | You must . . . | Using . . . |
|---|---|---|
| | f. Measure total selected metals concentration in fuel sample. | SW–846–6010B or ASTM D3683–94 (2000) (for coal) (IBR, see § 63.14(b)) or ASTM E885–88 (1996) (for biomass)(IBR, see § 63.14(b)). |
| | g. Convert concentrations into units of pounds of pollutant per MMBtu of heat content. | |
| 3. Hydrogen chloride | a. Collect fuel samples | Procedure in § 63.7521(c) or ASTM D2234[c1] (for coal)(IBR, see § 63.14(b)) or ASTM D6323–98 (2003) (for biomass)(IBR, see § 63.14(b)) or equivalent. |
| | b. Composite fuel samples | Procedure in § 63.7521(d) or equivalent. |
| | c. Prepare composited fuel samples | SW–846–3050B (for solid samples) or SW–846–3020A (for liquid samples) or ASTM D2013–01 (for coal)(IBR, see § 63.14(b)) or ASTM D5198–92 (2003) (for biomass)(IBR, see § 63.14(b)) or equivalent. |
| | d. Determine heat content of the fuel type | ASTM D5865–03a (for coal)(IBR, see § 63.14(b)) or ASTM E711–87 (1996) (for biomass)(IBR, see § 63.14(b)) or equivalent. |
| | e. Determine moisture content of the fuel type | ASTM D3173–02 (IBR, see § 63.14(b)) or ASTM E871–82 (1998)(IBR, see § 63.14(b)) or equivalent. |
| | f. Measure chlorine concentration in fuel sample. | SW–846–9250 or ASTM E776–87 (1996) (for biomass)(IBR, see § 63.14(b)) or equivalent. |
| | g. Convert concentrations into units of pounds of pollutant per MMBtu of heat content. | |

TABLE 7 TO SUBPART DDDDD OF PART 63.—ESTABLISHING OPERATING LIMITS

As stated in § 63.7520, you must comply with the following requirements for establishing operating limits:

| If you have an applicable emission limit for . . . | And your operating limits are based on . . . | You must . . . | Using . . . | According to the following requirements |
|---|---|---|---|---|
| 1. Particulate matter, mercury, or total selected metals. | a. Wet scrubber operating parameters. | i. Establish a site-specific minimum pressure drop and minimum flow rate operating limit according to § 63.7530(c). | (1) Data from the pressure drop and liquid flow rate monitors and the particulate matter, mercury, or total selected metals performance test. | (a) You must collect pressure drop and liquid flow-rate data every 15 minutes during the entire period of the performance tests;<br>(b) Determine the average pressure drop and liquid flow-rate for each individual test run in the three-run performance test by computing the average of all the 15-minute readings taken during each test run. |
| | b. Electrostatic precipitator operating parameters (option only for units with additional wet scrubber control). | i. Establish a site-specific minimum voltage and secondary current or total power input according to § 63.7530(c). | (1) Data from the pressure drop and liquid flow rate monitors and the particulate matter, mercury, or total selected metals performance test. | (a) You must collect voltage and secondary current or total power input data every 15 minutes during the entire period of the performance tests;<br>(b) Determine the average voltage and secondary current or total power input for each individual test run in the three-run performance test by computing the average of all the 15-minute readings taken during each test run. |

TABLE 7 TO SUBPART DDDDD OF PART 63.—ESTABLISHING OPERATING LIMITS—Continued

As stated in §63.7520, you must comply with the following requirements for establishing operating limits:

| If you have an applicable emission limit for . . . | And your operating limits are based on . . . | You must . . . | Using . . . | According to the following requirements |
|---|---|---|---|---|
| 2. Hydrogen Chloride ... | a. Wet scrubber operating parameters. | i. Establish a site-specific minimum pressure drop and minimum flow rate operating limit according to §63.7530(c). | (1) Data from the pH, pressure drop, and liquid flow-rate monitors and the hydrogen chloride performance test. | (a) You must collect pH, pressure drop, and liquid flow-rate data every 15 minutes during the entire period of the performance tests;<br>(b) Determine the average pH, pressure drop, and liquid flow-rate for each individual test run in the three-run performance test by computing the average of all the 15-minute readings taken during each test run. |
| | b. Dry scrubber operating parameters. | i. Establish a site-specific minimum sorbent injection rate operating limit according to §63.7530(c). | (1) Data from the sorbent injection rate monitors and hydrogen chloride performance test. | (a) You must collect sorbent injection rate data every 15 minutes during the entire period of the performance tests;<br>(b) Determine the average sorbent injection rate for each individual test run in the three-run performance test by computing the average of all the 15-minute readings taken during each test run. |

TABLE 8 TO SUBPART DDDDD OF PART 63.—DEMONSTRATING CONTINUOUS COMPLIANCE

As stated in §63.7540, you must show continuous compliance with the emission limitations for affected sources according to the following:

| If you must meet the following operating limits or work practice standards . . . | You must demonstrate continuous compliance by . . . |
|---|---|
| 1. Opacity | a. Collecting the opacity monitoring system data according to §§63.7525(b) and 63.7535; and<br>b. Reducing the opacity monitoring data to 6-minute averages; and<br>c. Maintaining opacity to less than or equal to 20 percent (6-minute average) except for one 6-minute period per hour of not more than 27 percent for existing sources; or maintaining opacity to less than or equal to 10 percent (1-hour block average) for new sources. |
| 2. Fabric Filter Bag Leak Detection Operation | Installing and operating a bag leak detection system according to §63.7525 and operating the fabric filter such that the requirements in §63.7540(a)(9) are met. |
| 3. Wet Scrubber Pressure Drop and Liquid Flow-rate | a. Collecting the pressure drop and liquid flow rate monitoring system data according to §§63.7525 and 63.7535; and<br>b. Reducing the data to 3-hour block averages; and<br>c. Maintaining the 3-hour average pressure drop and liquid flow-rate at or above the operating limits established during the performance test according to §63.7530(c). |
| 4. Wet Scrubber pH | a. Collecting the pH monitoring system data according to §§63.7525 and 63.7535; and<br>b. Reducing the data to 3-hour block averages; and<br>c. Maintaining the 3-hour average pH at or above the operating limit established during the performance test according to §63.7530(c). |
| 5. Dry Scrubber Sorbent or Carbon Injection Rate | a. Collecting the sorbent or carbon injection rate monitoring system data for the dry scrubber according to §§63.7525 and 63.7535; and<br>b. Reducing the data to 3-hour block averages; and<br>c. Maintaining the 3-hour average sorbent or carbon injection rate at or above the operating limit established during the performance test according to §§63.7530(c). |
| 6. Electrostatic Precipitator Secondary Current and Voltage or Total Power Input. | a. Collecting the secondary current and voltage or total power input monitoring system data for the electrostatic precipitator according to §§63.7525 and 63.7535; and<br>b. Reducing the data to 3-hour block averages; and |

TABLE 8 TO SUBPART DDDDD OF PART 63.—DEMONSTRATING CONTINUOUS COMPLIANCE—Continued

As stated in § 63.7540, you must show continuous compliance with the emission limitations for affected sources according to the following:

| If you must meet the following operating limits or work practice standards . . . | You must demonstrate continuous compliance by . . . |
|---|---|
| 7. Fuel Pollutant Content | c. Maintaining the 3-hour average secondary current and voltage or total power input at or above the operating limits established during the performance test according to §§ 63.7530(c).<br>a. Only burning the fuel types and fuel mixtures used to demonstrate compliance with the applicable emission limit according to § 63.7530(c) or (d) as applicable; and<br>b. Keeping monthly records of fuel use according to § 63.7540(a). |

TABLE 9 TO SUBPART DDDDD OF PART 63.—REPORTING REQUIREMENTS

As stated in § 63.7550, you must comply with the following requirements for reports:

| You must submit a(n) | The report must contain . . . | You must submit the report . . . |
|---|---|---|
| 1. Compliance report | a. Information required in § 63.7550(c)(1) through (11); and<br>b. If there are no deviations from any emission limitation (emission limit and operating limit) that applies to you and there are no deviations from the requirements for work practice standards in Table 8 to this subpart that apply to you, a statement that there were no deviations from the emission limitations and work practice standards during the reporting period. If there were no periods during which the CMSs, including continuous emissions monitoring system, continuous opacity monitoring system, and operating parameter monitoring systems, were out-of-control as specified in § 63.8(c)(7), a statement that there were no periods during which the CMSs were out-of-control during the reporting period; and<br>c. If you have a deviation from any emission limitation (emission limit and operating limit) or work practice standard during the reporting period, the report must contain the information in § 63.7550(d). If there were periods during which the CMSs, including continuous emissions monitoring system, continuous opacity monitoring system, and operating parameter monitoring systems, were out-of-control, as specified in § 63.8(c)(7), the report must contain the information in § 63.7550(e); and<br>d. If you had a startup, shutdown, or malfunction during the reporting period and you took actions consistent with your startup, shutdown, and malfunction plan, the compliance report must include the information in § 63.10(d)(5)(i) | Semiannually according to the requirements in § 63.7550(b). |
| 2. An immediate startup, shutdown, and malfunction report if you had a startup, shutdown, or malfunction during the reporting period that is not consistent with your startup, shutdown, and malfunction plan, and the source exceeds any applicable emission limitation in the relevant emission standard. | a. Actions taken for the event; and | i. By fax or telephone within 2 working days after starting actions inconsistent with the plan; and |
| | b. The information in § 63.10(d)(5)(ii) | ii. By letter within 7 working days after the end of the event unless you have made alternative arrangements with the permitting authority. |

TABLE 10 TO SUBPART DDDDD OF PART 63.—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART DDDDD

As stated in § 63.7565, you must comply with the applicable General Provisions according to the following:

| Citation | Subject | Brief description | Applicable |
|---|---|---|---|
| § 63.1 | Applicability | Initial Applicability Determination; Applicability After Standard Established; Permit Requirements; Extensions, Notifications. | Yes. |
| § 63.2 | Definitions | Definitions for part 63 standards | Yes. |
| § 63.3 | Units and Abbreviations | Units and abbreviations for part 63 standards. | Yes. |
| § 63.4 | Prohibited Activities | Prohibited Activities: Compliance date; Circumvention, Severability. | Yes. |
| § 63.5 | Construction/Reconstruction | Applicability; applications; approvals | Yes. |
| § 63.6(a) | Applicability | GP apply unless compliance extension; and GP apply to area sources that become major. | Yes. |
| § 63.6(b)(1)–(4) | Compliance Dates for New and Reconstructed sources. | Standards apply at effective date; 3 years after effective date; upon startup; 10 years after construction or reconstruction commences for 112(f). | Yes. |
| § 63.6(b)(5) | Notification | Must notify if commenced construction or reconstruction after proposal. | Yes. |
| § 63.6(b)(6) | [Reserved]. | | |
| § 63.6(b)(7) | Compliance Dates for New and Reconstructed Area Sources That Become Major. | Area sources that become major must comply with major source standards immediately upon becomlng major, regardless of whether required to comply when they were an area source. | Yes. |
| § 63.6(c)(1)–(2) | Compliance Dates for Existing Sources | Comply according to date in subpart, which must be no later than 3 years after effective date; and for 112(f) standards, comply within 90 days of effective date unless compliance extension. | Yes. |
| § 63.6(c)(3)–(4) | [Reserved]. | | |
| § 63.6(c)(5) | Compliance Dates for Existing Area Sources That Become Major. | Area sources that become major must comply with major source standards by date indicated in subpart or by equivalent time period (for example, 3 years). | Yes. |
| § 63.6(d) | [Reserved]. | | |
| § 63.6(e)(1)–(2) | Operation & Maintenance | Operate to minimize emissions at all times; and Correct malfunctions as soon as practicable; and Operation and maintenance requirements independently enforceable; information Administrator will use to determine if operation and maintenance requirements were met. | Yes. |
| § 63.6(e)(3) | Startup, Shutdown, and Malfunction Plan (SSMP). | Requirement for SSM and startup, shutdown, malfunction plan; and content of SSMP. | Yes. |
| § 63.6(f)(1) | Compliance Except During SSM | Comply with emission standards at all times except during SSM. | Yes. |
| § 63.6(f)(2)–(3) | Methods for Determining Compliance | Compliance based on performance test, operation and maintenance plans, records, inspection. | Yes. |
| § 63.6(g)(1)–(3) | Alternative Standard | Procedures for getting an alternative standard. | Yes. |
| § 63.6(h)(1) | Compliance with Opacity/VE Standards | Comply with opacity/VE emission limitations at all times except during SSM. | Yes. |
| § 63.6(h)(2)(i) | Determining Compliance with Opacity/Visible Emission (VE) Standards. | If standard does not state test method, use Method 9 for opacity and Method 22 for VE. | No. |
| § 63.6(h)(2)(ii) | [Reserved]. | | |
| § 63.6(h)(2)(iii) | Using Previous Tests to Demonstrate Compliance with Opacity/VE Standards | Criteria for when previous opacity/VE testing can be used to show compliance with this subpart. | Yes. |
| § 63.6(h)(3) | [Reserved]. | | |
| § 63.6(h)(4) | Notification of Opacity/VE Observation Date. | Notify Administrator of anticipated date of observation. | No. |
| § 63.6(h)(5)(i),(iii)–(v) | Conducting Opacity/VE Observations | Dates and Schedule for conducting opacity/VE observations. | No. |

TABLE 10 TO SUBPART DDDDD OF PART 63.—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART DDDDD—Continued

As stated in § 63.7565, you must comply with the applicable General Provisions according to the following:

| Citation | Subject | Brief description | Applicable |
|---|---|---|---|
| § 63.6(h)(5)(ii) | Opacity Test Duration and Averaging Times. | Must have at least 3 hours of observation with thirty, 6-minute averages. | No. |
| § 63.6(h)(6) | Records of Conditions During Opacity/VE observations. | Keep records available and allow Administrator to inspect. | No. |
| § 63.6(h)(7)(i) | Report continuous opacity monitoring system Monitoring Data from Performance Test. | Submit continuous opacity monitoring system data with other performance test data. | Yes. |
| § 63.6(h)(7)(ii) | Using continuous opacity monitoring system instead of Method 9. | Can submit continuous opacity monitoring system data instead of Method 9 results even if subpart requires Method 9, but must notify Administrator before performance test. | No. |
| § 63.6(h)(7)(iii) | Averaging time for continuous opacity monitoring system during performance test. | To determine compliance, must reduce continuous opacity monitoring system data to 6-minute averages. | Yes. |
| § 63.6(h)(7)(iv) | Continuous opacity monitoring system requirements. | Demonstrate that continuous opacity monitoring system performance evaluations are conducted according to §§ 63.8(e), continuous opacity monitoring systems are properly maintained and operated according to § 63.8(c) and data quality as § 63.8(d). | Yes. |
| § 63.6(h)(7)(v) | Determining Compliance with Opacity/VE Standards. | Continuous opacity monitoring system is probative but not conclusive evidence of compliance with opacity standard, even if Method 9 observation shows otherwise. Requirements for continuous opacity monitoring system to be probative evidence-proper maintenance, meeting PS 1, and data have not been altered. | Yes. |
| § 63.6(h)(8) | Determining Compliance with Opacity/VE Standards. | Administrator will use all continuous opacity monitoring system, Method 9, and Method 22 results, as well as information about operation and maintenance to determine compliance. | Yes. |
| § 63.6(h)(9) | Adjusted Opacity Standard | Procedures for Administrator to adjust an opacity standard. | Yes. |
| § 63.6(i)(1)–(14) | Compliance Extension | Procedures and criteria for Administrator to grant compliance extension. | Yes. |
| § 63.6(j) | Presidential Compliance Exemption | President may exempt source category from requirement to comply with rule. | Yes. |
| § 63.7(a)(1) | Performance Test Dates | Dates for Conducting Initial Performance Testing and Other Compliance Demonstrations. | Yes. |
| § 63.7(a)(2) | Performance Test Dates | New source with initial startup date before effective date has 180 days after effective date to demonstrate compliance | Yes. |
| § 63.7(a)(2)(ii–viii) | [Reserved]. | | |
| § 63.7(a)(2)(ix) | Performance Test Dates | 1. New source that commenced construction between proposal and promulgation dates, when promulgated standard is more stringent than proposed standard, has 180 days after effective date or 180 days after startup of source, whichever is later, to demonstrate compliance; and. | Yes. |
| | | 2. If source initially demonstrates compliance with less stringent proposed standard, it has 3 years and 180 days after the effective date of the standard or 180 days after startup of source, whichever is later, to demonstrate compliance with promulgated standard. | No. |
| § 63.7(a)(3) | Section 114 Authority | Administrator may require a performance test under CAA Section 114 at any time. | Yes. |

TABLE 10 TO SUBPART DDDDD OF PART 63.—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART DDDDD—Continued

As stated in § 63.7565, you must comply with the applicable General Provisions according to the following:

| Citation | Subject | Brief description | Applicable |
|---|---|---|---|
| § 63.7(b)(1) | Notification of Performance Test | Must notify Administrator 60 days before the test. | No. |
| § 63.7(b)(2) | Notification of Rescheduling | If rescheduling a performance test is necessary, must notify Administrator 5 days before scheduled date of rescheduled date. | Yes. |
| § 63.7(c) | Quality Assurance/Test Plan | Requirement to submit site-specific test plan 60 days before the test or on date Administrator agrees with: test plan approval procedures; and performance audit requirements; and internal and external QA procedures for testing. | Yes. |
| § 63.7(d) | Testing Facilities | Requirements for testing facilities | Yes. |
| § 63.7(e)(1) | Conditions for Conducting Performance Tests. | 1. Performance tests must be conducted under representative conditions; and | No. |
| | | 2. Cannot conduct performance tests during SSM; and | Yes. |
| | | 3. Not a deviation to exceed standard during SSM; and | Yes. |
| | | 4. Upon request of Administrator, make available records necessary to determine conditions of performance tests. | Yes. |
| § 63.7(e)(2) | Conditions for Conducting Performance Tests. | Must conduct according to rule and EPA test methods unless Administrator approves alternative. | Yes. |
| § 63.7(e)(3) | Test Run Duration | Must have three separate test runs; and Compliance is based on arithmetic mean of three runs; and conditions when data from an additional test run can be used. | Yes. |
| § 63.7(e)(4) | Interaction with other sections of the Act | Nothing in § 63.7(e)(1) through (4) can abrogate the Administrator's authority to require testing under Section 114 of the Act. | Yes. |
| § 63.7(f) | Alternative Test Method | Procedures by which Administrator can grant approval to use an alternative test method. | Yes. |
| § 63.7(g) | Performance Test Data Analysis | Must include raw data in performance test report; and must submit performance test data 60 days after end of test with the Notification of Compliance Status; and keep data for 5 years. | Yes. |
| § 63.7(h) | Waiver of Tests | Procedures for Administrator to waive performance test. | Yes. |
| § 63.8(a)(1) | Applicability of Monitoring Requirements | Subject to all monitoring requirements in standard. | Yes. |
| § 63.8(a)(2) | Performance Specifications | Performance Specifications in appendix B of part 60 apply. | Yes. |
| § 63.8(a)(3) | [Reserved]. | | |
| § 63.8(a)(4) | Monitoring with Flares | Unless your rule says otherwise, the requirements for flares in § 63.11 apply. | No. |
| §63.8(b)(1)(i)–(ii) | Monitoring | Must conduct monitoring according to standard unless Administrator approves alternative. | Yes. |
| § 63.8(b)(1)(iii) | Monitoring | Flares not subject to this section unless otherwise specified in relevant standard. | No. |
| § 63.8(b)(2)–(3) | Multiple Effluents and Multiple Monitoring Systems. | Specific requirements for installing monitoring systems; and must install on each effluent before it is combined and before it is released to the atmosphere unless Administrator approves otherwise; and if more than one monitoring system on an emission point, must report all monitoring system results, unless one monitoring system is a backup. | Yes. |
| § 63.8(c)(1) | Monitoring System Operation and Maintenance. | Maintain monitoring system in a manner consistent with good air pollution control practices. | Yes. |

TABLE 10 TO SUBPART DDDDD OF PART 63.—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART DDDDD—Continued

As stated in §63.7565, you must comply with the applicable General Provisions according to the following:

| Citation | Subject | Brief description | Applicable |
|---|---|---|---|
| §63.8(c)(1)(i) | Routine and Predictable SSM | Maintain and operate CMS according to §63.6(e)(1). | Yes. |
| §63.8(c)(1)(ii) | SSM not in SSMP | Must keep necessary parts available for routine repairs of CMSs. | Yes. |
| §63.8(c)(1)(iii) | Compliance with Operation and Maintenance Requirements. | Must develop and implement an SSMP for CMSs. | Yes. |
| §63.8(c)(2)–(3) | Monitoring System Installation | Must install to get representative emission and parameter measurements; and must verify operational status before or at performance test. | Yes. |
| §63.8(c)(4) | Continuous Monitoring System (CMS) Requirements. | CMSs must be operating except during breakdown, out-of-control, repair, maintenance, and high-level calibration drifts. | No. |
| §63.8(c)(4)(i) | Continuous Monitoring System (CMS) Requirements. | Continuous opacity monitoring system must have a minimum of one cycle of sampling and analysis for each successive 10-second period and one cycle of data recording for each successive 6-minute period. | Yes. |
| §63.8(c)(4)(ii) | Continuous Monitoring System (CMS) Requirements. | Continuous emissions monitoring system must have a minimum of one cycle of operation for each successive 15-minute period. | No. |
| §63.8(c)(5) | Continuous Opacity Monitoring system (COMS) Requirements. | Must do daily zero and high level calibrations. | Yes. |
| §63.8(c)(6) | Continuous Monitoring System (CMS) Requirements. | Must do daily zero and high level calibrations. | No. |
| §63.8(c)(7)–(8) | Continuous Monitoring Systems Requirements. | Out-of-control periods, including reporting | Yes. |
| §63.8(d) | Continuous Monitoring Systems Quality Control. | Requirements for continuous monitoring systems quality control, including calibration, etc.; and must keep quality control plan on record for the life of the affected source. Keep old versions for 5 years after revisions. | Yes. |
| §63.8(e) | Continuous monitoring systems Performance Evaluation. | Notification, performance evaluation test plan, reports. | Yes. |
| §63.8(f)(1)–(5) | Alternative Monitoring Method | Procedures for Administrator to approve alternative monitoring. | Yes. |
| §63.8(f)(6) | Alternative to Relative Accuracy Test | Procedures for Administrator to approve alternative relative accuracy tests for continuous emissions monitoring system. | No. |
| §63.8(g)(1)–(4) | Data Reduction | Continuous opacity monitoring system 6-minute averages calculated over at least 36 evenly spaced data points; and continuous emissions monitoring system 1-hour averages computed over at least 4 equally spaced data points. | Yes. |
| §63.8(g)(5) | Data Reduction | Data that cannot be used in computing averages for continuous emissions monitoring system and continuous opacity monitoring system. | No. |
| §63.9(a) | Notification Requirements | Applicability and State Delegation | Yes. |
| §63.9(b)(1)–(5) | Initial Notifications | Submit notification 120 days after effective date; and Notification of intent to construct/reconstruct; and Notification of commencement of construct/reconstruct; Notification of startup; and Contents of each. | Yes. |
| §63.9(c) | Request for Compliance Extension | Can request if cannot comply by date or if installed BACT/LAER. | Yes. |
| §63.9(d) | Notification of Special Compliance Requirements for New Source. | For sources that commence construction between proposal and promulgation and want to comply 3 years after effective date. | Yes. |
| §63.9(e) | Notification of Performance Test | Notify Administrator 60 days prior | No. |

TABLE 10 TO SUBPART DDDDD OF PART 63.—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART DDDDD—Continued

As stated in § 63.7565, you must comply with the applicable General Provisions according to the following:

| Citation | Subject | Brief description | Applicable |
|---|---|---|---|
| § 63.9(f) | Notification of VE/Opacity Test | Notify Administrator 30 days prior | No. |
| § 63.9(g) | Additional Notifications When Using Continuous Monitoring Systems. | Notification of performance evaluation; and notification using continuous opacity monitoring system data; and notification that exceeded criterion for relative accuracy. | Yes. |
| § 63.9(h)(1)–(6) | Notification of Compliance Status | Contents; and due 60 days after end of performance test or other compliance demonstration, and when to submit to Federal vs. State authority. | Yes. |
| § 63.9(i) | Adjustment of Submittal Deadlines | Procedures for Administrator to approve change in when notifications must be submitted. | Yes. |
| § 63.9(j) | Change in Previous Information | Must submit within 15 days after the change. | Yes. |
| § 63.10(a) | Recordkeeping/Reporting | Applies to all, unless compliance extension; and when to submit to Federal vs. State authority; and procedures for owners of more than 1 source. | Yes. |
| § 63.10(b)(1) | Recordkeeping/Reporting | General Requirements; and keep all records readily available and keep for 5 years. | Yes. |
| § 63.10(b)(2)(i)–(v) | Records related to Startup, Shutdown, and Malfunction. | Occurrence of each of operation (process, equipment); and occurrence of each malfunction of air pollution equipment; and maintenance of air pollution control equipment; and actions during startup, shutdown, and malfunction. | Yes. |
| § 63.10(b)(2)(vi) and (x–xi) | Continuous monitoring systems Records | Malfunctions, inoperative, out-of-control; and calibration checks; and adjustments, maintenance. | Yes. |
| § 63.10(b)(2)(vii)–(ix) | Records | Measurements to demonstrate compliance with emission limitations; and performance test, performance evaluation, and visible emission observation results; and measurements to determine conditions of performance tests and performance evaluations. | Yes. |
| § 63.10(b)(2)(xii) | Records | Records when under waiver | Yes. |
| § 63.10(b)(2)(xiii) | Records | Records when using alternative to relative accuracy test. | No. |
| § 63.10(b)(2)(xiv) | Records | All documentation supporting Initial Notification and Notification of Compliance Status. | Yes. |
| § 63.10(b)(3) | Records | Applicability Determinations | Yes. |
| § 63.10(c)(1),(5)–(8),(10)–(15) | Records | Additional Records for continuous monitoring systems. | Yes. |
| § 63.10(c)(7)–(8) | Records | Records of excess emissions and parameter monitoring exceedances for continuous monitoring systems. | No. |
| § 63.10(d)(1) | General Reporting Requirements | Requirement to report | Yes. |
| § 63.10(d)(2) | Report of Performance Test Results | When to submit to Federal or State authority. | Yes. |
| § 63.10(d)(3) | Reporting Opacity or VE Observations | What to report and when | Yes. |
| § 63.10(d)(4) | Progress Reports | Must submit progress reports on schedule if under compliance extension. | Yes. |
| § 63.10(d)(5) | Startup, Shutdown, and Malfunction Reports. | Contents and submission | Yes. |
| § 63.10(e)(1)(2) | Additional continuous monitoring systems Reports. | Must report results for each CEM on a unit; and written copy of performance evaluation; and 3 copies of continuous opacity monitoring system performance evaluation. | Yes. |
| § 63.10(e)(3) | Reports | Excess Emission Reports | No. |
| § 63.10(e)(3)(i–iii) | Reports | Schedule for reporting excess emissions and parameter monitor exceedance (now defined as deviations). | No. |

TABLE 10 TO SUBPART DDDDD OF PART 63.—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART DDDDD—Continued

As stated in § 63.7565, you must comply with the applicable General Provisions according to the following:

| Citation | Subject | Brief description | Applicable |
|---|---|---|---|
| § 63.10(e)(3)(iv–v) | Excess Emissions Reports | Requirement to revert to quarterly submission if there is an excess emissions and parameter monitor exceedance (now defined as deviations); and provision to request semiannual reporting after compliance for one year; and submit report by 30th day following end of quarter or calendar half; and if there has not been an exceedance or excess emission (now defined as deviations), report contents is a statement that there have been no deviations. | No. |
| § 63.10(e)(3)(iv–v) | Excess Emissions Reports | Must submit report containing all of the information in § 63.10(c)(5–13), § 63.8(c)(7–8). | No. |
| § 63.10(e)(3)(vi–viii) | Excess Emissions Report and Summary Report. | Requirements for reporting excess emissions for continuous monitoring systems (now called deviations); Requires all of the information in § 63.10(c)(5–13), § 63.8(c)(7–8). | No. |
| § 63.10(e)(4) | Reporting continuous opacity monitoring system data. | Must submit continuous opacity monitoring system data with performance test data. | Yes. |
| § 63.10(f) | Waiver for Recordkeeping/Reporting | Procedures for Administrator to waive | Yes. |
| § 63.11 | Flares | Requirements for flares | No. |
| § 63.12 | Delegation | State authority to enforce standards | Yes. |
| § 63.13 | Addresses | Addresses where reports, notifications, and requests are sent. | Yes. |
| § 63.14 | Incorporation by Reference | Test methods incorporated by reference | Yes. |
| § 63.15 | Availability of Information | Public and confidential Information | Yes. |

## Appendix A to Subpart DDDDD—Methodology and Criteria for Demonstrating Eligibility for the Health-Based Compliance Alternatives Specified for the Large Solid Fuel Subcategory

**1. Purpose/Introduction**

This appendix provides the methodology and criteria for demonstrating that your affected source is eligible for the compliance alternative for the HCl emission limit and/or the total selected metals (TSM) emission limit. This appendix specifies emissions testing methods that you must use to determine HCl, chlorine, and manganese emissions from the affected units and what parts of the affected source facility must be included in the eligibility demonstration. You must demonstrate that your affected source is eligible for the health-based compliance alternatives using either a look-up table analysis (based on the look-up tables included in this appendix) or a site-specific compliance demonstration performed according to the criteria specified in this appendix. This appendix also specifies how and when you file any eligibility demonstrations for your affected source and how to show that your affected source remains eligible for the health-based compliance alternatives in the future.

**2. Who Is Eligible To Demonstrate That They Qualify for the Health-Based Compliance Alternatives?**

Each new, reconstructed, or existing affected source may demonstrate that they are eligible for the health-based compliance alternatives. Section 63.7490 of subpart DDDDD defines the affected source and explains which affected sources are new, existing, or reconstructed.

**3. What Parts of My Facility Have To Be Included in the Health-Based Eligibility Demonstration?**

If you are attempting to determine your eligibility for the compliance alternative for HCl, you must include every emission point subject to subpart DDDDD that emits either HCl or $Cl_2$ in the eligibility demonstration.

If you are attempting to determine your eligibility for the compliance alternative for TSM, you must include every emission point subject to subpart DDDDD that emits manganese in the eligibility demonstration.

**4. How Do I Determine HAP Emissions From My Affected Source?**

(a) You must conduct HAP emissions tests or fuel analysis for every emission point covered under subpart DDDDD within the affected source facility according to the requirements in paragraphs (b) through (f) of this section and the methods specified in Table 1 of this appendix.

(1) If you are attempting to determine your eligibility for the compliance alternative for HCl, you must test the subpart DDDDD units at your facility for both HCl and $Cl_2$. When conducting fuel analysis, you must assume any chlorine detected will be emitted as $Cl_2$.

(2) If you are attempting to determine your eligibility for the compliance alternative for TSM, you must test the subpart DDDDD units at your facility for manganese.

(b) *Periods when emissions tests must be conducted.*

(1) You must not conduct emissions tests during periods of startup, shutdown, or malfunction, as specified in § 63.7(e)(1).

(2) You must test under worst-case operating conditions as defined in this appendix. You must describe your worst-case operating conditions in your performance test report for the process and control systems (if applicable) and explain why the conditions are worst-case.

(c) *Number of test runs.* You must conduct three separate test runs for each test required in this section, as specified in § 63.7(e)(3). Each test run must last at least 1 hour.

(d) *Sampling locations.* Sampling sites must be located at the outlet of the control device and prior to any releases to the atmosphere.

(e) *Collection of monitoring data for HAP control devices.* During the emissions test, you must collect operating parameter monitoring system data at least every 15 minutes during the entire emissions test and establish the site-specific operating requirements in Tables 3 or 4, as appropriate, of subpart DDDDD using data from the monitoring system and the procedures specified in § 63.7530 of subpart DDDDD.

(f) *Nondetect data.* You may treat emissions of an individual HAP as zero if all of the test runs result in a nondetect measurement and the condition in paragraph (f)(1) of this section is met for the manganese test method. Otherwise, nondetect data for individual HAP must be treated as one-half of the method detection limit.

(1) For manganese measured using Method 29 in appendix A to 40 CFR part 60, you analyze samples using atomic absorption spectroscopy (AAS).

(g) You must determine the maximum hourly emission rate for each appropriate emission point according to Equation 1 of this appendix.

$$\text{Max Hourly Emissions} = \sum_{i=1}^{n} (\text{Er} \times \text{Hm}) \qquad \text{(Eq. 1)}$$

Where:

Max Hourly Emissions = Maximum hourly emissions for hydrogen chloride, chlorine, or manganese, in units of pounds per hour.

Er = Emission rate (the 3-run average as determined according to Table 1 of this appendix or the pollutant concentration in the fuel samples analyzed according to § 63.7521) for hydrogen chloride, chlorine, or manganese, in units of pounds per million Btu of heat input.

Hm = Maximum rated heat input capacity of appropriate emission point, in units of million Btu per hour.

**5. What Are the Criteria for Determining If My Facility Is Eligible for the Health-Based Compliance Alternatives?**

(a) Determine the HAP emissions from each appropriate emission point within the affected source facility using the procedures specified in section 4 of this appendix.

(b) Demonstrate that your facility is eligible for either of the health-based compliance alternatives using either the methods described in section 6 of this appendix (look-up table analysis) or section 7 of this appendix (site-specific compliance demonstration).

(c) Your facility is eligible for the health-based compliance alternative for HCl if one of the following two statements is true:

(1) The calculated HCl-equivalent emission rate is below the appropriate value in the look-up table;

(2) Your site-specific compliance demonstration indicates that your maximum HI for HCl and $C1_2$ at a location where people live is less than or equal to 1.0;

(d) Your facility is eligible for the health-based compliance alternative for TSM if one of the following two statements is true:

(1) The manganese emission rate for all your subpart DDDDD sources is below the appropriate value in the look-up table;

(2) Your site-specific compliance demonstration indicates that your maximum HQ for manganese at a location where people live is less than or equal to 1.0.

**6. How Do I Conduct a Look-Up Table Analysis?**

You may use look-up tables to demonstrate that your facility is eligible for either the compliance alternative for the HCl emission limit or the compliance alternative for TSM emission limit.

(a) *HCl health-based compliance alternative.* (1) To calculate the total toxicity-weighted HCl-equivalent emission rate for your facility, first calculate the total affected source emission rate of HCl by summing the maximum hourly HCl emission rates from all your subpart DDDDD sources. Then, similarly, calculate the total affected source emission rate for $Cl_2$. Finally, calculate the toxicity-weighted emission rate (expressed in HCl equivalents) according to Equation 2 of this appendix.

$$ER_{tw} = \sum \left( ER_i \times \left( RfC_{HCl} / RfC_i \right) \right) \qquad \text{(Eq. 2)}$$

Where:

$ER_{tw}$ is the HCl-equivalent emission rate, lb/hr.

$ER_i$ is the emission rate of HAP i in lbs/hr

$RfC_i$ is the reference concentration of HAP i

$RfC_{HCl}$ is the reference concentration of HCl (RfCs for HCl and $Cl_2$ can be found at *http://www.epa.gov/ttn/atw/toxsource/summary.html).*

(2) The calculated HCl-equivalent emission rate will then be compared to the appropriate allowable emission rate in Table 2 of this appendix. To determine the correct value from the table, an average value for the appropriate subpart DDDDD emission points should be used for stack height and the minimum distance between any appropriate subpart DDDDD stack at the facility and the property boundary should be used for property boundary distance. Appropriate emission points and stacks are those that emit HCl and/or $Cl_2$. If one or both of these values does not match the exact values in the lookup tables, then use the next lowest table value. (**Note:** If your average stack height is less than 5 meters, you must use the 5 meter row.) Your facility is eligible to comply with the health-based alternative HCl emission limit if your toxicity-weighted HCl equivalent emission rate, determined using the methods specified in this appendix, does not exceed the appropriate value in Table 2 of this appendix.

(b) *TSM Compliance Alternative.* To calculate the total manganese emission rate for your affected source, sum the maximum hourly manganese emission rates for all your subpart DDDDD sources. The calculated manganese emission rate will then be compared to the allowable emission rate in the Table 3 of this appendix. To determine the correct value from the table, an average value for the appropriate subpart DDDDD emission points should be used for stack height and the minimum distance between any appropriate subpart DDDDD stack at the facility and the property boundary should be used for property boundary distance. Appropriate emission points and stacks are those that emit manganese. If one or both of these values does not match the exact values in the lookup tables, then use the next lowest table value. (**Note:** If your average stack height is less than 5 meters, you must use the 5 meter row.) Your facility may exclude manganese when demonstrating compliance with the TSM emission limit if your manganese emission rate, determined using the methods specified in this appendix, does not exceed the appropriate value specified in Table 3 of this appendix.

**7. How Do I Conduct a Site-Specific Compliance Demonstration?**

If you fail to demonstrate that your facility is able to comply with one or both of the alternative health-based emission standards using the look-up table approach, you may choose to perform a site-specific compliance demonstration for your facility. You may use any scientifically-accepted peer-reviewed risk assessment methodology for your site-specific compliance demonstration. An example of one approach for performing a site-specific compliance demonstration for air toxics can be found in the EPA's "Air Toxics Risk Assessment Reference Library, Volume 2, Site-Specific Risk Assessment Technical Resource Document", which may be obtained through the EPA's Air Toxics Web site at *http://www.epa.gov/ttn/fera/risk_atoxic.html.*

(a) Your facility is eligible for the HCl alternative compliance option if your site-specific compliance demonstration shows that the maximum HI for HCl and $Cl_2$ from your subpart DDDDD sources is less than or equal to 1.0.

(b) Your facility is eligible for the TSM alternative compliance option if your site-specific compliance demonstration shows that the maximum HQ for manganese from your subpart DDDDD sources is less than or equal to 1.0.

(c) At a minimum, your site-specific compliance demonstration must:

(1) Estimate long-term inhalation exposures through the estimation of annual

or multi-year average ambient concentrations;

(2) Estimate the inhalation exposure for the individual most exposed to the facility's emissions;

(3) Use site-specific, quality-assured data wherever possible;

(4) Use health-protective default assumptions wherever site-specific data are not available, and;

(5) Contain adequate documentation of the data and methods used for the assessment so that it is transparent and can be reproduced by an experienced risk assessor and emissions measurement expert.

(d) Your site-specific compliance demonstration need not:

(1) Assume any attenuation of exposure concentrations due to the penetration of outdoor pollutants into indoor exposure areas;

(2) Assume any reaction or deposition of the emitted pollutants during transport from the emission point to the point of exposure.

**8. What Must My Health-Based Eligibility Demonstration Contain?**

(a) Your health-based eligibility demonstration must contain, at a minimum, the information specified in paragraphs (a)(1) through (6) of this section.

(1) Identification of each appropriate emission point at the affected source facility, including the maximum rated capacity of each appropriate emission point.

(2) Stack parameters for each appropriate emission point including, but not limited to, the parameters listed in paragraphs (a)(2)(i) through (iv) below:

(i) Emission release type.

(ii) Stack height, stack area, stack gas temperature, and stack gas exit velocity.

(iii) Plot plan showing all emission points, nearby residences, and fenceline.

(iv) Identification of any control devices used to reduce emissions from each appropriate emission point.

(3) Emission test reports for each pollutant and appropriate emission point which has been tested using the test methods specified in Table 1 of this appendix, including a description of the process parameters identified as being worst case. Fuel analyses for each fuel and emission point which has been conducted including collection and analytical methods used.

(4) Identification of the RfC values used in your look-up table analysis or site-specific compliance demonstration.

(5) Calculations used to determine the HCl-equivalent or manganese emission rates according to sections 6(a) or (b) of this appendix.

(6) Identification of the controlling process factors (including, but not limited to, fuel type, heat input rate, type of control devices, process parameters reflecting the emissions rates used for your eligibility demonstration) that will become Federally enforceable permit conditions used to show that your facility remains eligible for the health-based compliance alternatives.

(b) If you use the look-up table analysis in section 6 of this appendix to demonstrate that your facility is eligible for either health-based compliance alternative, your eligibility demonstration must contain, at a minimum, the information in paragraphs (a) and (b)(1) through (3) of this section.

(1) Calculations used to determine the average stack height of the subpart DDDDD emission points that emit either manganese or HCl and $Cl_2$.

(2) Identification of the subpart DDDDD emission point, that emits either manganese or HCl and $Cl_2$, with the minimum distance to the property boundary of the facility.

(3) Comparison of the values in the look-up tables (Tables 2 and 3 of this appendix) to your maximum HCl-equivalent or manganese emission rates.

(c) If you use a site-specific compliance demonstration as described in section 7 of this appendix to demonstrate that your facility is eligible, your eligibility demonstration must contain, at a minimum, the information in paragraphs (a) and (c)(1) through (7) of this section:

(1) Identification of the risk assessment methodology used.

(2) Documentation of the fate and transport model used.

(3) Documentation of the fate and transport model inputs, including the information described in paragraphs (a)(1) through (5) of this section converted to the dimensions required for the model and all of the following that apply: meteorological data; building, land use, and terrain data; receptor locations and population data; and other facility-specific parameters input into the model.

(4) Documentation of the fate and transport model outputs.

(5) Documentation of any exposure assessment and risk characterization calculations.

(6) Comparison of the HQ HI to the limit of 1.0.

**9. When Do I Have to Complete and Submit My Health-Based Eligibility Demonstration?**

(a) If you have an existing affected source, you must complete and submit your eligibility demonstration to your permitting authority, along with a signed certification that the demonstration is an accurate depiction of your facility, no later than the date one year prior to the compliance date of subpart DDDDD. A separate copy of the eligibility demonstration must be submitted to: U.S. EPA, Risk and Exposure Assessment Group, Emission Standards Division (C404–01), Attn: Group Leader, Research Triangle Park, North Carolina 27711, electronic mail address *REAG@epa.gov*.

(b) If you have a new or reconstructed affected source that starts up before the effective date of subpart DDDDD, or an affected source that is an area source that increases its emissions or its potential to emit such that it becomes a major source of HAP before the effective date of subpart DDDDD, then you must comply with the requirements of subpart DDDDD until your eligibility demonstration is completed and submitted to your permitting authority.

(c) If you have a new or reconstructed affected source that starts up after the effective date of subpart DDDDD, or an affected source that is an area source that increases its emissions or its potential to emit such that it becomes a major source of HAP after the effective date for subpart DDDDD, then you must follow the schedule in paragraphs (c)(1) and (2) of this section.

(1) You must complete and submit a preliminary eligibility demonstration based on the information (*e.g.*, equipment types, estimated emission rates, etc.) used to obtain your title V permit. You must base your preliminary eligibility demonstration on the maximum emissions allowed under your title V permit. If the preliminary eligibility demonstration indicates that your affected source facility is eligible for either compliance alternative, then you may start up your new affected source and your new affected source will be considered in compliance with the alternative HCl standard and subject to the compliance requirements in this appendix or, in the case of manganese, your compliance demonstration with the TSM emission limit is based on 7 metals (excluding manganese).

(2) You must conduct the emission tests or fuel analysis specified in section 4 of this appendix upon initial startup and use the results of these emissions tests to complete and submit your eligibility demonstration within 180 days following your initial startup date. To be eligible, you must meet the criteria in section 11 of this appendix within 18 months following initial startup of your affected source.

**10. When Do I Become Eligible for the Health-Based Compliance Alternatives?**

To be eligible for either health-based compliance alternative, the parameters that defined your affected source as eligible for the health-based compliance alternatives (including, but not limited to, fuel type, fuel mix (annual average), type of control devices, process parameters reflecting the emissions rates used for your eligibility demonstration) must be submitted for incorporation as Federally enforceable limits into your title V permit. If you do not meet these criteria, then your affected source is subject to the applicable emission limits, operating limits, and work practice standards in Subpart DDDDD.

**11. How Do I Ensure That My Facility Remains Eligible for the Health-Based Compliance Alternatives?**

(a) You must update your eligibility demonstration and resubmit it each time you have a process change, such that any of the parameters that defined your affected source changes in a way that could result in increased HAP emissions (including, but not limited to, fuel type, fuel mix (annual average), change in type of control device, changes in process parameters documented as worst-case conditions during the emissions testing used for your approved eligibility demonstration).

(b) If you are updating your eligibility demonstration to account for an action in paragraph (a) of this section, then you must perform emission testing or fuel analysis according to section 4 of this appendix for the subpart DDDDD emission points that may have increased HAP emissions beyond the levels reflected in your previously approved eligibility demonstration due to the process

change. You must submit your revised eligibility demonstration to the permitting authority prior to revising your permit to incorporate the process change. If your updated eligibility demonstration indicates that your affected source is no longer eligible for the health-based compliance alternatives, then you must comply with the applicable emission limits, operating limits, and compliance requirements in Subpart DDDDD prior to making the process change and revising your permit.

**12. What Records Must I Keep?**

You must keep records of the information used in developing the eligibility demonstration for your affected source, including all of the information specified in section 8 of this appendix.

**13. Definitions**

The definitions in § 63.7575 of subpart DDDDD apply to this appendix. Additional definitions applicable for this appendix are as follows:

*Hazard Index (HI)* means the sum of more than one hazard quotient for multiple substances and/or multiple exposure pathways.

*Hazard Quotient (HQ)* means the ratio of the predicted media concentration of a pollutant to the media concentration at which no adverse effects are expected. For inhalation exposures, the HQ is calculated as the air concentration divided by the RfC.

*Look-up table analysis* means a risk screening analysis based on comparing the HAP or HAP-equivalent emission rate from the affected source to the appropriate maximum allowable HAP or HAP-equivalent emission rates specified in Tables 2 and 3 of this appendix.

*Reference Concentration (RfC)* means an estimate (with uncertainty spanning perhaps an order of magnitude) of a continuous inhalation exposure to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime. It can be derived from various types of human or animal data, with uncertainty factors generally applied to reflect limitations of the data used.

*Worst-case operating conditions* means operation of an affected unit during emissions testing under the conditions that result in the highest HAP emissions or that result in the emissions stream composition (including HAP and non-HAP) that is most challenging for the control device if a control device is used. For example, worst-case conditions could include operation of an affected unit firing solid fuel likely to produce the most HAP.

TABLE 1 TO APPENDIX B OF SUBPART DDDDD—EMISSION TEST METHODS

| For . . . | You must . . . | Using . . . |
|---|---|---|
| (1) Each subpart DDDDD emission point for which you choose to use a compliance alternative. | Select sampling ports' location and the number of traverse points. | Method 1 of 40 CFR part 60, appendix A. |
| (2) Each subpart DDDDD emission point for which you choose to use a compliance alternative. | Determine velocity and volumetric flow rate; ... | Method 2, 2F, or 2G in appendix A to 40 CFR part 60. |
| (3) Each subpart DDDDD emission point for which you choose to use a compliance alternative. | Conduct gas molecular weight analysis ..... | Method 3A or 3B in appendix A to 40 CFR part 60. |
| (4) Each subpart DDDDD emission point for which you choose to use a compliance alternative. | Measure moisture content of the stack gas .... | Method 4 in appendix A to 40 CFR part 60. |
| (5) Each subpart DDDDD emission point for which you choose to use the HCl compliance alternative. | Measure the hydrogen chloride and chlorine emission concentrations. | Method 26 or 26A in appendix A to 40 CFR part 60. |
| (6) Each subpart DDDDD emission point for which you choose to use the TSM compliance alternative. | Measure the manganese emission concentration. | Method 29 in appendix A to 40 CFR part 60. |
| (7) Each subpart DDDDD emission point for which you choose to use a compliance alternative. | Convert emissions concentration to lb per MMBtu emission rates. | Method 19 F-factor methodology in appendix A to part 60 of this chapter. |

TABLE 2 TO APPENDIX A OF SUBPART DDDDD—ALLOWABLE TOXICITY-WEIGHTED EMISSION RATE EXPRESSED IN HCl EQUIVALENTS (lbs/hr)

| Stack ht. (m) | Distance to property boundary (m) | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 0 | 50 | 100 | 150 | 200 | 250 | 500 | 1000 | 1500 | 2000 | 3000 | 5000 |
| 5 | 114.9 | 114.9 | 114.9 | 114.9 | 114.9 | 114.9 | 144.3 | 287.3 | 373.0 | 373.0 | 373.0 | 373.0 |
| 10 | 188.5 | 188.5 | 188.5 | 188.5 | 188.5 | 188.5 | 195.3 | 328.0 | 432.5 | 432.5 | 432.5 | 432.5 |
| 20 | 386.1 | 386.1 | 386.1 | 386.1 | 386.1 | 386.1 | 386.1 | 425.4 | 580.0 | 602.7 | 602.7 | 602.7 |
| 30 | 396.1 | 396.1 | 396.1 | 396.1 | 396.1 | 396.1 | 396.1 | 436.3 | 596.2 | 690.6 | 807.8 | 816.5 |
| 40 | 408.1 | 408.1 | 408.1 | 408.1 | 408.1 | 408.1 | 408.1 | 448.2 | 613.3 | 715.5 | 832.2 | 966.0 |
| 50 | 421.4 | 421.4 | 421.4 | 421.4 | 421.4 | 421.4 | 421.4 | 460.6 | 631.0 | 746.3 | 858.2 | 1002.8 |
| 60 | 435.5 | 435.5 | 435.5 | 435.5 | 435.5 | 435.5 | 435.5 | 473.4 | 649.0 | 778.6 | 885.0 | 1043.4 |
| 70 | 450.2 | 450.2 | 450.2 | 450.2 | 450.2 | 450.2 | 450.2 | 486.6 | 667.4 | 813.8 | 912.4 | 1087.4 |
| 80 | 465.5 | 465.5 | 465.5 | 465.5 | 465.5 | 465.5 | 465.5 | 500.0 | 685.9 | 849.8 | 940.9 | 1134.8 |
| 100 | 497.5 | 497.5 | 497.5 | 497.5 | 497.5 | 497.5 | 497.5 | 527.4 | 723.6 | 917.1 | 1001.2 | 1241.3 |
| 200 | 677.3 | 677.3 | 677.3 | 677.3 | 677.3 | 677.3 | 677.3 | 682.3 | 919.8 | 1167.1 | 1390.4 | 1924.6 |

TABLE 3 TO APPENDIX A OF SUBPART DDDDD—ALLOWABLE MANGANESE EMISSION RATE (lbs/hr)

| Stack ht. (m) | Distance to property boundary (m) | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 0 | 50 | 100 | 150 | 200 | 250 | 500 | 1000 | 1500 | 2000 | 3000 | 5000 |
| 5 | 0.29 | 0.29 | 0.29 | 0.29 | 0.29 | 0.29 | 0.36 | 0.72 | 0.93 | 0.93 | 0.93 | 0.94 |
| 10 | 0.47 | 0.47 | 0.47 | 0.47 | 0.47 | 0.47 | 0.49 | 0.82 | 1.08 | 1.08 | 1.08 | 1.08 |
| 20 | 0.97 | 0.97 | 0.97 | 0.97 | 0.97 | 0.97 | 0.97 | 1.06 | 1.45 | 1.51 | 1.51 | 1.51 |
| 30 | 0.99 | 0.99 | 0.99 | 0.99 | 0.99 | 0.99 | 0.99 | 1.09 | 1.49 | 1.72 | 2.02 | 2.04 |
| 40 | 1.02 | 1.02 | 1.02 | 1.02 | 1.02 | 1.02 | 1.02 | 1.12 | 1.53 | 1.79 | 2.08 | 2.42 |
| 50 | 1.05 | 1.05 | 1.05 | 1.05 | 1.05 | 1.05 | 1.05 | 1.15 | 1.58 | 1.87 | 2.15 | 2.51 |
| 60 | 1.09 | 1.09 | 1.09 | 1.09 | 1.09 | 1.09 | 1.09 | 1.18 | 1.62 | 1.95 | 2.21 | 2.61 |
| 70 | 1.13 | 1.13 | 1.13 | 1.13 | 1.13 | 1.13 | 1.13 | 1.22 | 1.67 | 2.03 | 2.28 | 2.72 |
| 80 | 1.16 | 1.16 | 1.16 | 1.16 | 1.16 | 1.16 | 1.16 | 1.25 | 1.71 | 2.12 | 2.35 | 2.84 |
| 100 | 1.24 | 1.24 | 1.24 | 1.24 | 1.24 | 1.24 | 1.24 | 1.32 | 1.81 | 2.29 | 2.50 | 3.10 |
| 200 | 1.69 | 1.69 | 1.69 | 1.69 | 1.69 | 1.69 | 1.69 | 1.71 | 2.30 | 2.92 | 3.48 | 4.81 |

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September 13, 2004

Part III

# Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 216

**Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP); Final Rule**

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 040806232–4232–01, I.D. 041404C]

RIN 0648–AS45

## Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP)

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

**ACTION:** Final rule.

**SUMMARY:** NMFS issues a final rule to implement provisions of the International Dolphin Conservation Program Act (IDCPA). This rule replaces the interim rule published in the **Federal Register** on January 3, 2000. This final rule makes technical changes and clarifications to the interim final rule which is already in effect. The interim final rule allows the entry of yellowfin tuna into the United States under certain conditions from nations fully complying with the International Dolphin Conservation Program (IDCP) and the Agreement on the IDCP. The interim final rule establishes a standard for the use of "dolphin-safe" labels for tuna products and also establishes a tuna-tracking and verification program to ensure that the dolphin-safe status of tuna domestically produced and imported into the United States is documented. This final rule does not contain substantive changes to the actions implemented in the interim final rule unless suggested by commenters.

**DATES:** Effective October 13, 2004.

**ADDRESSES:** Written comments on the collection-of-information requirements should be sent to Jeremy Rusin, NMFS, Southwest Region, Protected Resources Division, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213. Comments also may via sent via facsimile (fax) to (562) 980–4027.

**FOR FURTHER INFORMATION CONTACT:** Jeremy Rusin, NMFS, Southwest Region, Protected Resources Division, (562) 980–3248.

**SUPPLEMENTARY INFORMATION:**

### Background

In 1992, ten nations fishing for tuna in the ETP, including the United States, reached a non-binding international agreement (referred to as the La Jolla Agreement) that included, among other measures, a schedule for significantly reducing dolphin mortality. (These nations included Colombia, Costa Rica, Ecuador, Mexico, Nicaragua, Spain, Panama, Vanuatu, Venezuela and the United States.) By 1993, nations fishing in the ETP under the La Jolla Agreement had reduced dolphin mortality to less than 5,000 dolphins annually, 6 years ahead of the schedule established in that Agreement. In October 1995, the success of the La Jolla Agreement led the United States, Belize, Colombia, Costa Rica, Ecuador, France, Honduras, Mexico, Panama, Spain, Vanuatu, and Venezuela to sign the Panama Declaration, another voluntary measure, to strengthen and enhance the IDCP.

The program outlined in the Panama Declaration provided greater protection for dolphins and enhanced the conservation of yellowfin tuna and other living marine resources in the ETP ecosystem. The signers of the Panama Declaration anticipated that the United States would amend the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 *et seq.*) to allow import of yellowfin tuna into the United States from nations that are participating in, and are in compliance with, the IDCP. Implementation of the Panama Declaration by the United States was also anticipated to allow U.S. vessels to participate in the ETP fishery on an equal basis with the vessels of other nations. Under the Panama Declaration, signatory nations agreed to develop a legally binding, international agreement.

The IDCPA was signed into law August 15, 1997, and became effective March 3, 1999. The IDCPA was the United States' domestic endorsement of the Panama Declaration. The IDCPA amends the MMPA, the Dolphin Protection Consumer Information Act (DPCIA) (16 U.S.C. 1385), and the Tuna Conventions Act, 16 U.S.C. 951 *et seq.* It provides a framework for governing marine mammal mortality incidental to the U.S. ETP tuna purse seine fishery and the importation of yellowfin tuna and yellowfin tuna products from other nations with vessels engaged in the ETP tuna purse seine fishery.

### Agreement on the IDCP

The IDCPA, together with the Panama Declaration, became the blueprint for the Agreement on the IDCP. In May 1998, eight nations, including the United States, signed a binding, international agreement to implement the IDCP. The Agreement on the IDCP became effective on February 15, 1999, after Mexico became the fourth nation to ratify the Agreement.

The nations who are Parties to the Agreement on the IDCP agreed that 1999 would be a transition year and that 2000 would be the first year the Agreement would be fully implemented and nations would operate under the Agreement. This final rule is intended to implement the IDCPA and the Agreement for dolphin conservation in the ETP.

### Proposed Rule and Interim Final Rule

On June 14, 1999, NMFS published proposed regulations to implement the IDCPA (64 FR 31806). These regulations proposed to: (1) allow the entry of yellowfin tuna into the United States under certain conditions from nations fully complying with the IDCP; (2) allow U.S. vessels to set their purse seines on dolphins in the ETP; (3) change the standard for the use of dolphin-safe labels for tuna products and; (4) establish a system of tracking and verification for tuna harvested by U.S. and foreign vessels in the ETP that enter the commerce of the United States.

Public comments on the proposed rule were accepted through July 14, 1999. Several commenters on the proposed rule stated that the 30–day comment period for this proposed rule was too short and requested an extension of the public comment period. To accommodate this, NMFS published an interim final rule (65 FR 31, January 3, 2000) with a 90–day comment period, instead of a final rule. Public comments on the interim final rule were accepted through April 3, 2000. NMFS held two public hearings on the proposed rule: one in Long Beach, CA on July 8, 1999, and one in Silver Spring, MD on July 14, 1999. In addition to publication of the interim final rule in the **Federal Register**, NMFS sent the proposed rule and the interim final rule to industry representatives, environmental organizations, vessel and operator permit holders, importers, IDCP member nations, Department of State (DoS), Inter-American Tropical Tuna Commission (IATTC), U.S. Commissioners to the IATTC, Department of the Treasury, U.S. Customs Service, Marine Mammal Commission, Department of Justice, and the Federal Trade Commission. NMFS also issued press releases announcing the availability of the proposed rule and the interim final rule. Information in the press release was published in several national newspapers and on NMFS websites and was broadcast on several radio stations.

*Litigation: Labeling Standard*

On August 17, 1999, in response to NMFS' issuance of the initial finding mandated under paragraph (g)(1) of the DPCIA, twelve environmental

organizations and individuals filed a complaint against the Department of Commerce and NMFS alleging that NMFS violated the MMPA, the DPCIA, the IDCPA and the National Environmental Policy Act (NEPA). The plaintiffs in *Brower* v. *Daley* sought to prevent the change of the dolphin-safe labeling standard that had resulted from NMFS' initial finding. The plaintiffs alleged that NMFS failed to follow the requirements of these Acts in its April 29, 1999, initial finding that there was insufficient evidence to conclude that the encirclement of dolphins with purse seine nets by fishing vessels in the ETP was having a significant adverse impact on depleted ETP dolphin stocks. Under NMFS' initial finding, the dolphin-safe labeling standard changed to the definition under paragraph (h)(1) of the DPCIA. This definition states that tuna harvested by "large purse seine vessels," i.e. vessels with carrying capacity greater than 400 short tons (st), in the ETP may be labeled dolphin-safe only if no dolphins were killed or seriously injured during the sets in which the tuna were caught.

On April 11, 2000, the U.S. District Court for the Northern District of California reversed NMFS' initial finding and reinstated the dolphin-safe labeling standard under paragraph (h)(2) of the DPCIA (*Brower* v. *Daley*, 93 F.Supp.2d 1071). Under this ruling, tuna harvested in the ETP could be labeled dolphin-safe only if no dolphins were intentionally encircled during the fishing trip and if no dolphins were killed or seriously injured during the sets in which the tuna were caught. On May 18, 2000, the Federal defendants appealed the order of the District Court. On July 23, 2001, the U.S. Court of Appeals for the Ninth Circuit upheld the District Court decision (*Brower* v. *Evans*, 257 F.3d 1058). The appellate court ruled that (1) NMFS had not made sufficient progress in the required scientific research and (2) NMFS' decision was inconsistent with the DPCIA, which requires the Secretary of Commerce (Secretary) to determine whether or not there was an adverse impact on depleted dolphin stocks from chase and encirclement.

On December 31, 2002, NMFS, on behalf of the Secretary, made a final finding, based on the results of required research, information obtained under the IDCP, and other relevant information, that the intentional deployment on or encirclement of dolphins with purse seine nets is not having a "significant adverse impact" on any depleted dolphin stock in the ETP (68 FR 2010, January 15, 2003). This finding meant that tuna harvested by large purse seine vessels in the ETP could be labeled dolphin-safe even if dolphins were encircled or chased, provided that no dolphins were killed or seriously injured in the set in which the tuna was harvested. The finding, and the change in the labeling standard, became effective immediately on December 31, 2002..This determination was based largely on the results of research projects mandated by Section 304 of the MMPA. NMFS conducted the research to determine if, despite the relatively low levels of observed mortality, the intentional chase and encirclement of dolphins by the tuna industry is having a significant adverse impact on any of the depleted dolphin stocks. The research results, including those of a chase-recapture experiment on dolphins in the ETP and other relevant information, were considered by the Secretary for the final dolphin-safe determination.

Also on December 31, 2002, Earth Island Institute, eight other environmental groups, and one individual filed a lawsuit against the Secretary in an effort to overturn the final finding. On January 22, 2003, the United States District Court for the Northern District of California issued an order that stayed the implementation of the final finding (*Earth Island Institute et al.* v. *Evans et al.*, C 03–0007 TEH, N.D.Cal.). Under the terms of the order, the dolphin-safe labeling standard for tuna harvested by large purse seine vessels in the ETP reverted to the standard in effect immediately prior to the December 31, 2002, final finding. The terms of the order, outlined in the **Federal Register** (68 FR 4449, January 29, 2003), further provide that this labeling standard shall remain in effect for 90 days from the date of the order or until a ruling is issued on a motion for a preliminary injunction, which will also be published in the **Federal Register**. The stay was agreed to by all parties involved in the Earth Island Institute lawsuit. On April 10, 2003, the District Court issued a preliminary injunction that orders NMFS not to implement the final finding or the new dolphin-safe labeling standard (*Earth Island Institute et al.* v. *Evans et al.*, C 03–0007 THE, N.D.Cal.). In an August 9, 2004, decision, the District Court set aside the final finding and declared that "dolphin-safe" may be used only on tuna products harvested by large purse seine vessels in the ETP if the tuna were caught on a trip in which (1) the purse seine was never intentionally deployed on or to encircle dolphins, and (2) no dolphins were killed or seriously injured during the sets in which the tuna were caught.

*Litigation: Implementing Regulations*

On February 8, 2000, Defenders of Wildlife and other environmental organizations filed suit against the Assistant Administrator for Fisheries, NMFS, in the U.S. Court of International Trade. The plaintiffs alleged that NMFS did not lawfully follow the IDCPA, NEPA, and the Administrative Procedure Act in the implementation of the IDCPA. The plaintiffs motioned the Court for a preliminary injunction to prevent NMFS from making "affirmative findings" that would lift embargoes against Mexico or other ETP tuna fishing nations. This motion was denied on April 14, 2000.

On December 7, 2001, the Court of International Trade denied plaintiffs' motion for summary judgement and dismissed the lawsuit against NMFS (*Defenders of Wildlife* v. *Hogarth*, 177 F.Supp.2d 1336). The Court agreed with NMFS' interpretation of the IDCPA and upheld the legality of the January 2000 interim final rule in regard to several very specific allegations. The Court also affirmed that the Federal government complied with NEPA in promulgating the interim final rule and in negotiating the 1999 Agreement on the IDCP. Finally, the Court held that NMFS' affirmative finding for Mexico was not arbitrary and capricious. The affirmative finding allows Mexico to export to the United States yellowfin tuna and yellowfin tuna products harvested in the ETP using purse seine vessels. The U.S. Court of Appeals for the Federal Circuit upheld the Court of International Trade's decision. Plaintiffs appealed to the U.S. Supreme Court and the Court declined to entertain the appeal on May 3, 2004.

**Responses to Comments**

NMFS received over 800 comments during the comment period for the interim final rule. Comments were received from tuna industry organizations, environmental organizations, members of the public, DoS, U.S. Customs Service. and foreign nations. Key issues and concerns are summarized below and responded to as follows:

*Import Procedures*

*Comment 1:* For clarification purposes, revise the last sentence of § 216.24(f)(9)(vi) to read as follows: "Since shipments destined for the United States on a through bill of lading at the time of the original shipment are neither imported for consumption in the 'intermediary nation' nor exported

therefrom under 50 CFR 216.24(f)(9)(viii), the nation would not be considered an 'intermediary nation' under the MMPA.≥

*Response:* NMFS has revised the sentence to clarify its meaning. This sentence appears in § 216.24(f)(9)(ii) of this final rule.

*Comment 2:* NMFS has never requested that the U.S. Customs Service monitor compliance with the dolphin-safe labeling requirements. This would involve a significant increase in Customs Inspection workload. Before any Customs enforcement actions could be taken both agencies would have to concur in the development of a practical implementation plan.

*Response:* U.S. Customs' monitoring of imports of certain frozen and canned tuna shipments enables NMFS to monitor compliance with the dolphin-safe labeling requirements. NMFS is working with U.S. Customs to develop a practicable implementation plan for enforcement of NMFS tuna import requirements.

*Comment 3:* Over 95 percent of all U.S. Customs entries are electronic. Therefore, requiring submission of a paper Fisheries Certificate of Origin ((FCO), NOAA Form 370) at the time of importation inhibits the automation initiative of the U.S. Custom Service.

*Response:* NMFS and U.S. Customs have agreed that, for the foreseeable future, import shipments of tuna and tuna products that require an accompanying FCO may not be entered electronically.

*Comment 4:* If fish is denied entry, that action per se constitutes a U.S. Customs refusal of admission and no formal notice of such refusal is issued by Customs. Please remove the phrase "and shall issue a notice of such refusal to the importer or consignee" at the end of § 216.24(f)(10). The issue of 'notice of refusal' and 'redelivery' should be discussed by Customs and NMFS further.

*Response:* NMFS consulted with U.S. Customs and made the requested changes.

*Comment 5:* The regulations describe the old FCO that references non-encirclement of dolphins instead of the new FCO that references the Tuna Tracking Form and non-mortality or serious injury.

*Response:* The regulations are fully up to date. Section 216.24(f)(3) and (4) describe, in general terms, the requirements for processing and maintaining the FCOs.

*Comment 6:* The regulations should include a provision for seizure of a product that is neither exported nor destroyed after the 90–day period has elapsed.

*Response:* NMFS revised § 216.24(f)(11) accordingly.

*Comment 7:* U.S. Customs has informed NMFS that Harmonized Tariff Schedule (HTS) number 1605.90.6055 (which appears in § 216.24(f)(2)(iii)(B)) has changed from "Squid, loligo, prepared/preserved" to "Squid, other, prepared/preserved." U.S. Customs also informed NMFS that the current HTS number for "Squid, loligo, prepared/preserved" is 1605.90.6050. The commenter indicated that these changes should be reflected in the regulations.

*Response:* NMFS has reviewed and updated all HTS numbers applicable to this final rule and has made the appropriate changes in § 216.24(f)(2)(iii)(B).

*Definitions*

*Comment 8:* The definition of "Serious injury" under § 216.3 is not descriptive enough to be used by official observers to determine whether or not a dolphin is seriously injured.

*Response:* The definition will enable officials to determine whether or not a dolphin is seriously injured. Further, an overly descriptive definition has the potential to restrict one's ability to categorize an injury as serious. Observers are responsible for noting information regarding any interactions with marine mammals; however, observers are not expected to determine whether or not a dolphin is seriously injured. The IATTC reviews and evaluates the Observer Forms, and the IATTC and NMFS evaluate individual reported injuries using criteria developed by the international program.

*Application for Vessel Permit*

*Comment 9:* Section 216.24(b)(4) should specifically require the name and address of the owner of the vessel if it is different from the applicant.

*Response:* MMPA section 306(a)(1)(A), 16 U.S.C. 1416(a)(1)(A), directs the Secretary to require the submission of the name and address of the owner of each vessel for which a vessel permit is sought. NMFS has addressed this issue in these regulations and the vessel permit application process. The vessel permit application specifically requires the name and address of the owner of the vessel if it is different from the applicant.

*Observer Placement*

*Comment 10:* In order to ensure the competitiveness of U.S. purse seine vessels fishing pursuant to the South Pacific Tuna Treaty in the western Pacific Ocean, the Forum Fisheries Agency (FFA) observers should be approved for use in the ETP by the IDCP and the Administrator.

*Response:* A vessel that does not normally fish for tuna in the ETP (for example, a vessel that typically fishes in the western Pacific Ocean) but desires to participate in the ETP fishery on a limited basis may do so after complying with § 216.24. FFA observers have been approved for use in the Agreement Area of the Agreement on the IDCP. The IATTC is currently training FFA observers to record data on IATTC forms for compatibility and consistency.

Mortality and Serious Injury Reports

*Comment 11:* Section 216.24(b)(9) requires that the Secretary provide to the public "periodic status reports summarizing the estimated incidental dolphin mortality and serious injury by U.S. vessels." These reports should be completed on either a quarterly or bi-annual basis.

*Response:* NMFS provides this information on an annual basis. This information can be found in the Marine Mammal Protection Act Annual Reports. Historically, NMFS issued weekly reports of dolphin mortality in the ETP tuna purse seine fishery to assist the public in observing compliance with dolphin mortality quotas; however, U.S. vessels have not made intentional sets on dolphins since February 1994. While U.S. vessels continue to abstain from intentionally setting on dolphins, NMFS believes annual reports are adequate. In the event that U.S. vessels begin setting on dolphins, the regulations provide the flexibility for NMFS to issue more frequent reports.

*Purse Seining by Vessels With Dolphin Mortality Limits (DMLs)*

*Comment 12:* There is no requirement or mechanism for any reduction in dolphin mortality in the regulations. We recommend that the regulations provide incentives to the vessels to reduce DMLs. Two possible incentives are (1) monetary reimbursement for unused DMLs or (2) ability to sell unused DMLs to other vessels. In addition, there should be civil and criminal penalties against persons who exceed their DML.

*Response:* The Parties to the Agreement on the IDCP, of which the United States is a member, established a working group to develop incentives and rewards to encourage vessel operators to reduce dolphin mortality. Recently, this working group selected vessel operators who had met or exceeded the criteria for high performing captains in reducing dolphin mortality in this fishery and awarded them with plaques recognizing

their performance. This working group will continue to develop incentives for vessel captains and methods to reduce dolphin mortality. Additionally, while penalties are not part of these regulations, § 216.24(c)(9)(v) provides that a DML assigned to a U.S. vessel that exceeded its DML in a given year will be reduced by 150 percent of the overage in the following year.

*Comment 13:* These regulations create incentives for tuna fishermen to set on and potentially kill the maximum number of dolphins allowed under the international system.

*Response:* These regulations do not create an incentive for tuna fishermen to set on dolphins. Since the implementation of these regulations, no U.S. purse seine vessels have made intentional sets on dolphins. Under the Agreement on the IDCP (Annex IV, section II, paragraph 1), any vessel that is assigned a full-year DML must make at least one set on dolphins prior to April 1 to keep from losing its DML allocation; however, an intentional set on dolphins does not necessarily lead to dolphin mortality. This requirement is part of the process established by the international program to deter frivolous requests for DMLs.

*Backdown Procedure*

*Comment 14:* Although the regulations provide for the use of a backdown procedure, they do not address how the procedure will be carried out and do not provide vessels with the opportunity to implement a more effective procedure to avoid mortality or serious injury to dolphins.

*Response:* Vessel operators receive formal training through either NMFS or the IATTC Captains training program on the requirements and execution of this procedure. In addition, new vessel operators participate in a lengthy apprentice program in which they master all operations of a vessel (including the backdown procedure) before becoming a Captain or vessel operator. The backdown process is a dynamic procedure that requires an in-depth knowledge and understanding of the net construction and design to effectively deploy this maneuver. Because of the complexities of the procedure and the training programs in place to ensure vessel operators learn the procedure, it is unnecessary to describe this procedure in these regulations. Further, NMFS has not determined that tuna purse seine fishers fail to adhere to the training they receive. In fact, they have an incentive to successfully perform the procedure and to avoid dolphin mortalities.

The regulations allow for experimental fishing operations, consistent with the IDCP, for the purpose of testing proposed improvements in fishing techniques and equipment that may reduce or eliminate dolphin mortality or serious injury, or do not require the encirclement of dolphins in the course of fishing operations.

NMFS has funded research to test various methods of finding and fishing for yellowfin tuna not in association with dolphins. For example, funding priorities for the Saltonstall-Kennedy Grant Program include proposals that address marine mammal and fishery interactions.

*Sundown Sets Prohibition*

*Comment 15:* The rule ignores the IDCPA requirement that backdown procedures be completed by 30 minutes before sundown.

*Response:* NMFS research, previous NMFS regulations and previous amendments to the MMPA, the La Jolla Agreement and the IDCP specify that the backdown procedure must be completed no later than one-half hour after sundown. Furthermore, under the Agreement on the IDCP, signatory nations agreed that the backdown procedure must be completed no later than one-half hour after sundown, thus prohibiting sundown sets. Because early drafts of the IDCPA used the word "after" and no congressional reports or colloquy indicated that the change to "before" was adopted purposefully, NMFS concludes the language in the IDCPA stating that backdown procedures must be completed no later than one-half hour before sundown must have been a drafting error. Furthermore, the IDCPA gives NMFS discretion to promulgate, and adjust through regulations, this requirement to carry out U.S. obligations under the Agreement on the IDCP. This interpretation was upheld by the Court of International Trade in the Defenders of Wildlife litigation (discussed above). Therefore, NMFS is retaining the "30 minutes after" language that appeared in the interim final rule.

*Experimental Fishing Operations*

*Comment 16:* Section 216.24(c)(7) should specify which requirements may be waived for experimental fishing activities.

*Response:* Section 216.24(c)(7) specifies that NOAA's Assistant Administrator for Fisheries, NMFS, may not waive the DML requirements and the obligation to carry an observer. The regulations allow the Administrator flexibility to waive other requirements of § 216.24 as appropriate. This flexibility is critical to encourage a variety of alternative experimental designs and techniques that might be effective.

*Per-stock, Per-year Limits*

*Comment 17:* The regulations state that if the per-stock, per-year limits are exceeded for a depleted stock, then fishing on dolphin shall cease for all vessels for the year. The regulations should be changed to state that fishing on that particular dolphin stock should cease.

*Response:* The commenter misunderstood this part of the regulations, which already focuses on fishing for tuna in association with particular dolphin stocks. Section 216.24(c)(9)(viii) of the regulations states that if a per-stock, per-year quota is exceeded, then fishing for tuna in association with the stock(s) whose limits had been exceeded would cease for the remainder of the calendar year.

*Dolphin Sets After Reaching DML*

*Comment 18:* The IDCPA states that regulations must be adopted to prevent the occurrence of intentional sets after reaching the DML. However, disqualifying the vessel from obtaining a DML for the following year is clearly not a preventive measure that will prohibit additional takes. A more immediate penalty is needed.

*Response:* A vessel that reaches its DML must immediately cease fishing on dolphins in accordance with these regulations and the international program. If, after due process, it is determined that a vessel exceeded its DML, these regulations and the international program provide for the disqualification of the vessel from receiving a DML for the following year under certain circumstances. Also, any vessel that exceeds its assigned DML, if not disqualified, will have its DML for the subsequent year reduced by 150 percent of the overage. These measures conform to the Agreement on the IDCP and serve as a deterrent or preventative measure for vessels to not exceed their DMLs.

*Purse Seining by Vessels Without Assigned DMLs*

*Comment 19:* Section 216.24(d) is invalid because the IDCPA requires every vessel to have a DML assigned. Section 216.24(d) is unclear regarding whether it applies only to vessels that are not engaging in tuna fishing operations or to tuna fishing vessels that do not have a DML or to both.

*Response:* The heading of § 216.24 makes clear that the section deals with

commercial fishing operations by tuna purse seine vessels in the ETP. Section 216.24(d) applies only to vessels without assigned DMLs, i.e. only vessels that do not intentionally deploy nets on or encircle dolphins. Under § 216.24(a)(2), vessels that do not have DMLs may not make intentional sets on dolphins. The IDCPA does not require every vessel to have a DML assigned. MMPA section 303(a)(2)(B)(ix) prohibits a vessel without an assigned DML from intentionally setting on dolphins.

*Observers*

*Comment 20:* While § 216.24(e) of the proposed regulation addresses the role of the observer of the vessel, it fails to address the inherent problems associated with observer programs or to describe what criteria must be met in order to qualify as an observer. If these criteria are mentioned elsewhere in the Code of Federal Regulations, the section should either be referenced or restated in § 216.24.

*Response:* For the tuna purse seine fishery in the ETP, the IATTC trains observers so that they are qualified to perform observer duties. The IATTC observer program and its training requirements remain in effect.

*Affirmative Finding Procedures*

*Comment 21:* In order for a country to receive an affirmative finding, nations should be required to supply documentary evidence of their fishing fleets' actions on an annual basis, not every 5 years as described in the interim final rule.

*Response:* The MMPA does not specifically require a yearly submission of documentary evidence specifically from harvesting nations. NMFS' interpretation of the MMPA is reasonable because it enables NMFS to verify compliance while minimizing the burden on other nations. It places the burden on NMFS to make or renew an affirmative finding annually, if the harvesting nation has provided all of the information and authorizations required by § 216.24 (f)(8)(i) and (ii). An annual review allows NMFS to verify compliance with the IDCP. Through these regulations NMFS is authorized in the annual renewal process to seek out documentation from the harvesting nation, DoS and IATTC.

*Comment 22:* Allowing countries to exceed DMLs for "extraordinary circumstances beyond the control of the nation and the vessel captain..." undermines the IDCPA by allowing fishing nations to exceed DMLs without fear of enforcement actions by the U.S. Government.

*Response:* NMFS does not have the authority to take enforcement actions against foreign nations. However, if a nation's fleet's annual dolphin mortality or per-stock dolphin mortality exceeds its aggregate DMLs because of extraordinary circumstances beyond the control of the nation or of the vessel's captain, but otherwise is in conformance to the Agreement on the IDCP, that nation should not be embargoed. Section 216.24(f)(8)(i)(C) further explains that the nation must have immediately required all its vessels to cease fishing for tuna in association with dolphins for the remainder of the calendar year. This encourages harvesting nations to comply with the Agreement on the IDCP, yet threatens economic sanctions against nations that do not control or manage their fleets.

*Dolphin-safe Labeling Standards*

*Comment 23:* These regulations burden U.S. purse seine vessel operators who do not intentionally set on dolphin. Under previous regulations, tuna could be labeled dolphin-safe, even if an accidental dolphin mortality occurred. Under the new regulations, U.S. vessels will not be able to sell their tuna to canneries as dolphin-safe if a single accidental fatality occurs during the trip.

*Response:* Before the IDCPA was enacted, tuna could be labeled dolphin-safe even if dolphins were observed killed in a set in which they were accidentally captured. The IDCPA, however, changed the labeling standard such that no tuna product harvested in the ETP by a large purse seine vessel may be labeled dolphin-safe if an observed dolphin mortality, or serious injury, occurs during a set, whether or not the vessel intentionally deployed its nets on dolphin. (This part of the dolphin-safe labeling standard remains constant regardless of the "significant adverse impact" finding under paragraph (g) of the DPCIA.) Therefore, if an accidental dolphin mortality occurs in a set, that set is by definition non-dolphin-safe. The determination of whether tuna is dolphin-safe is made on a set-by-set basis; only tuna caught in a set in which a net was intentionally deployed on a marine mammal or in which dolphin mortality or serious injury occurs would be considered non-dolphin-safe. The U.S. canned tuna industry is not required by the final rule to refuse tuna caught in association with dolphins so long as all the requirements of the rule are met. That the U.S. canned tuna industry chooses to do so, is a private, corporate decision and not a requirement of this final rule.

*Comment 24:* Section 216.92(a) seems to preclude a U.S. processor from labeling fish as dolphin-safe if the U.S. processor processes the fish at some location other than those listed in the paragraph. This would preclude a U.S. processor from ever processing such fish at a plant in a country that has entered into a Compact of Free Association with the United States. Because these states now have limited "duty free" access to the United States, it is possible that U.S. processors may establish plants there in the future. The paragraph should allow the fish to enter the United States as dolphin-safe from Compact of Free Association locations if it otherwise meets the dolphin-safe requirements of the IDCPA and has been processed in a plant that is in compliance with the tuna tracking and verification requirements of § 216.94 (now found at § 216.93 of this final rule).

*Response:* Nothing in the rule precludes tuna processed in a Compact of Free Association nation (i.e., the Republic of Palau, Federated States of Micronesia or the Republic of the Marshall Islands) from being labeled dolphin-safe or from being imported into the United States. The requirements for tuna caught in the ETP and imported into the United States to carry a dolphin-safe label are described in § 216.92(b). All Compact of Free Association nations are located outside the U.S. Custom's territory and, therefore, tuna processed in those nations are subject to the procedures for imported tuna regardless of the nation's duty-free status.

*Tuna Tracking and Verification Program*

*Comment 25:* These regulations fail to implement adequate monitoring systems for ensuring the separation and tracking of imported dolphin-safe and non-dolphin-safe tuna.

*Response:* The regulations implement adequate monitoring systems for ensuring the separation and tracking of imported dolphin-safe and non-dolphin-safe tuna. All imports of tuna harvested in the ETP by large purse seine vessels must be accompanied by a certificate signed by an IDCP-member government official attesting to the dolphin-safe status of the tuna in that shipment. Shipments of tuna that are not declared to be dolphin-safe and that are imported into the United States from a nation that has an affirmative finding are spot-checked to ensure that no dolphin-safe logo appears on the product. In addition, NMFS tuna tracking and verification specialists perform spot-checks of canned tuna on grocery shelves. In this final rule, NMFS

requires processors to provide documentary proof of the origin of that tuna. Finally, U.S. canned tuna processors report all purchases of imported frozen tuna to NMFS on a regular basis.

*Comment 26:* The handling of the Tuna Tracking Forms is confusing and cumbersome. NMFS, the cannery, and the country where the tuna is offloaded all require the original tuna tracking forms. Furthermore, the regulations require that it be submitted in an unreasonably short time frame. In Mexico, the dolphin-safe certificate is duplicated and notarized, and the certified copies are distributed to various entities.

*Response:* The final regulations require changes in the handling of Tuna Tracking Forms that streamline the process and are consistent with changes made to the International Tuna Tracking and Verification Program. Between February 3, 2000, and the effective date of this final rule, several improvements were made in the U.S. tuna tracking system. Changes also improve the process by which canned tuna processors report their activities. For example, early in the operation of the tuna tracking program it was recognized that requiring a separate report every time a canner received tuna for processing was unwieldy and did not provide useful information. Report forms and schedules were then revised so that systems could be automated and reports would include the information needed to assure the dolphin-safe status of canned tuna production in the United States. The links between NMFS and U.S. Customs were improved to provide faster and more easily usable tuna import information. Verification of the dolphin-safe status of tuna being sold in the United States was improved by development of a program to sample products on grocery store shelves around the country. Other changes were made in order to remain consistent with the requirements of the international tuna tracking system.

The AIDCP Permanent Working Group on Tuna Tracking was formed to oversee the operation of the international tuna tracking system. As time passed, improvements were made in that system, which were subsequently incorporated in the U.S. program. Some of the changes included improved tuna tracking form handling procedures, the elimination of any "mixed wells" on tuna purse seine vessels, and requirements for safeguarding dolphin-safe status of tuna harvested by vessels that fish inside and outside the convention area during one trip.

*Comment 27:* Observers may not see some seriously injured and killed dolphins and falsely report the catch as dolphin-safe.

*Response:* The possibility for observers to miscount dolphin mortality and serious injury exists in all fishery observer programs worldwide. However, IATTC trained observers are well trained, and any miscounts that may occur would be negligible.

*Comment 28:* Section 216.94(b)(2)(i) (now found at § 216.93 of this final rule) should be rewritten to clarify that dolphin-safe and non-dolphin-safe tuna are segregated during the unloading of mixed-wells.

*Response:* A study of the need for and frequency of the use of fish wells in which dolphin-safe and non-dolphin-safe tuna are both stored aboard tuna purse seine vessels revealed that there is virtually no need for such "mixed-wells." Therefore, the provisions for the use of mixed-wells have been removed from the final rule.

*Comment 29:* Tuna caught by methods that kill and seriously injure dolphins should not be mixed with dolphin-safe tuna aboard tuna boats.

*Response:* See response to Comment 28.

*Tracking Cannery Operations*

*Comment 30:* In order to reduce paperwork and simplify the reporting process, receiving reports should be submitted on a monthly basis, along with the submissions contained in (3) and (5) of paragraph 216.94(c)(3) and (5) (now found at § 216.93 of this final rule). This would not have any negative impact on NMFS' monitoring role and will ensure that all reports are received together on a timely, monthly basis.

*Response:* Instead of requiring a report within 5 days of delivery and a separate report every month, receiving reports are now required only on a monthly basis. The NMFS tuna tracking and verification staff, in cooperation with the U.S. canned tuna industry, tested various reporting methods for completeness and accuracy. Section 216.93 of this final rule contains changes and refinements to the reporting procedures that provide complete information to NMFS without over-burdening the industry contributors of those reports.

*Comment 31:* The receiving report requires identifying containers (scows) by serial number for tracking; however, some systems of sizing tuna come after the unloading, thus possibly causing a perceived loss of identity of the original unloaded fish. This would require the issuance of two reports, one with the initial scow serial numbers and weights, and a second report (same total weight) with sized scow serial numbers and weights.

*Response:* The requirement that receiving reports be submitted monthly, rather than within 5 working days of delivery, should alleviate this problem.

*Miscellaneous Comments*

*Comment 32:* By the passage of the IDCPA and the entry into force of the Agreement on the IDCP in February 1999, can the United States ensure that all U.S. flag vessels act in accordance with the provisions of the Agreement on the IDCP at all times and enforce the provisions of the MMPA with respect to U.S. vessels operating in the territorial sea of another country?

*Response:* The U.S. Government has the statutory authority to apply the provisions of the Agreement on the IDCP to the operation of U.S. vessels wherever they operate within the Agreement Area. The Agreement Area is defined as the waters of the Pacific Ocean bounded by the following: to the east, the coastline of North, Central and South America; to the north, the 40° N parallel; to the west, the 150° W meridian and to the south, the 40°S parallel. This includes the waters under the jurisdiction of the coastal states, including their exclusive economic zones and territorial seas.

The United States has jurisdiction over U.S. flag vessels wherever they operate, even in the territorial seas of other countries. Specifically, § 303(a), 306, and 307 of the MMPA clearly require the Secretary to implement and enforce the provisions of the IDCPA for all U.S. vessels anywhere in the Agreement Area.

*Comment 33:* The DML cap of 5,000 animals per year is inconsistent with the MMPA and its goal of reducing incidental dolphin mortality to insignificant levels approaching zero mortality rate.

*Response:* Section 302(1) of the MMPA provides that "the total annual dolphin mortality in the purse seine fishery for yellowfin tuna in the eastern tropical Pacific Ocean shall not exceed 5,000 animals with a commitment and objective to progressively reduce dolphin mortality to a level approaching zero through the setting of annual limits." Further, section 302(1) of the MMPA only establishes an annual mortality limit of 5,000 animals; this is a cap rather than a goal.

NMFS is striving to further reduce dolphin mortalities associated with the tuna purse seine fishery in the ETP. It is also important to note that no U.S. purse seine vessels are currently intentionally chasing or deploying purse

seine nets on dolphins. In addition, annual dolphin mortality in the ETP tuna purse seine fishery, including both the domestic and foreign fleets, has averaged less than 2,000 dolphins since 2000. An annual dolphin mortality limit is one of a suite of tools being used by NMFS and Parties to the Agreement on the IDCP to conserve dolphin stocks, as well as other components of the ETP ecosystem.

*Comment 34:* Replace the current IDCPA and regulations with a different system that would end purse seining as a fishing method in the ETP and establish other mechanisms to protect dolphins and pursue fishing in the ETP.

*Response:* These regulations implement the IDCPA as passed by Congress in 1997, which allows purse seining in the ETP as a method to harvest tuna and provides protection to dolphin stocks.

*Changes From the Interim Final Rule*

In this final rule, NMFS is publishing 50 CFR 216.24, 216.46, 216.90, 216.91, 216.92, and 216.93 in their entirety (including provisions that were not changed from the interim final rule) for the convenience of readers, to correct cross-referencing errors, and to improve clarity.

The interim final rule contained a generic provision for NMFS to consider for potential enforcement action of alleged violations of the Agreement on the IDCP and/or these regulations that are identified by the International Review Panel (codified in the interim final rule in § 216.24(c)(9)(xi)). The provision is maintained in this final rule except that it now appears in § 216.24(a)(2)(vi). NMFS changed the position of the provision because it was concerned that in its previous position at the end of § 216.24(c)(9) the provision might be overlooked. The current position of the provision is intuitive; the provision appears in a list of other, general prohibitions at the beginning of § 216.24. NMFS also amended § 216.24(a)(2)(vi) (formerly § 216.24(c)(9)(xi)) to clarify that the International Review Panel may identify and recommend cases to NOAA for possible enforcement action as is provided in the Agreement on the IDCP. The International Review Panel is a panel created under Article XII of the Agreement on the IDCP to identify, review and make recommendations on potential violations of the Agreement on the IDCP. The former language of this section could have been read to imply that the International Review Panel would also recommend sanctions or penalties for those potential violations, which is not the case.

*Changes to the Tracking and Verification Program*

Section 216.93 of the interim final rule has been revised as the result of comments received and in order to remain consistent with changes made to the Agreement on the IDCP System of Tracking and Verification of Tuna. NMFS believes that the changes described enhance the effectiveness of the NMFS Tuna Tracking and Verification Program.

The international tuna tracking and verification system adopted by the Parties to the Agreement on the IDCP in June 1999 contained conditional provisions under which dolphin-safe and non-dolphin-safe tuna could be mixed in the same well aboard large purse seine vessels fishing in the ETP. Representatives of some environmental organizations expressed concern that any mixing of dolphin-safe and non-dolphin-safe tuna would compromise the effectiveness of the Agreement. Nonetheless, the Parties instituted the use of two mixed-well exceptions for a trial period, during which time the Secretariat of the IATTC would track their use. During the trial period, from January until June 2000, only five occurrences of a mixed-well exception were noted on over 200 IATTC-observed trips. Citing a desire to maintain a fully credible system and acknowledging the low usage of mixed-well exceptions, the Permanent Working Group on Tuna Tracking and Verification recommended that all mixed-well exceptions be eliminated from the international system for tracking and verification of tuna. The Meeting of the Parties to the Agreement on the IDCP approved the recommendation at the June 2000 meeting. Therefore, the mixed-well language at § 216.94(b)(2) was removed from the regulations.

At the meeting of the Parties to the Agreement on the IDCP held in June 2001, in San Salvador, El Salvador, the Parties adopted a voluntary IDCP Dolphin-Safe Tuna Certification Program. This program establishes a framework for member nations to issue a dolphin-safe certificate and to apply the IDCP dolphin-safe logo to tuna harvested by their flag vessels and offered for sale in international markets. The new program also provides that, upon request by a member nation, the Secretariat for the Agreement on the IDCP will evaluate such shipments of tuna that are labeled with the IDCP dolphin-safe logo and affirm, as appropriate, that they are dolphin-safe as defined by the Agreement.

Under current U.S. law, the definition of "dolphin-safe" tuna is different from the definition adopted by the Parties to the Agreement on the IDCP. Thus, the United States is unable, at present, to adopt the voluntary IDCP Dolphin-Safe Tuna Certification Program. However, a NMFS dolphin-safe certificate is available.

Upon request, the Office of the Administrator, Southwest Region, will provide written certification that tuna harvested by U.S. purse seine vessels greater than 400 st (362.8 mt) carrying capacity is dolphin-safe, but only if NMFS' review of the tuna tracking forms (TTFs) for the subject trip shows that the tuna for which the certification is requested is dolphin-safe under the requirements of the Agreement on the IDCP and U.S. law. These new procedures are included in the final rule at § 216.93(b).

The Parties to the Agreement on the IDCP have also adopted several technical and procedural modifications that have improved the international tuna tracking and verification program. These modifications include a change in § 216.93(a) where the word "observer" was changed to "additional". This change was made because observers are not the only ones that can make notes on TTFs; engineers or captains may also do so.

Additional changes were made in § 216.93(c)(5) (formerly 216.94(b)(6)) to the procedures for handling and disposition of TTFs. In § 216.93(c)(5)(ii), (iii) and (iv) of the final rule, NMFS specified that the captain of the vessel or the vessel's managing office is responsible for assuring delivery of the TTFs to the Administrator, Southwest Region, unless the TTF is retrieved by a NMFS representative meeting the vessel in port at the time of arrival. Sections 216.94(b)(6)(ii) and (iii) of the interim final rule now appear in § 216.93(c)(5)(iii) and (ii) in the final rule; the order of the two paragraphs has been reversed. Section 216.93(c)(5)(ii) of the final rule includes an added provision allowing the captain to entrust the observer to deliver the signed TTFs to a local IATTC office, provided the captain notifies the Southwest Regional Administrator of this decision.

In § 216.93(c)(5), paragraphs (iii) and (iv) clarify the entity responsible for delivering completed TTFs to the Southwest Regional Administrator. Paragraph (iii) describes a situation in which a vessel lands in a country that is a Party to the Agreement on the IDCP this case, a representative of the country has first responsibility for the TTFs. Paragraph (iv) describes a situation in which the vessel lands in a country that is not a Party to the Agreement. In this

case, NMFS does not expect that a representative of the country will meet the vessel. Therefore, when landing in such a country, the vessel captain has responsibility for delivering the TTFs to the Southwest Regional Administrator.

Paragraph (v) was added to § 216.93(c)(5) pursuant to the IDCP Rules of Confidentiality to emphasize the confidential status of the TTFs as international documents that are the property of the Secretariat to the Agreement on the IDCP. Other modifications incorporated into the NMFS tuna tracking system in § 216.93 (formerly § 216.94) include clarification of partial unloading procedures.

NMFS has made certain changes to the tuna tracking procedures that will enable NMFS to track and verify the dolphin-safe status of canned tuna processed in U.S. canneries while not being overly burdensome to the U.S. canning industry. NMFS found that requiring canners to report the receipt of every shipment of raw tuna 48 hours in advance was not necessary because spot-checks and unscheduled visits by representatives of the Administrator, Southwest Region, coupled with monthly reports of all cannery activities, were already provided for in regulations.

NMFS removed the requirement for U.S. purse seine vessels greater than 400 st (362.8 mt) harvesting tuna in the ETP to submit an FCO under 216.92(a) because this information is already available to NMFS through tuna processors.

NMFS removed the requirement for an invoice to accompany the FCO at the time of import (§ 216.24(f)(3)(i)). Importers are required to keep all documents, including the invoice, that accompany import shipments, and to make the documents available to the Secretary or the Administrator, Southwest Region, on request. The requirement that an invoice accompany FCOs was found to be burdensome to U.S. Customs and did not provide any additional information needed for tracking and verifying import shipments.

*Changes to Vessel Permit Holder, Dolphin Mortality Limits*

NMFS modified the heading of § 216.24(c)(2) to clarify that live marine mammals may not be retained. In the interim final rule, "live" was not included in the heading, but was used in the regulatory text of § 216.24(c)(2), and continues to be in this final rule. Therefore, this modification does not change the meaning of paragraph (c)(2); it just provides clarification.

NMFS added a requirement in § 216.24(c)(7)(i) of this final rule that the signature of the permitted operator or the operator's representative applying for an experimental fishing operation waiver be included in the application. This requirement was added to indicate ownership of the experimental fishing operation waiver application, as well as ensure the validity of such applications and maintain consistency with other applications, such as those for vessel and operator permits described in § 216.24(b)(4) and (b)(5), respectively.

NMFS amended § 216.24(c)(9) to identify the policy of NOAA's Office of the General Counsel that, in any enforcement action, the appropriate sanction to be assessed should be determined by referring to a NOAA civil administrative penalty schedule and the discretion of the prosecutor, except where a specific penalty is mandated by an international agreement. Specific sanctions and fines cannot be established by regulation. Accordingly, NMFS deleted § 216.24(c)(9)(xii) because it created a specific penalty by regulation, contrary to NOAA's policy, and added language to § 216.24(c)(9)(v) to identify that the sanction of reducing a vessel's DML, which is identified in that section, was mandated by an international agreement.

In addition, NMFS modified § 216.24(c)(9)(x)(A) to clarify the point at which vessel and operator permit holders on vessels with assigned DMLs must refrain from intentionally setting purse seine nets on or encircling dolphins because the DML was reached or exceeded. The interim final rule was ambiguous in that it used the term "when", which could have been interpreted to mean that vessel and operator permit holders would be in violation of this rule at the moment their DMLs were reached or exceeded. The intent of § 216.24(c)(9)(x)(A) was to prohibit vessel and operator permit holders from intentionally setting on or encircling dolphins in sets subsequent to that in which their DMLs were reached or exceeded. To achieve this clarity, "when" was changed to "after a set in which."

*Changes to Market Prohibitions*

Section 216.24(f)(120)(iii) of the interim final rule described the dolphin-safe standard. This paragraph was removed from the final rule because the provision was redundant. The dolphin-safe standard appears in § 216.91 and is already cross referenced in § 216.24(f)(12)(i).

*De-certification Under Pelly*

NMFS added a provision that the Secretary will initiate a Pelly certification under section 8(a) of the Fisherman's Protective Act (22 U.S.C. 1978(a)) against any nation embargoed for 6 months under § 216.24(f)(6) of this final rule (formerly § 216.24(f)(7)). A new provision in § 216.24(f)(6)(iii) provides that after the embargo is lifted, the Secretary will terminate the Pelly certification.

*Changes to Penalties*

NMFS expanded § 216.24(g) to identify the various options for enforcement action available to NOAA to respond to violations of these regulations. For example, options for enforcement action may include civil monetary fines, permit suspension or revocation, and reductions in current or future DMLs. In addition, NMFS added language to inform the reader that recommended sanction levels for the various violations are listed in NOAA's Civil Administrative Penalty Schedule and that the regulations detailing the procedures for the various enforcement actions can be found at 15 CFR part 904. This language was added to clarify the enforcement process and to allow readers to conduct their own research on the processes and penalties.

*Changes to Observer Placement Fee*

Small Class 1–5, as well as large Class 6 (in excess of 400 st (362.8 mt) carrying capacity), purse seine vessels classified as either active or inactive on the register of vessels authorized to purse seine for tunas in the ETP are now required to pay observer fees, or vessel assessments, as a result of the Resolution on Vessel Assessments and Financing, adopted at the Meeting of the Parties to the Agreement on the IDCP in June 2003. Therefore, NMFS modified § 216.24(b)(6)(iii) of the interim final rule to be consistent with the June 2003 Resolution. As a result, the due date for payment of the observer placement fee, previously September 1, was changed to December 1 in the final rule. The final rule also provides for a late payment surcharge of 10 percent, consistent with that specified in the June 2003 Resolution. NMFS added language to § 216.24(b)(6)(iii) to clarify that observer fees may be used to maintain the IATTC observer program, generally, rather than solely for placement of observers on individual vessels.

*Corrections, Updates, and Technical Changes*

Section 216.24(c)(9)(ii) of the interim final rule incorrectly described the second semester DML calculation by the

IDCP as not to exceed "one-third" of an unadjusted full-year DML. Annex IV of the Agreement on the IDCP clearly states that "one-half" of an unadjusted full-year DML shall constitute the amount of a second semester DML. Therefore, NMFS has corrected § 216.24(c)(9)(ii) to state "one-half" instead of "one-third" in this final rule.

The Harmonized Tariff Schedule (HTS) of the United States is revised and updated periodically. NMFS revised the HTS codes listed in § 216.24(f)(2) to reflect those updates and changes.

The HTS codes for fresh/chilled products were included in the interim final rule in error. Fresh/chilled products under these HTS codes do not require a Fisheries Certificate of Origin. Fresh and chilled tuna and tuna products are always dolphin-safe because they are harvested only by methods that do not involve the presence of dolphins. Therefore, the HTS codes for fresh/chilled products have been removed in this final rule.

In addition, NMFS revised § 216.24(f)(2)(i) to remedy a drafting error that appeared to require nations that are mere conduits of tuna harvested in the ETP by purse seine vessels of other nations to receive an affirmative finding to export that yellowfin tuna to the U.S. Language that appeared in the interim final rule indicated that both the harvesting nation and exporting nation were required to have an affirmative finding to export yellowfin tuna or yellowfin tuna products harvested by purse seine vessels in the ETP to the United States. A harvesting nation, as defined in 50 CFR 216.3, is subject to a primary nation embargo unless it obtains an affirmative finding. Under 50 CFR 216.24(f)(7) (now § 216.24(f)(6)), it is clear that an exporting nation, if it is not also a harvesting nation, is not required to obtain an affirmative finding to export yellowfin tuna to the United States. However, exporting nations are subject to intermediary nation embargoes if they currently, or in the previous 6 months, imported, as defined in 50 CFR 216.3, any yellowfin tuna or yellowfin tuna products subject to a direct ban under section 101(a)(2)(B) of the MMPA. The scope of yellowfin tuna embargoes and procedures for obtaining an affirmative finding are described in § 216.24(f)(6) and (f)(8), respectively, of this final rule.

In § 216.24(f)(8)(i) of the final rule, NMFS clarified that affirmative findings are based on documentary evidence provided by the governments of harvesting nations, or by the IDCP and IATTC. Language that appeared in the interim final rule indicated that documentary evidence would be provided by harvesting nations or exporting nations. However, nations that serve as mere conduits for tuna harvested by purse seine vessels of other nations in the ETP are not required to obtain affirmative findings. This change is consistent with § 216.24(f)(2)(i) and (f)(6) of this final rule.

In § 216.24(f)(4) (formerly § 216.24(f)(5)), the words "described by checking the appropriate statement on the form and attaching additional certifications if required" were added to further describe the contents of an FCO. The language added to paragraph (f)(4)(xii) of this section, a technical change, requires that the dolphin-safe condition of the shipment must be indicated on the Certificate by checking a box, and that additional certifications may be required depending on which box is checked. Although descriptive language has been added to the final rule, the FCO and boxes to be checked remain unchanged.

In the first sentence of § 216.24(f)(9) (formerly codified at § 216.24(f)(9)(vi)), NMFS added the words "yellowfin", "ETP", and "purse seine" to clarify the scope of the intermediary nation embargo within the explanation of procedures for embargoing certain tuna from "intermediary nations." This clarification is consistent with the MMPA. In the interim final rule the words "yellowfin", "ETP", and "purse seine" were unintentionally left out of this explanation, which appeared to prevent an intermediary nation from exporting to the United States any tuna or tuna products classified under an HTS number listed in § 216.24(f)(2)(i). That error was corrected in this final rule. § 216.24(f)(9) now correctly describes the scope of the embargo, i.e., intermediary nations may not export to the United States only yellowfin tuna and yellowfin tuna products harvested by purse seine in the ETP classified under an HTS number listed in § 216.24(f)(2)(i). This conforms with § 216.24(f)(6)(i)(B) (formerly § 216.24(f)(7)(i)(B)), which correctly describes the scope of an intermediary nation embargo. The description of intermediary nation embargoes in § 216.24(f)(6)(i)(B) included the words "yellowfin", "ETP", and "purse seine" in the proposed and interim final rules; it was always correct.

NMFS modified § 216.93(d)(2)(i) (formerly § 216.94(c)(5)(i)) to require processors to include the dolphin-safe status of the tuna in their monthly cannery receipt reports (the monthly reports were required in the interim final rule). This requirement was inadvertently deleted from the interim final rule.

NMFS reduced the length of time that records must be maintained by exporters, trans-shippers, importers, or processors under § 216.93(f)(1) (formerly § 216.94(e)) in this rule from 3 to 2 years to be consistent with the length of time required to maintain records throughout this final rule.

NMFS has removed § 216.93 "Submission of documentation," as the requirements for the submission of documentation were repeated elsewhere in the final rule. The requirements for the submission of documents concerning the activities of U.S. flag purse seine vessels greater than 400 st (362.8 mt) carrying capacity fishing in the ETP are contained in newly designated § 216.93 "Tracking and verification program." Requirements for the submission of import documents referred to in § 216.91 and 216.92 are contained in § 216.24(f)(3).

## Classification

*Executive Order 12866*

Pursuant to the procedures established to implement section 6 of Executive Order 12866, the Office of Management and Budget (OMB) has determined that this rule is significant.

*Regulatory Flexibility Act*

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration when this rule was proposed that it would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule. Specifically, the expected impacts to 15 to 17 small (less than 362.8 metric tons carrying capacity) purse seine vessels that participate on a seasonal basis in the fishery, domestic and foreign tuna processors, and tuna wholesalers and brokers were discussed in the proposed rule. Possible compliance costs, paperwork burdens, and other restrictions on these small business entities were expected to be minimal or nonexistent at the time the proposed rule was published. Experience since that time indicate that our expectations were correct, as there has not been a significant economic impact on a substantial number of small entities. In fact, any impacts to small purse seine vessels are expected to have decreased, as the number of small purse seine vessels participating in the ETP fishery has decreased from approximately 16 in 1999, the year in which this rule was proposed, to approximately 6 in 2004.

The per vessel impact is expected to be equal to the impact anticipated when this rule was proposed. Further, no comments have been received regarding the certification. As a result, no regulatory flexibility analysis was prepared.

*Paperwork Reduction Act*

Notwithstanding any other provision of the law, no person is required to respond to, nor will any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act (PRA), unless that collection of information displays a currently valid OMB control number.

This final rule contains collection of information requirements subject to the PRA. Exporters from all countries importing tuna and tuna products, except some fresh products, into the United States must provide information about the shipment to U.S. Customs using the Fisheries Certificate of Origin (NOAA Form 370). Approved by OMB under control number 0648–0335, the public reporting burden for this collection is estimated to average 20 minutes per submission.

This final rule also contains a collection-of-information requirement that was discussed at the proposed and interim final rule stages for this rule and is being repeated here for the convenience of readers and to improve clarity. This revised collection-of-information requirement has been approved by OMB under control number 0648–0387. The public reporting burden for this collection is estimated to average as follows: 30 minutes for an application for a vessel permit; 10 minutes for an application for an operator permit; 30 minutes for a request for a waiver to transit the ETP without a permit; 10 minutes for a notification by a vessel permit holder 5 days prior to departure on a fishing trip; 10 minutes for the requirement that vessel permit holders who intend to make intentional sets on marine mammals must notify NMFS at least 48 hours in advance if there is a vessel operator change or within 72 hours if the change was made due to an emergency; 10 minutes for a notification by a vessel permit holder of any net modification at least 5 days prior to departure of the vessel; 15 minutes for a request for a DML; 10 hours for an experimental fishing operation waiver; 10 minutes for a notification by a captain, managing owner, or vessel agent 48 hours prior to arrival to unload; 1 hour for a captain to review and sign the tuna tracking form; 10 minutes for a cannery to provide the monthly processor's storage removal report; 1 hour for a cannery to provide the monthly cannery receipt report; 30 minutes for an exporter, trans-shipper, importer, or processor to produce records if requested by the Administrator, Southwest Region.

The preceding public reporting burden estimates for collections of information include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden to NMFS (see **ADDRESSES**) and OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 (Attention: NOAA Desk Officer).

*National Environmental Policy Act*

NMFS prepared an environmental assessment (EA) for the interim final rule, and the Administrator for Fisheries concluded that there will be no significant impact on the human environment as a result of this final rule. A copy of the EA is available at: *http://www.nmfs.noaa.gov/prot_res/PR2/Tuna_Dolphin/IDCPA.html*

*Endangered Species Act*

NMFS prepared a Biological Opinion for the interim final rule, concluding that fishing activities conducted under the interim final rule are not likely to jeopardize the continued existence of any endangered or threatened species under the jurisdiction of NMFS or result in the destruction or adverse modification of critical habitat. NMFS is unaware of any new information that would indicate the effects of the action may affect listed species in a manner or to an extent not previously considered, nor does the final rule modify the fishery in a manner that causes an effect to listed species not previously considered in the Opinion. Therefore, NMFS has determined that the conclusions and incidental take statement of the Biological Opinion remain valid and reinitiation of consultation is not required.

**List of Subjects in 50 CFR Part 216**

Exports, Fish, Imports, Labeling, Marine mammals, Penalties, Reporting and recordkeeping requirements, Transportation.

Dated: August 31, 2004.

**Rebecca Lent,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

■ For the reasons set out in the preamble, 50 CFR part 216 is amended as follows:

## PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 1. The authority citation for part 216 continues to read as follows:

**Authority:** 16 U.S.C. 1361 *et seq.*, unless otherwise noted.

■ 2. Section 216.24 is revised to read as follows:

### § 216.24 Taking and related acts incidental to commercial fishing operations by tuna purse seine vessels in the eastern tropical Pacific Ocean.

(a)(1) No marine mammal may be taken in the course of a commercial fishing operation by a U.S. purse seine fishing vessel in the ETP unless the taking constitutes an incidental catch as defined in § 216.3, and vessel and operator permits have been obtained in accordance with these regulations, and such taking is not in violation of such permits or regulations.

(2)(i) It is unlawful for any person using a U.S. purse seine fishing vessel of 400 short tons (st) (362.8 metric tons (mt)) carrying capacity or less to intentionally deploy a net on or to encircle dolphins, or to carry more than two speedboats, if any part of its fishing trip is in the ETP.

(ii) It is unlawful for any person using a U.S. purse seine fishing vessel of greater than 400 st (362.8 mt) carrying capacity that does not have a valid permit obtained under these regulations to catch, possess, or land tuna if any part of the vessel's fishing trip is in the ETP.

(iii) It is unlawful for any person subject to the jurisdiction of the United States to receive, purchase, or possess tuna caught, possessed, or landed in violation of paragraph (a)(2)(ii) of this section.

(iv) It is unlawful for any person subject to the jurisdiction of the United States to intentionally deploy a purse seine net on, or to encircle, dolphins from a vessel operating in the ETP when there is not a DML assigned to that vessel.

(v) It is unlawful for any person subject to the jurisdiction of the United States to intentionally deploy a purse seine net on, or to encircle, dolphins from a vessel operating in the ETP with an assigned DML after a set in which the DML assigned to that vessel has been reached or exceeded.

(vi) Alleged violations of the Agreement on the IDCP and/or these regulations identified by the International Review Panel will be considered for potential enforcement action by NMFS.

(3) Upon written request made in advance of entering the ETP, the limitations in paragraphs (a)(2)(i) and (a)(2)(ii) of this section may be waived by the Administrator, Southwest Region, for the purpose of allowing transit through the ETP. The waiver will provide, in writing, the terms and conditions under which the vessel must operate, including a requirement to report to the Administrator, Southwest Region, the vessel's date of exit from or subsequent entry into the permit area.

(b) *Permits*—(1) *Vessel permit.* The owner or managing owner of a U.S. purse seine fishing vessel of greater than 400 st (362.8 mt) carrying capacity that participates in commercial fishing operations in the ETP must possess a valid vessel permit issued under paragraph (b) of this section. This permit is not transferable and must be renewed annually. If a vessel permit holder surrenders his/her permit to the Administrator, Southwest Region, the permit will not be returned and a new permit will not be issued before the end of the calendar year. Vessel permits will be valid through December 31 of each year.

(2) *Operator permit.* The person in charge of and actually controlling fishing operations (hereinafter referred to as the operator) on a U.S. purse seine fishing vessel engaged in commercial fishing operations under a vessel permit must possess a valid operator permit issued under paragraph (b) of this section. Such permits are not transferable and must be renewed annually. To receive a permit, the operator must have satisfactorily completed all required training under paragraph (c)(5) of this section. The operator's permit is valid only when the permit holder is on a vessel with a valid vessel permit. Operator permits will be valid through December 31 of each year.

(3) *Possession and display.* A valid vessel permit issued pursuant to paragraph (b)(1) of this section must be on board the vessel while engaged in fishing operations, and a valid operator permit issued pursuant to paragraph (b)(2) of this section must be in the possession of the operator to whom it was issued. Permits must be shown upon request to NMFS enforcement agents, U.S. Coast Guard officers, or designated agents of NMFS or the Inter-American Tropical Tuna Commission (IATTC) (including observers). A vessel owner or operator who is at sea on a fishing trip when his or her permit expires and to whom a permit for the next year has been issued, may take marine mammals under the terms of the new permit without having to display it on board the vessel until the vessel returns to port.

(4) *Application for vessel permit.* The owner or managing owner of a purse seine vessel may apply for a permit from the Administrator, Southwest Region, allowing at least 45 days for processing. An application must contain:

(i) The name, official number, tonnage, carrying capacity in short or metric tons, maximum speed in knots, processing equipment, and type and quantity of gear, including an inventory of equipment required under paragraph (c)(3) of this section if the application is for purse seining involving the intentional taking of marine mammals, of the vessel that is to be covered under the permit;

(ii) A statement of whether the vessel will make sets involving the intentional taking of marine mammals;

(iii) The type and identification number(s) of Federal, state, and local commercial fishing licenses under which vessel operations are conducted, and the dates of expiration;

(iv) The name(s) of the operator(s) anticipated to be used; and

(v) The name and signature of the applicant, whether he/she is the owner or the managing owner, his/her address, telephone and fax numbers, and, if applicable, the name, address, telephone and fax numbers of the agent or organization acting on behalf of the vessel.

(5) *Application for operator permit.* An applicant for an operator permit must provide the following information to the Administrator, Southwest Region, allowing at least 45 days for processing:

(i) The name, address, telephone and fax numbers of the applicant;

(ii) The type and identification number(s) of any Federal, state, and local fishing licenses held by the applicant;

(iii) The name of the vessel(s) on which the applicant anticipates serving as an operator;

(iv) The date, location, and provider of training required under paragraph (c)(5) of this section for the operator permit; and

(v) The applicant's signature or the signature of the applicant's representative.

(6) *Fees.*—(i) *Vessel permit application fees.* An application for a permit under paragraph (b)(1) of this section will include a fee for each vessel. The Assistant Administrator may change the amount of this fee required at any time if a different fee is determined in accordance with the NOAA Finance Handbook and specified by the Administrator, Southwest Region, on the application form.

(ii) *Operator permit fee.* There is no fee for the operator permit. The Assistant Administrator may require a fee at any time if a fee is determined in accordance with the NOAA Finance Handbook and specified by the Administrator, Southwest Region, on the application form.

(iii) *Observer placement fee.* The vessel owner or managing owner must submit the fee for the placement of observers, and maintenance of the observer program, as established by the IATTC or other approved observer program, to the Administrator, Southwest Region by December 1 of the year prior to the year in which the vessel will be operated in the ETP. Payments received after December 1 will be subject to a 10–percent surcharge. The Administrator, Southwest Region, will forward all observer placement fees to the IATTC or to the applicable organization approved by the Administrator, Southwest Region.

(7) *Application approval.* The Administrator, Southwest Region, will determine the adequacy and completeness of an application and, upon determining that an application is adequate and complete, will approve that application and issue the appropriate permit, except for applicants having unpaid or overdue civil penalties, criminal fines, or other liabilities incurred in a legal proceeding.

(8) *Conditions applicable to all permits*--(i) *General conditions.* Failure to comply with the provisions of a permit or with these regulations may lead to suspension, revocation, modification, or denial of a permit. The permit holder, vessel, vessel owner, operator, or master may be subject, jointly or severally, to the penalties provided for under the MMPA. Procedures governing permit sanctions and denials are found at subpart D of 15 CFR part 904.

(ii) *Observer placement.* By obtaining a permit, the permit holder consents to the placement of an observer on the vessel during every trip involving operations in the ETP and agrees to payment of the fees for observer placement. No observer will be assigned to a vessel unless that vessel owner has submitted payment of observer fees to the Administrator, Southwest Region. The observers may be placed under an observer program of NMFS, IATTC, or another observer program approved by the Administrator, Southwest Region.

(iii) *Explosives.* The use of explosive devices is prohibited during all tuna purse seine operations that involve marine mammals.

(iv) *Reporting requirements.* (A) The vessel permit holder of each permitted vessel must notify the Administrator, Southwest Region or the IATTC contact designated by the Administrator, Southwest Region, at least 5 days in advance of the vessel's departure on a fishing trip to allow for observer placement on every trip.

(B) The vessel permit holder must notify the Administrator, Southwest Region, or the IATTC contact designated by the Administrator, Southwest Region, of any change of vessel operator at least 48 hours prior to departing on a fishing trip. In the case of a change in operator due to an emergency, notification must be made within 72 hours of the change.

(v) *Data release.* By using a permit, the permit holder authorizes the release to NMFS and the IATTC of all data collected by observers aboard purse seine vessels during fishing trips under the IATTC observer program or another international observer program approved by the Administrator, Southwest Region. The permit holder must furnish the international observer program with all release forms required to authorize the observer data to be provided to NMFS and the IATTC. Data obtained under such releases will be used for the same purposes as would data collected directly by observers placed by NMFS and will be subject to the same standards of confidentiality.

(9) *Mortality and serious injury reports.* The Administrator, Southwest Region, will provide to the public periodic status reports summarizing the estimated incidental dolphin mortality and serious injury by U.S. vessels of individual species and stocks.

(c) *Purse seining by vessels with Dolphin Mortality Limits (DMLs).* In addition to the terms and conditions set forth in paragraph (b) of this section, any permit for a vessel to which a DML has been assigned under paragraph (c)(9) of this section and any operator permit when used on such a vessel are subject to the following terms and conditions:

(1) A vessel may be used to chase and encircle schools of dolphins in the ETP only under the immediate direction of the holder of a valid operator's permit.

(2) *No retention of live marine mammals.* Except as otherwise authorized by a specific permit, live marine mammals incidentally taken must be immediately returned to the ocean without further injury. The operator of a purse seine vessel must take every precaution to refrain from causing or permitting incidental mortality or serious injury of marine mammals. Live marine mammals may not be brailed, sacked up, or hoisted onto the deck during ortza retrieval.

(3) *Gear and equipment required for valid permit.* A vessel possessing a vessel permit for purse seining involving the intentional taking of marine mammals may not engage in fishing operations involving the intentional deployment of the net on or encirclement of dolphins unless it is equipped with a dolphin safety panel in its purse seine, has the other required gear and equipment, and uses the required procedures.

(i) *Dolphin safety panel.* The dolphin safety panel must be a minimum of 180 fathoms in length (as measured before installation), except that the minimum length of the panel in nets deeper than 18 strips must be determined in a ratio of 10 fathoms in length for each strip of net depth. It must be installed so as to protect the perimeter of the backdown area. The perimeter of the backdown area is the length of corkline that begins at the outboard end of the last bowbunch pulled and continues to at least two-thirds the distance from the backdown channel apex to the stern tiedown point. The dolphin safety panel must consist of small mesh webbing not to exceed 1 1/4 inches (3.18 centimeters (cm)) stretch mesh extending downward from the corkline and, if present, the base of the dolphin apron to a minimum depth equivalent to two strips of 100 meshes of 4 1/4 inches (10.80 cm) stretch mesh webbing. In addition, at least a 20–fathom length of corkline must be free from bunchlines at the apex of the backdown channel.

(ii) *Dolphin safety panel markers.* Each end of the dolphin safety panel and dolphin apron, if present, must be identified with an easily distinguishable marker.

(iii) *Dolphin safety panel hand holds.* Throughout the length of the corkline under which the dolphin safety panel and dolphin apron are located, hand hold openings must be secured so that they will not allow the insertion of a 1 3/8 inch (3.50 cm) diameter cylindrical-shaped object.

(iv) *Dolphin safety panel corkline hangings.* Throughout the length of the corkline under which the dolphin safety panel and dolphin apron if present, are located, corkline hangings must be inspected by the vessel operator following each trip. Hangings found to have loosened to the extent that a cylindrical-shaped object with a 1 3/8 inch (3.50 cm) diameter can be inserted between the cork and corkline hangings, must be tightened so as not to allow the insertion of a cylindrical-shaped object with a 1 3/8 inch (3.50 cm) diameter.

(v) *Speedboats.* A minimum of three speedboats in operating condition must be carried. All speedboats carried aboard purse seine vessels and in operating condition must be rigged with tow lines and towing bridles or towing posts. Speedboat hoisting bridles may not be substituted for towing bridles.

(vi) *Raft.* A raft suitable to be used as a dolphin observation-and-rescue platform must be carried.

(vii) *Facemask and snorkel, or viewbox.* At least two facemasks and snorkels or viewboxes must be carried.

(viii) *Lights.* The vessel must be equipped with lights capable of producing a minimum of 140,000 lumens of output for use in darkness to ensure sufficient light to observe that procedures for dolphin release are carried out and to monitor incidental dolphin mortality.

(4) *Vessel inspection*—(i) *Annual.* At least once during each calendar year, purse seine nets and other gear and equipment required under § 216.24(c)(3) must be made available for inspection and for a trial set/net alignment by an authorized NMFS inspector or IATTC staff as specified by the Administrator, Southwest Region, in order to obtain a vessel permit.

(ii) *Reinspection.* Purse seine nets and other gear and equipment required by these regulations must be made available for reinspection by an authorized NMFS inspector or IATTC staff as specified by the Administrator, Southwest Region. The vessel permit holder must notify the Administrator, Southwest Region, of any net modification at least 5 days prior to departure of the vessel in order to determine whether a reinspection or trial set/net alignment is required.

(iii) *Failure to pass inspection.* Upon failure to pass an inspection or reinspection, a vessel may not engage in purse seining involving the intentional taking of marine mammals until the deficiencies in gear or equipment are corrected as required by NMFS.

(5) *Operator permit holder training requirements.* An operator must maintain proficiency sufficient to perform the procedures required herein, and must attend and satisfactorily complete a formal training session approved by the Administrator, Southwest Region, in order to obtain his or her permit. At the training session, an attendee will be instructed on the relevant provisions and regulatory requirements of the MMPA and the IDCP, and the fishing gear and techniques that are required for

reducing serious injury and mortality of dolphin incidental to purse seining for tuna. Operators who have received a written certificate of satisfactory completion of training and who possess a current or previous calendar year permit will not be required to attend additional formal training sessions unless there are substantial changes in the relevant provisions or implementing regulations of the MMPA or the IDCP, or in fishing gear and techniques. Additional training may be required for any operator who is found by the Administrator, Southwest Region, to lack proficiency in the required fishing procedures or familiarity with the relevant provisions or regulations of the MMPA or the IDCP.

(6) *Marine mammal release requirements.* All operators fishing pursuant to paragraph (c) of this section must use the following procedures during all sets involving the incidental taking of marine mammals in association with the capture and landing of tuna.

(i) *Backdown procedure.* Backdown must be performed following a purse seine set in which dolphins are captured in the course of catching tuna, and must be continued until it is no longer possible to remove live dolphins from the net by this procedure. At least one crewmember must be deployed during backdown to aid in the release of dolphins. Thereafter, other release procedures required will be continued so that all live dolphins are released prior to the initiation of the sack-up procedure.

(ii) *Prohibited use of sharp or pointed instrument.* The use of a sharp or pointed instrument to remove any marine mammal from the net is prohibited.

(iii) *Sundown sets prohibited.* On every set encircling dolphin, the backdown procedure must be completed no later than one-half hour after sundown, except as provided here. For the purpose of this section, sundown is defined as the time at which the upper edge of the sun disappears below the horizon or, if the view of the sun is obscured, the local time of sunset calculated from tables developed by the U.S. Naval Observatory or other authoritative source approved by the Administrator, Southwest Region. A sundown set is a set in which the backdown procedure has not been completed and rolling the net to sack-up has not begun within one-half hour after sundown. Should a set extend beyond one-half hour after sundown, the operator must use the required marine mammal release procedures including the use of the high intensity lighting system. In the event a sundown set occurs where the seine skiff was let go 90 or more minutes before sundown, and an earnest effort to rescue dolphins is made, the International Review Panel of the IDCP may recommend to the United States that in the view of the International Review Panel, prosecution by the United States is not recommended. Any such recommendation will be considered by the United States in evaluating the appropriateness of prosecution in a particular circumstance.

(iv) *Dolphin safety panel.* During backdown, the dolphin safety panel must be positioned so that it protects the perimeter of the backdown area. The perimeter of the backdown area is the length of corkline that begins at the outboard end of the last bow bunch pulled and continues to at least two-thirds the distance from the backdown channel apex to the stern tiedown point.

(7) *Experimental fishing operations.* The Administrator, Southwest Region, may authorize experimental fishing operations, consistent with the provisions of the IDCP, for the purpose of testing proposed improvements in fishing techniques and equipment that may reduce or eliminate dolphin mortality or serious injury, or do not require the encirclement of dolphins in the course of fishing operations. The Administrator, Southwest Region, may waive, as appropriate, any requirements of this section except DMLs and the obligation to carry an observer.

(i) A vessel permit holder may apply for an experimental fishing operation waiver by submitting the following information to the Administrator, Southwest Region, no less than 90 days before the date the proposed operation is intended to begin:

(A) The name(s) of the vessel(s) and the vessel permit holder(s) to participate;

(B) A statement of the specific vessel gear and equipment or procedural requirement to be exempted and why such an exemption is necessary to conduct the experiment;

(C) A description of how the proposed modification to the gear and equipment or procedures is expected to reduce incidental mortality or serious injury of marine mammals;

(D) A description of the applicability of this modification to other purse seine vessels;

(E) The planned design, time, duration, and general area of the experimental operation;

(F) The name(s) of the permitted operator(s) of the vessel(s) during the experiment;

(G) A statement of the qualifications of the individual or company doing the analysis of the research; and

(H) Signature of the permitted operator or of the operator's representative.

(ii) The Administrator, Southwest Region, will acknowledge receipt of the application and, upon determining that it is complete, will publish a notice in the **Federal Register** summarizing the application, making the full application available for inspection and inviting comments for a minimum period of 30 days from the date of publication.

(iii) The Administrator, Southwest Region, after considering the information submitted in the application identified in paragraph (c)(7)(i) of this section and the comments received, will either issue a waiver to conduct the experiment that includes restrictions or conditions deemed appropriate, or deny the application, giving the reasons for denial.

(iv) A waiver for an experimental fishing operation will be valid only for the vessels and operators named in the permit, for the time period and areas specified, for trips carrying an observer designated by the Administrator, Southwest Region, and when all the terms and conditions of the permit are met.

(v) The Administrator, Southwest Region, may suspend or revoke an experimental fishing waiver in accordance with 15 CFR part 904 if the terms and conditions of the waiver or the provisions of the regulations are not followed.

(8) *Operator permit holder performance requirements.* [Reserved]

(9) *Vessel permit holder dolphin mortality limits.* For purposes of this paragraph, the term "vessel permit holder" includes both the holder of a current vessel permit and also the holder of a vessel permit for the following year.

(i) By September 1 each year, a vessel permit holder desiring a DML for the following year must provide to the Administrator, Southwest Region, the name of the U.S. purse seine fishing vessel(s) of carrying capacity greater than 400 st (362.8 mt) that the owner intends to use to intentionally deploy purse seine fishing nets in the ETP to encircle dolphins in an effort to capture tuna during the following year. NMFS will forward the list of purse seine vessels to the Director of the IATTC on or before October 1, or as otherwise required by the IDCP, for assignment of a DML for the following year under the provisions of Annex IV of the Agreement on the IDCP.

(ii) Each vessel permit holder that desires a DML only for the period between July 1 to December 31 must provide the Administrator, Southwest Region, by September 1 of the prior year, the name of the U.S. purse seine fishing vessel(s) of greater than 400 st (362.8 mt) carrying capacity that the owner intends to use to intentionally deploy purse seine fishing nets in the ETP to encircle dolphins in an effort to capture tuna during the period. NMFS will forward the list of purse seine vessels to the Director of the IATTC on or before October 1, or as otherwise required under the IDCP, for possible assignment of a DML for the 6–month period July 1 to December 31. Under the IDCP, the DML will be calculated by the IDCP from any unutilized pool of DMLs in accordance with the procedure described in Annex IV of the Agreement on the IDCP and will not exceed one-half of an unadjusted full-year DML as calculated by the IDCP.

(iii)(A) The Administrator, Southwest Region, will notify vessel owners of the DML assigned for each vessel for the following year, or the second half of the year, as applicable.

(B) The Administrator, Southwest Region, may adjust the DMLs in accordance with Annex IV of the Agreement on the IDCP. All adjustments of full-year DMLs will be made before January 1, and the Administrator, Southwest Region, will notify the Director of the IATTC of any adjustments prior to a vessel departing on a trip using its adjusted DML. The notification will be no later than February 1 in the case of adjustments to full-year DMLs, and no later than May 1 in the case of adjustments to DMLs for the second half of the year.

(C) In accordance with the requirements of Annex IV of the Agreement on the IDCP, the Administrator, Southwest Region, may adjust a vessel's DML if it will further scientific or technological advancement in the protection of marine mammals in the fishery or if the past performance of the vessel indicates that the protection or use of the yellowfin tuna stocks or marine mammals is best served by the adjustment, within the mandates of the MMPA. Experimental fishing operation waivers or scientific research permits will be considered a basis for adjustments.

(iv)(A) A vessel assigned a full-year DML that does not make a set on dolphins by April 1 or that leaves the fishery will lose its DML for the remainder of the year, unless the failure to set on dolphins is due to force majeure or other extraordinary circumstances as determined by the International Review Panel.

(B) A vessel assigned a DML for the second half of the year will be considered to have lost its DML if the vessel has not made a set on dolphins before December 31, unless the failure to set on dolphins is due to force majeure or extraordinary circumstances as determined by the International Review Panel.

(C) Any vessel that loses its DML for 2 consecutive years will not be eligible to receive a DML for the following year.

(D) NMFS will determine, based on available information, whether a vessel has left the fishery.

(*1*) A vessel lost at sea, undergoing extensive repairs, operating in an ocean area other than the ETP, or for which other information indicates that vessel will no longer be conducting purse seine operations in the ETP for the remainder of the period covered by the DML will be determined to have left the fishery.

(*2*) NMFS will make all reasonable efforts to determine the intentions of the vessel owner. The owner of any vessel that has been preliminarily determined to have left the fishery will be provided notice of such preliminary determination and given the opportunity to provide information on whether the vessel has left the fishery prior to NMFS making a final determination under 15 CFR part 904 and notifying the IATTC.

(v) Any vessel that exceeds its assigned DML after any applicable adjustment under paragraph (c)(9)(iii) of this section will have its DML for the subsequent year reduced by 150 percent of the overage, unless another adjustment is determined by the International Review Panel, as mandated by the Agreement on the IDCP.

(vi) A vessel that is covered by a valid vessel permit and that does not normally fish for tuna in the ETP but desires to participate in the fishery on a limited basis may apply for a per-trip DML from the Administrator, Southwest Region, at any time, allowing at least 60 days for processing. The request must state the expected number of trips involving sets on dolphins and the anticipated dates of the trip or trips. The request will be forwarded to the Secretariat of the IATTC for processing in accordance with Annex IV of the Agreement on the IDCP. A per-trip DML will be assigned if one is made available in accordance with the terms of Annex IV of the Agreement on the IDCP. If a vessel assigned a per-trip DML does not set on dolphins during that trip, the vessel will be considered to have lost its DML unless this was a result of force majeure or other extraordinary circumstances as determined by the International Review Panel. After two consecutive losses of a DML, a vessel will not be eligible to receive a DML for the next fishing year.

(vii) Observers will make their records available to the vessel operator at any reasonable time, including after each set, in order for the operator to monitor the balance of the DML(s) remaining for use.

(viii) Vessel and operator permit holders must not deploy a purse seine net on or encircle any school of dolphins containing individuals of a particular stock of dolphins for the remainder of the calendar year:

(A) after the applicable per-stock per-year dolphin mortality limit for that stock of dolphins (or for that vessel, if so assigned) has been reached or exceeded; or

(B) after the time and date provided in actual notification or notification in the **Federal Register** by the Administrator, Southwest Region, based upon the best available evidence, stating when any applicable per-stock per-year dolphin mortality limit has been reached or exceeded, or is expected to be reached in the near future.

(ix) If individual dolphins belonging to a stock that is prohibited from being taken are not reasonably observable at the time the net skiff attached to the net is released from the vessel at the start of a set, the fact that individuals of that stock are subsequently taken will not be cause for enforcement action provided that all procedures required by the applicable regulations have been followed.

(x) Vessel and operator permit holders must not intentionally deploy a purse seine net on or encircle dolphins intentionally:

(A) after a set in which the vessel's DML, as adjusted, has been reached or exceeded; or

(B) after the date and time provided in actual notification by letter, facsimile, radio, or electronic mail, or notice in the **Federal Register** by the Administrator, Southwest Region, based upon the best available evidence, that intentional sets on dolphins must cease because the total of the DMLs assigned to the U.S. fleet has been reached or exceeded, or is expected to be exceeded in the near future.

(d) *Purse seining by vessels without assigned DMLs.* In addition to the requirements of paragraph (b) of this section, a vessel permit used for a trip not involving an assigned DML and the operator's permit when used on such a vessel are subject to the following terms

and conditions: a permit holder may take marine mammals provided that such taking is an accidental occurrence in the course of normal commercial fishing operations and the vessel does not intentionally deploy its net on, or to encircle, dolphins; marine mammals taken incidental to such commercial fishing operations must be immediately returned to the environment where captured without further injury, using release procedures such as hand rescue, or aborting the set at the earliest effective opportunity; and the use of one or more rafts and facemasks or viewboxes to aid in the rescue of dolphins is recommended.

(e) *Observers*—(1) The holder of a vessel permit must allow an observer duly authorized by the Administrator, Southwest Region, to accompany the vessel on all fishing trips in the ETP for the purpose of conducting research and observing operations, including collecting information that may be used in civil or criminal penalty proceedings, forfeiture actions, or permit sanctions. A vessel that fails to carry an observer in accordance with these requirements may not engage in fishing operations.

(2) Research and observation duties will be carried out in such a manner as to minimize interference with commercial fishing operations. Observers must be provided access to vessel personnel and to dolphin safety gear and equipment, electronic navigation equipment, radar displays, high powered binoculars, and electronic communication equipment. The navigator must provide true vessel locations by latitude and longitude, accurate to the nearest minute, upon request by the observer. Observers must be provided with adequate space on the bridge or pilothouse for clerical work, as well as space on deck adequate for carrying out observer duties. No vessel owner, master, operator, or crew member of a permitted vessel may impair, or in any way interfere with, the research or observations being carried out. Masters must allow observers to use vessel communication equipment necessary to report information concerning the take of marine mammals and other observer collected data upon request of the observer.

(3) Any marine mammals killed during fishing operations that are accessible to crewmen and requested from the permit holder or master by the observer must be brought aboard the vessel and retained for biological processing, until released by the observer for return to the ocean. Whole marine mammals or marine mammal parts designated as biological specimens by the observer must be retained in cold storage aboard the vessel until retrieved by authorized personnel of NMFS or the IATTC when the vessel returns to port for unloading.

(4) It is unlawful for any person to forcibly assault, impede, intimidate, interfere with, or to influence or attempt to influence an observer, or to harass (including sexual harassment) an observer by conduct that has the purpose or effect of unreasonably interfering with the observer's work performance, or that creates an intimidating, hostile, or offensive environment. In determining whether conduct constitutes harassment, the totality of the circumstances, including the nature of the conduct and the context in which it occurred, will be considered. The determination of the legality of a particular action will be made from the facts on a case-by-case basis.

(5)(i) All observers must be provided sleeping, toilet and eating accommodations at least equal to that provided to a full crew member. A mattress or futon on the floor or a cot is not acceptable in place of a regular bunk. Meal and other galley privileges must be the same for the observer as for other crew members.

(ii) Female observers on a vessel with an all-male crew must be accommodated either in a single-person cabin or, if reasonable privacy can be ensured by installing a curtain or other temporary divider, in a two-person cabin shared with a licensed officer of the vessel. If the cabin assigned to a female observer does not have its own toilet and shower facilities that can be provided for the exclusive use of the observer, then a schedule for time-sharing common facilities must be established before the placement meeting and approved by NMFS or other approved observer program and must be followed during the entire trip.

(iii) In the event there are one or more female crew members, the female observer must be provided a bunk in a cabin shared solely with female crew members, and provided toilet and shower facilities shared solely with these female crew members.

(f) *Importation, purchase, shipment, sale and transport.* (1)(i) It is illegal to import into the United States any fish, whether fresh, frozen, or otherwise prepared, if the fish have been caught with commercial fishing technology that results in the incidental kill or incidental serious injury of marine mammals in excess of that allowed under this part for U.S. fishermen, or as specified at paragraph (f)(6) of this section.

(ii) For purposes of this paragraph (f), and in applying the definition of an "intermediary nation," an import occurs when the fish or fish product is released from a nation's Customs' custody and enters into the commerce of the nation. For other purposes, "import" is defined in § 216.3.

(2) *Imports requiring a Fisheries Certificate of Origin.* Shipments of tuna, tuna products, and certain other fish products identified by the U.S. Harmonized Tariff Schedule (HTS) numbers listed in paragraphs (f)(2)(i), (f)(2)(ii) and (f)(2)(iii) of this section may not be imported into the United States unless a properly completed Fisheries Certificate of Origin (FCO), NOAA Form 370, is filed with the U.S. Customs Service at the time of importation.

(i) *HTS numbers requiring a Fisheries Certificate of Origin, subject to yellowfin tuna embargo.* The following HTS numbers identify yellowfin tuna or yellowfin tuna products (other than fresh tuna) known to be imported into the United States. All shipments imported into the United States under these HTS numbers must be accompanied by an FCO. The scope of yellowfin tuna embargoes and procedures for attaining an affirmative finding are described under paragraphs (f)(6) and (f)(8) of this section, respectively.

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|---|---|
| (A) *Frozen:* | |
| 0303.42.0020 | Yellowfin tuna, whole, frozen. |
| 0303.42.0040 | Yellowfin tuna, eviscerated, head on, frozen. |
| 0303.42.0060 | Yellowfin tuna, other, frozen. |
| (B) *Airtight Containers:* (products containing Yellowfin) | |
| 1604.14.1010 | Tuna, non-specific, in oil, in foil or other flexible airtight containers weighing with their contents not more than 6.8 kg each. |
| 1604.14.1090 | Tuna, non-specific, in oil, in airtight containers, other. |

| | |
|---|---|
| 1604.14.2291 | Tuna, other than albacore, not in oil, in foil or other flexible airtight containers weighing with their contents not more than 6.8 kg each, under quota. |
| 1604.14.2299 | Tuna, other than albacore, not in oil, in airtight containers, under quota. |
| 1604.14.3091 | Tuna, other than albacore, not in oil, in foil or other flexible airtight containers weighing with their contents not more than 6.8 kg each, over quota. |
| 1604.14.3099 | Tuna, other than albacore, not in oil, in airtight containers, over quota. |
| (C) *Loins:* (Yellowfin) | |
| 1604.14.4000 | Tuna, not in airtight containers, not in oil, weighing with their contents over 6.8 kg. |
| 1604.14.5000 | Tuna, not in airtight containers, other. |
| (D) *Other:* (products containing Yellowfin) | |
| 0304.20.2066 | Other fish, fillets, skinned, in blocks weighing over 4.5 kg, frozen. |
| 0304.20.6096 | Other fish, fillets, frozen. |
| 1604.20.2500 | Balls and cakes, not in oil, in airtight containers, other. |
| 1604.20.3000 | Balls and cakes, other. |

(ii) *HTS numbers requiring a Fisheries Certificate of Origin, not subject to yellowfin tuna embargo.* The following HTS numbers identify tuna or tuna products, (other than fresh tuna or yellowfin tuna identified in paragraph (f)(2)(i)) of this section, known to be imported into the United States. All shipments imported into the United States under these HTS numbers must be accompanied by an FCO.

| | |
|---|---|
| (A) Frozen: | |
| 0303.41.0000 | Albacore or longfinned tunas, frozen. |
| 0303.43.0000 | Skipjack, frozen. |
| 0303.44.0000 | Bigeye, frozen. |
| 0303.45.0000 | Bluefin, frozen. |
| 0303.46.0000 | Bluefin Southern, frozen. |
| 0303.49.0100 | Other tuna, frozen. |
| (B) *Airtight Containers:* (Other than Yellowfin) | |
| 1604.14.1010 | Tuna, non-specific, in oil, in foil or other flexible airtight containers weighing with their contents not more than 6.8 kg each. |
| 1604.14.1090 | Tuna, non-specific, in oil, in airtight containers, other. |
| 1604.14.2251 | Tuna, albacore, not in oil, in foil or other flexible airtight containers weighing with their contents not more than 6.8 kg each, under quota. |
| 1604.14.2259 | Tuna, albacore, not in oil, in airtight containers, other, under quota. |
| 1604.14.2291 | Tuna, other than albacore, not in oil, in foil or other flexible airtight containers weighing with their contents not more than 6.8 kg each, under quota. |
| 1604.14.2299 | Tuna, other than albacore, not in oil, in airtight containers, other, under quota. |
| 1604.14.3051 | Tuna, albacore, not in oil, in foil or other flexible airtight containers weighing with their contents not more than 6.8 kg each, over quota. |
| 1604.14.3059 | Tuna, albacore, not in oil, in airtight containers, other, over quota. |
| 1604.14.3091 | Tuna, other than albacore, not in oil, in foil or other flexible airtight containers weighing with their contents not more than 6.8 kg each, over quota. |
| 1604.14.3099 | Tuna, other than albacore, not in oil, in airtight containers, other, over quota. |
| (C) *Loins:* (Other than Yellowfin) | |
| 1604.14.4000 | Tuna, not in airtight containers, in bulk or in immediate containers weighing with their contents over 6.8 kg, in oil. |
| 1604.14.5000 | Tuna, not in airtight containers, other. |
| (D) *Other:* (only if the product contains tuna) | |
| 0304.20.2066 | Other fish, fillets, skinned, in blocks weighing over 4.5 kg, frozen. |
| 0304.20.6096 | Other fish, fillets, frozen. |
| 1604.20.2500 | Balls and cakes, not in oil, in airtight containers, other. |
| 1604.20.3000 | Balls and cakes, other. |

(iii) *Exports from driftnet nations only: HTS numbers requiring a Fisheries Certificate of Origin and official certification.* The following HTS numbers identify categories of fish and shellfish, in addition to those identified in paragraphs (f)(2)(i) and (f)(2)(ii) of this section, known to have been harvested using a large-scale driftnet

and imported into the United States. Shipments exported from a large-scale driftnet nation, as identified under paragraph (f)(7) of this section, and imported into the United States under any of the HTS numbers listed in paragraph (f)(2) of this section must be accompanied by an FCO and the official statement described in paragraph (f)(4)(xiii) of this section.

| | |
|---|---|
| (A) *Frozen:* | |
| 0303.19.0012 | Salmon, chinook, frozen. |
| 0303.19.0022 | Salmon, chum, frozen. |
| 0303.19.0032 | Salmon, pink, frozen. |
| 0303.19.0052 | Salmon, coho, frozen. |
| 0303.19.0062 | Salmon, Pacific, non-specific, frozen. |
| 0303.21.0000 | Trout, frozen. |
| 0303.22.0000 | Salmon, Atlantic and Danube, frozen. |
| 0303.29.0000 | Salmonidae, other, frozen. |
| 0303.75.0010 | Dogfish, frozen. |
| 0303.75.0090 | Other sharks, frozen. |
| 0303.79.2041 | Swordfish steaks, frozen. |
| 0303.79.2049 | Swordfish, other, frozen. |
| 0303.79.4097 | Fish, other, frozen. |
| 0304.20.2066 | Fish, fillet, skinned, in blocks, frozen over 4.5 kg. |
| 0304.20.6008 | Salmonidae, salmon fillet, frozen. |
| 0304.20.6092 | Swordfish fillets, frozen. |
| 0304.20.6096 | Fish, fillet, other, frozen. |
| 0307.49.0010 | Squid, other, fillet, frozen. |
| (B) *Canned:* | |
| 1604.11.2020 | Salmon, pink, canned in oil, in airtight containers. |
| 1604.11.2030 | Salmon, sockeye, canned in oil, in airtight containers. |
| 1604.11.2090 | Salmon, other, canned in oil, in airtight containers. |
| 1604.11.4010 | Salmon, chum, canned, not in oil. |
| 1604.11.4020 | Salmon, pink, canned, not in oil. |
| 1604.11.4030 | Salmon, sockeye, canned, not in oil. |
| 1604.11.4040 | Salmon, other, canned, not in oil. |
| 1604.11.4050 | Salmon, other, canned, not in oil. |
| 1604.19.2000 | Fish, other, in airtight containers, not in oil. |
| 1604.19.3000 | Fish, other, in airtight containers, in oil. |
| 1605.90.6050 | Squid, loligo, prepared/preserved. |
| 1605.90.6055 | Squid, other, prepared/preserved. |
| (C) *Other:* | |
| 0305.30.6080 | Fish, other, fillet, dried/salted/brine. |
| 0305.49.4040 | Fish, other, smoked. |
| 0305.59.2000 | Shark fins, dried. |
| 0305.59.4000 | Fish, other, dried. |
| 0305.69.4000 | Salmon, other, salted (or in brine). |
| 0305.69.5000 | Fish, other, salted (or in brine), in immediate containers, not over 6.8 kg. |
| 0305.69.6000 | Fish, other, salted (or in brine). |
| 0307.49.0050 | Squid, other, frozen/dried/salted/brine. |
| 0307.49.0060 | Squid, other, & cuttle fish frozen/dried/salted/brine. |

(3) *Disposition of Fisheries Certificates of Origin.* The FCO described in paragraph (f)(4) of this section may be obtained from the Administrator, Southwest Region, or downloaded from the Internet at *http://swr.nmfs.noaa.gov/noaa370.htm.*

(i) A properly completed FCO and its attached certificates, if applicable, must accompany the required U.S. Customs entry documents that are filed at the time of import.

(ii) FCOs that accompany imported shipments of tuna destined for further processing in the United States must be endorsed at each change in ownership and submitted to the Administrator, Southwest Region, by the last endorser when all required endorsements are completed.

(iii) Importers and exporters are required to retain their records, including FCOs, import or export documents, invoices, and bills of lading for 2 years, and such records must be made available within 30 days of a request by the Secretary or the Administrator, Southwest Region.

(4) *Contents of Fisheries Certificate of Origin.* An FCO, certified to be accurate by the exporter(s) of the accompanying shipment, must include the following information:

(i) Customs entry identification;

(ii) Date of entry;

(iii) Exporter's full name and complete address;

(iv) Importer's or consignee's full name and complete address;

(v) Species description, product form, and HTS number;

(vi) Total net weight of the shipment in kilograms;

(vii) Ocean area where the fish were harvested (ETP, western Pacific Ocean, south Pacific Ocean, eastern Atlantic Ocean, western Atlantic Ocean, Caribbean Sea, Indian Ocean, or other);

(viii) Type of fishing gear used to harvest the fish (purse seine, longline, baitboat, large-scale driftnet, gillnet, trawl, pole and line, or other);

(ix) Country under whose laws the harvesting vessel operated based upon the flag of the vessel or, if a certified charter vessel, the country that accepted responsibility for the vessel's fishing operations;

(x) Dates on which the fishing trip began and ended;

(xi) If the shipment includes tuna or products harvested with a purse seine net, the name of the harvesting vessel;

(xii) Dolphin-safe condition of the shipment, described by checking the

appropriate statement on the form and attaching additional certifications if required;

(xiii) For shipments harvested by vessels of a nation known to use large-scale driftnets, as determined by the Secretary pursuant to paragraph (f)(7) of this section, the High Seas Driftnet Certification contained on the FCO must be dated and signed by a responsible government official of the harvesting nation, certifying that the fish or fish products were harvested by a method other than large-scale driftnet; and

(xiv) If the shipment contains tuna harvested in the ETP by a purse seine vessel of more than 400 st (362.8 mt) carrying capacity, each importer or processor who takes custody of the shipment must sign and date the form to certify that the form and attached documentation accurately describe the shipment of fish they accompany.

(5) *Dolphin-safe label.* Tuna or tuna products sold in or exported from the United States that include on the label the term "dolphin-safe" or any other term or symbol that claims or suggests the tuna were harvested in a manner not injurious to dolphins are subject to the requirements of subpart H of this part (§ 216.90 *et seq.*).

(6) *Scope of embargoes*—(i) *ETP yellowfin tuna embargo.* Yellowfin tuna or products of yellowfin tuna harvested using a purse seine in the ETP identified by an HTS number listed in paragraph (f)(2)(i) of this section may not be imported into the United States if such tuna or tuna products were:

(A) Harvested on or after March 3, 1999, the effective date of section 4 of the IDCPA, and harvested by, or exported from, a nation that the Assistant Administrator has determined has jurisdiction over purse seine vessels of greater than 400 st (362.8 mt) carrying capacity harvesting tuna in the ETP, unless the Assistant Administrator has made an affirmative finding required for importation for that nation under paragraph (f)(8) of this section;

(B) Exported from an intermediary nation, as defined in Section 3 of the MMPA, and a ban is currently in force prohibiting the importation from that nation under paragraph (f)(9) of this section; or

(C) Harvested before March 3, 1999, the effective date of Section 4 of the IDCPA, and would have been banned from importation under Section 101(a)(2) of the MMPA at the time of harvest.

(ii) *Driftnet embargo.* A shipment containing fish or fish products identified by an HTS number listed in paragraph (f)(2) of this section may not be imported into the United States if it is harvested by a large-scale driftnet, or if it is exported from or harvested on the high seas by any nation determined by the Assistant Administrator to be engaged in large-scale driftnet fishing, unless a government official of the large-scale driftnet nation completes, signs and dates the High Seas Driftnet section of the FCO certifying that the fish or fish products were harvested by a method other than large-scale driftnet.

(iii) *Pelly certification.* After 6 months of an embargo being in place against a nation under this section, the Secretary will certify that nation under section 8(a) of the Fishermen's Protective Act (22 U.S.C. 1978(a)). When such an embargo is lifted, the Secretary will terminate the certification under Section 8(d) of that Act (22 U.S.C. 1978(d)).

(iv) *Coordination.* The Assistant Administrator will promptly advise the Department of State and the Department of Homeland Security of embargo decisions, actions, and finding determinations.

(7) *Large-scale driftnet nation: determination.* Based upon the best information available, the Assistant Administrator will determine which nations have registered vessels that engage in fishing using large-scale driftnets. Such determinations will be published in the **Federal Register**. A responsible government official of any such nation may certify to the Assistant Administrator that none of the nation's vessels use large-scale driftnets. Upon receipt of the certification, the Assistant Administrator may find, and publish such finding in the **Federal Register**, that none of that nation's vessels engage in fishing with large-scale driftnets.

(8) *Affirmative finding procedure for nations harvesting yellowfin tuna using a purse seine in the ETP.* (i) The Assistant Administrator will determine, on an annual basis, whether to make an affirmative finding based upon documentary evidence provided by the government of the harvesting nation or by the IDCP and the IATTC, and will publish the finding in the **Federal Register**. A finding will remain valid for 1 year or for such other period as the Assistant Administrator may determine. An affirmative finding will be terminated if the Assistant Administrator determines that the requirements of this paragraph are no longer being met. Every 5 years, the government of the harvesting nation must submit such documentary evidence directly to the Assistant Administrator and request an affirmative finding. Documentary evidence must be submitted by the harvesting nation for the first affirmative finding application. The Assistant Administrator may require the submission of supporting documentation or other verification of statements made in connection with requests to allow importations. An affirmative finding applies to yellowfin tuna and yellowfin tuna products that were harvested by vessels of the nation after March 3, 1999. To make an affirmative finding, the Assistant Administrator must find that:

(A) The harvesting nation participates in the IDCP and is either a member of the IATTC or has initiated (and within 6 months thereafter completed) all steps required of applicant nations, in accordance with article V, paragraph 3, of the Convention establishing the IATTC, to become a member of that organization;

(B) The nation is meeting its obligations under the IDCP and its obligations of membership in the IATTC, including all financial obligations;

(C)(*1*) The annual total dolphin mortality of the nation's purse seine fleet (including certified charter vessels operating under its jurisdiction) did not exceed the aggregated total of the mortality limits assigned by the IDCP for that nation's purse seine vessels for the year preceding the year in which the finding would start; or

(*2*)(*i*) Because of extraordinary circumstances beyond the control of the nation and the vessel captains, the total dolphin mortality of the nation's purse seine fleet (including certified charter vessels operating under its jurisdiction) exceeded the aggregated total of the mortality limits assigned by the IDCP for that nation's purse seine vessels; and

(*ii*) Immediately after the national authorities discovered the aggregate mortality of its fleet had been exceeded, the nation required all its vessels to cease fishing for tuna in association with dolphins for the remainder of the calendar year; and

(D)(*1*) In any years in which the parties agree to a global allocation system for per-stock per-year individual stock quotas, the nation responded to the notification from the IATTC that an individual stock quota had been reached by prohibiting any additional sets on the stock for which the quota had been reached;

(*2*) If a per-stock per-year quota is allocated to each nation, the annual per-stock per-year dolphin mortality of the nation's purse seine fleet (including certified charter vessels operating under its jurisdiction) did not exceed the aggregated total of the per-stock per-year limits assigned by the IDCP for that nation's purse seine vessels (if any) for

the year preceding the year in which the finding would start; or

(*3*)(*i*) Because of extraordinary circumstances beyond the control of the nation and the vessel captains, the per-stock per-year dolphin mortality of the nation's purse seine fleet (including certified charter vessels operating under its jurisdiction) exceeded the aggregated total of the per-stock per-year limits assigned by the IDCP for that nation's purse seine vessels; and

(*ii*) Immediately after the national authorities discovered the aggregate per-stock mortality limits of its fleet had been exceeded, the nation required all its vessels to cease fishing for tuna in association with the stocks whose limits had been exceeded, for the remainder of the calendar year.

(*iii*) *Documentary Evidence and Compliance with the IDCP.*—(A) *Documentary Evidence.* The Assistant Administrator will make an affirmative finding under paragraph (f)(8)(i) of this section only if the government of the harvesting nation provides directly to the Assistant Administrator, or authorizes the IATTC to release to the Assistant Administrator, complete, accurate, and timely information that enables the Assistant Administrator to determine whether the harvesting nation is meeting the obligations of the IDCP, and whether ETP-harvested tuna imported from such nation comports with the tracking and verification regulations of subpart H of this part.

(B) *Revocation.* After considering the information provided under paragraph (f)(8)(ii)(A) of this section, each party's financial obligations to the IATTC, and any other relevant information, including information that a nation is consistently failing to take enforcement actions on violations that diminish the effectiveness of the IDCP, the Assistant Administrator, in consultation with the Secretary of State, will revoke an affirmative finding issued to a nation that is not meeting the obligations of the IDCP.

(iv) A harvesting nation may apply for an affirmative finding at any time by providing to the Assistant Administrator the information and authorizations required in paragraphs (f)(8)(i) and (f)(8)(ii) of this section, allowing at least 60 days from the submission of complete information to NMFS for processing.

(v) The Assistant Administrator will make or renew an affirmative finding for the period from April 1 through March 31 of the following year, or portion thereof, if the harvesting nation has provided all the information and authorizations required by paragraphs (f)(8)(i) and (f)(8)(ii) of this section, and has met the requirements of paragraphs (f)(8)(i) and (f)(8)(ii) of this section.

(vi) *Reconsideration of finding.* The Assistant Administrator may reconsider a finding upon a request from, and the submission of additional information by, the harvesting nation, if the information indicates that the nation has met the requirements under paragraphs (f)(8)(i) and (f)(8)(ii) of this section.

(9) *Intermediary nation.* Except as authorized under this paragraph, no yellowfin tuna or yellowfin tuna products harvested by purse seine in the ETP classified under one of the HTS numbers listed in paragraph (f)(2)(i) of this section may be imported into the United States from any intermediary nation.

(i) An "intermediary nation" is a nation that exports yellowfin tuna or yellowfin tuna products to the United States and that imports yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation into the United States pursuant to Section 101(a)(2)(B) of the MMPA.

(ii) Shipments of yellowfin tuna that pass through any nation (e.g. on a 'through Bill of Lading') and are not entered for consumption in that nation are not considered to be imports to that nation and thus, would not cause that nation to be considered an intermediary nation under the MMPA.

(iii) The Assistant Administrator will publish in the **Federal Register** a notice announcing when NMFS has determined, based on the best information available, that a nation is an "intermediary nation." After the effective date of that notice, the import restrictions of this paragraph shall apply.

(iv) *Changing the status of intermediary nation determinations.* Imports from an intermediary nation of yellowfin tuna and yellowfin tuna products classified under any of the HTS numbers in paragraph (f)(2)(i) of this section may be imported into the United States only if the Assistant Administrator determines, and publishes a notice of such determination in the **Federal Register**, that the intermediary nation has provided certification and reasonable proof that it has not imported in the preceding 6 months yellowfin tuna or yellowfin tuna products that are subject to a ban on direct importation into the United States under Section 101(a)(2)(B) of the MMPA. At that time, the nation shall no longer be considered an "intermediary nation" and these import restrictions shall no longer apply.

(v) The Assistant Administrator will review decisions under this paragraph upon the request of an intermediary nation. Such requests must be accompanied by specific and detailed supporting information or documentation indicating that a review or reconsideration is warranted. For purposes of this paragraph, the term "certification and reasonable proof" means the submission to the Assistant Administrator by a responsible government official from the nation of a document reflecting the nation's customs records for the preceding 6 months, together with a certification attesting that the document is accurate.

(10) *Fish refused entry.* If fish is denied entry under paragraph (f)(2) of this section, the Port Director of Customs shall refuse to release the fish for entry into the United States.

(11) *Disposition of fish refused entry into the United States.* Fish that is denied entry under paragraph (f)(2) of this section and that is not exported under Customs supervision within 90 days shall be disposed of under Customs laws and regulations at the importer's expense. Provided, however, that any disposition shall not result in an introduction into the United States of fish caught in violation of the MMPA.

(12) *Market Prohibitions.* It is unlawful for any person to sell, purchase, offer for sale, transport, or ship in the United States, any tuna or tuna products unless the tuna products are either:

(i) Dolphin-safe under subpart H of this part; or

(ii) Harvested in compliance with the IDCP by vessels under the jurisdiction of a nation that is a member of the IATTC or has initiated, and within 6 months thereafter completes, all steps required by an applicant nation to become a member of the IATTC and the nation has an affirmative finding.

(g) *Penalties.* Any person or vessel subject to the jurisdiction of the United States will be subject to the penalties provided for under the MMPA for the conduct of fishing operations in violation of these regulations. Penalties for violating these regulations may include, but are not limited to, civil monetary fines, permit suspension or revocation, and reductions in current and future DMLs. Recommended sanctions are identified in the IDCPA/DPCIA Tuna/Dolphin Civil Administrative Penalty Schedule. Procedures for the imposition of penalties under the MMPA are found at 15 CFR part 904.

■ 3. Section 216.46 is republished to read as follows:

**§ 216.46 U.S. citizens on foreign flag vessels operating under the International Dolphin Conservation Program.**

The MMPA's provisions do not apply to a citizen of the United States who incidentally takes any marine mammal during fishing operations in the ETP that are outside the U.S. exclusive economic zone (as defined in Section 3 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1802)), while employed on a fishing vessel of a harvesting nation other than the United States that is participating in, and is in compliance with, the IDCP.

■ 4. In subpart H, § 216.93 is removed, §§ 216.94 through 216.96 are redesignated as §§ 216.93 through 216.95, and §§ 216.90 through 216.92 and the newly redesignated § 216.93 are revised to read as follows:

**§ 216.90 Purposes.**

This subpart governs the requirements for using the official mark described in § 216.95 or an alternative mark that refers to dolphins, porpoises, or marine mammals, to label tuna or tuna products offered for sale in or exported from the United States using the term dolphin-safe or suggesting the tuna were harvested in a manner not injurious to dolphins.

**§ 216.91 Dolphin-safe labeling standards.**

(a) It is a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) for any producer, importer, exporter, distributor, or seller of any tuna products that are exported from or offered for sale in the United States to include on the label of those products the term "dolphin-safe" or any other term or symbol that claims or suggests that the tuna contained in the products were harvested using a method of fishing that is not harmful to dolphins if the products contain tuna harvested:

(1) *ETP large purse seine vessel.* In the ETP by a purse seine vessel of greater than 400 st (362.8 mt) carrying capacity unless:

(i) the documentation requirements for dolphin-safe tuna under § 216.92 and 216.93 are met;

(ii) No dolphins were killed or seriously injured during the sets in which the tuna were caught; and

(iii) None of the tuna were caught on a trip using a purse seine net intentionally deployed on or to encircle dolphins, provided that this paragraph (a)(1)(iii) will not apply if the Assistant Administrator publishes a notification in the **Federal Register** announcing a finding under 16 U.S.C. 1385(g)(2) that the intentional deployment of purse seine nets on or encirclement of dolphins is not having a significant adverse impact on any depleted stock.

(2) *Non-ETP purse seine vessel.* Outside the ETP by a vessel using a purse seine net:

(i) In a fishery in which the Assistant Administrator has determined that a regular and significant association occurs between dolphins and tuna (similar to the association between dolphins and tuna in the ETP), unless such products are accompanied by a written statement, executed by the Captain of the vessel and an observer participating in a national or international program acceptable to the Assistant Administrator, certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular trip on which the tuna were caught and no dolphins were killed or seriously injured in the sets in which the tuna were caught; or

(ii) In any other fishery unless the products are accompanied by a written statement executed by the Captain of the vessel certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular trip on which the tuna was harvested;

(3) *Driftnet.* By a vessel engaged in large-scale driftnet fishing; or

(4) *Other fisheries.* By a vessel in a fishery other than one described in paragraphs (a)(1) through(a)(3) of this section that is identified by the Assistant Administrator as having a regular and significant mortality or serious injury of dolphins, unless such product is accompanied by a written statement, executed by the Captain of the vessel and an observer participating in a national or international program acceptable to the Assistant Administrator, that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught, provided that the Assistant Administrator determines that such an observer statement is necessary.

(b) It is a violation of section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to willingly and knowingly use a label referred to in this section in a campaign or effort to mislead or deceive consumers about the level of protection afforded dolphins under the IDCP.

(c) A tuna product that is labeled with the official mark, described in § 216.95, may not be labeled with any other label or mark that refers to dolphins, porpoises, or marine mammals.

**§ 216.92 Dolphin-safe requirements for tuna harvested in the ETP by large purse seine vessels.**

(a) *U.S. vessels.* Tuna products that contain tuna harvested by U.S. flag purse seine vessels of greater than 400 st (362.8 mt) carrying capacity in the ETP may be labeled dolphin-safe only if the following requirements are met:

(1) Tuna Tracking Forms containing a complete record of all the fishing activities on the trip, certified by the vessel Captain and the observer, are submitted to the Administrator, Southwest Region, at the end of the fishing trip during which the tuna was harvested;

(2) The tuna is delivered for processing to a U.S. tuna processor in a plant located in one of the 50 states, Puerto Rico, or American Samoa that is in compliance with the tuna tracking and verification requirements of § 216.93; and

(3) The tuna or tuna products meet the dolphin-safe labeling standards under § 216.91.

(b) *Imported tuna.*

(1) Yellowfin tuna or tuna products harvested in the ETP by vessels of greater than 400 st (362.8 mt) carrying capacity and presented for import into the United States may be labeled dolphin-safe only if the yellowfin tuna was harvested by a U.S. vessel fishing in compliance with the requirements of the IDCP and applicable U.S. law, or by a vessel belonging to a nation that has obtained an affirmative finding under § 216.24(f)(8).

(2) Tuna or tuna products, other than yellowfin tuna, harvested in the ETP by purse seine vessels of greater than 400 st (362.8 mt) carrying capacity and presented for import into the United States may be labeled dolphin-safe only if:

(i) The tuna was harvested by a U.S. vessel fishing in compliance with the requirements of the IDCP and applicable U.S. law, or by a vessel belonging to a nation that is a Party to the Agreement on the IDCP or has applied to become a Party and is adhering to all the requirements of the Agreement on the IDCP Tuna Tracking and Verification Plan;

(ii) The tuna or tuna products are accompanied by a properly completed FCO; and

(iii) The tuna or tuna products are accompanied by valid documentation signed by a representative of the appropriate IDCP member nation, containing the harvesting vessel names and tuna tracking form numbers represented in the shipment, and certifying that:

(A) There was an IDCP approved observer on board the vessel(s) during the entire trip(s); and

(B) The tuna contained in the shipment were caught according to the dolphin-safe labeling standards of § 216.91.

**§ 216.93 Tracking and verification program.**

The Administrator, Southwest Region, has established a national tracking and verification program to accurately document the dolphin-safe condition of tuna, under the standards set forth in §§ 216.91 and 216.92. The tracking program includes procedures and reports for use when importing tuna into the United States and during U.S. purse seine fishing, processing, and marketing in the United States and abroad. Verification of tracking system operations is attained through the establishment of audit and document review requirements. The tracking program is consistent with the international tuna tracking and verification program adopted by the Parties to the Agreement on the IDCP.

(a) *Tuna tracking forms.* Whenever a U.S. flag tuna purse seine vessel of greater than 400 st (362.8 mt) carrying capacity fishes in the ETP, IDCP approved Tuna Tracking Forms (TTFs), bearing a unique number assigned to that trip, are used by the observer to record every set made during that trip. One TTF is used to record dolphin-safe sets and a second TTF is used to record non-dolphin-safe sets. The information entered on the TTFs following each set includes the date, well number, weights by species composition, estimated tons loaded, and additional notes, if any. The observer and the vessel engineer initial the entry as soon as possible following each set, and the vessel captain and observer review and sign both TTFs at the end of the fishing trip certifying that the information on the forms is accurate. TTFs are confidential official documents of the IDCP, consistent with Article XVIII of the Agreement on the IDCP, and the Agreement on the IDCP Rules of Confidentiality.

(b) *Dolphin-Safe Certification.* Upon request, the Office of the Administrator, Southwest Region, will provide written certification that tuna harvested by U.S. purse seine vessels greater than 400 st (362.8 mt) carrying capacity is dolphin-safe, but only if NMFS' review of the TTFs for the subject trip shows that the tuna for which the certification is requested is dolphin-safe under the requirements of the Agreement on the IDCP and U.S. law.

(c) *Tracking fishing operations.* (1) During ETP fishing trips by purse seine vessels greater than 400 st (362.8 mt) carrying capacity, tuna caught in sets designated as dolphin-safe by the vessel observer must be stored separately from tuna caught in non-dolphin-safe sets from the time of capture through unloading. Vessel personnel will decide into which wells tuna will be loaded. The observer will initially designate whether each set is dolphin-safe or not, based on his/her observation of the set. The observer will initially identify a vessel fish well as dolphin-safe if the first tuna loaded into the well during a trip was captured in a set in which no dolphin died or was seriously injured. The observer will initially identify a vessel fish well as non-dolphin-safe if the first tuna loaded into the well during a trip was captured in a set in which a dolphin died or was seriously injured. Any tuna loaded into a well previously designated non-dolphin-safe is considered non-dolphin-safe tuna. The observer will change the designation of a dolphin-safe well to non-dolphin-safe if any tuna are loaded into the well that were captured in a set in which a dolphin died or was seriously injured.

(2) The captain, managing owner, or vessel agent of a U.S. purse seine vessel greater than 400 st (362.8 mt) returning to port from a trip, any part of which included fishing in the ETP, must provide at least 48 hours notice of the vessel's intended place of landing, arrival time, and schedule of unloading to the Administrator, Southwest Region.

(3) If the trip terminates when the vessel enters port to unload part or all of its catch, new TTFs will be assigned to the new trip, and any information concerning tuna retained on the vessel will be recorded as the first entry on the TTFs for the new trip. If the trip is not terminated following a partial unloading, the vessel will retain the original TTFs and submit a copy of those TTFs to the Administrator, Southwest Region, within 5 working days. In either case, the species and amount unloaded will be noted on the respective originals.

(4) Tuna offloaded to trucks, storage facilities, or carrier vessels must be loaded or stored in such a way as to maintain and safeguard the identification of the dolphin-safe or non-dolphin-safe designation of the tuna as it left the fishing vessel.

(5)(i) When ETP caught tuna is offloaded from a U.S. purse seine vessel greater than 400 st (362.8 mt) directly to a U.S. canner within the 50 states, Puerto Rico, or American Samoa, or in any port and subsequently loaded aboard a carrier vessel for transport to a U.S. processing location, a NMFS representative may meet the U.S. purse seine vessel to receive the TTFs from the vessel observer and to monitor the handling of dolphin-safe and non-dolphin-safe tuna.

(ii) If a NMFS representative does not meet the vessel in port at the time of arrival, the captain of the vessel or the vessel's managing office must assure delivery of the TTFs to the Administrator, Southwest Region, from that location within 5 working days of the end of the trip. Alternatively, if the captain approves and notifies the Administrator, Southwest Region, the captain may entrust the observer to deliver the signed TTFs to the local office of the IATTC.

(iii) When ETP caught tuna is offloaded from a U.S. purse seine vessel greater than 400 st (362.8 mt) carrying capacity directly to a processing facility located outside the jurisdiction of the United States in a country that is a Party to the Agreement on the IDCP, the national authority in whose area of jurisdiction the tuna is to be processed will assume the responsibility for tracking and verification of the tuna offloaded. If a representative of the national authority meets the vessel in port, that representative will receive the original TTFs and assume the responsibility for providing copies of the TTFs to the Administrator, Southwest Region. If a representative of the national authority does not meet the vessel, the fishing vessel captain or the vessel's managing office must assure delivery of the completed TTFs in accordance with paragraphs (ii) and (v) of this section.

(iv) When ETP caught tuna is offloaded from a U.S. purse seine vessel greater than 400 st (362.8 mt) carrying capacity in a country that is not a Party to the Agreement on the IDCP, the tuna becomes the tracking and verification responsibility of the national authority of the processing facility when it is unloaded from the fishing vessel. The captain or the vessel's managing office must assure delivery of the completed TTFs in accordance with paragraphs (ii) and (v) of this section.

(v) TTFs are confidential official documents of the IDCP. Vessel captains and managing offices shall not provide copies of TTFs to any representatives of private organizations or non-member states.

(d) *Tracking cannery operations.* (1) Whenever a U.S. tuna canning company in the 50 states, Puerto Rico, or American Samoa receives a domestic or imported shipment of ETP caught tuna for processing, a NMFS representative may be present to monitor delivery and verify that dolphin-safe and non-

dolphin-safe tuna are clearly identified and remain segregated. Such inspections may be scheduled or unscheduled, and canners must allow the NMFS representative access to all areas and records.

(2) Tuna processors must submit a report to the Administrator, Southwest Region, of all tuna received at their processing facilities in each calendar month whether or not the tuna is actually canned or stored during that month. Monthly cannery receipt reports must be submitted electronically or by mail before the last day of the month following the month being reported. Monthly reports must contain the following information:

(i) *Domestic receipts:* dolphin-safe status, species, condition (round, loin, dressed, gilled and gutted, other), weight in short tons to the fourth decimal, ocean area of capture (ETP, western Pacific, Indian, eastern and western Atlantic, other), catcher vessel, trip dates, carrier name, unloading dates, and location of unloading.

(ii) *Import receipts:* In addition to the information required in paragraph (d)(2)(i) of this section, a copy of the FCO for each imported receipt must be provided.

(3) Tuna processors must report on a monthly basis the amounts of ETP-caught tuna that were immediately utilized upon receipt or removed from cold storage. This report may be submitted in conjunction with the monthly report required in paragraph (d)(2) of this section. This report must contain:

(i) The date of removal from cold storage or disposition;

(ii) Storage container or lot identifier number(s) and dolphin-safe or non-dolphin-safe designation of each container or lot; and

(iii) Details of the disposition of fish (for example, canning, sale, rejection, etc.).

(4) During canning activities, non-dolphin-safe tuna may not be mixed in any manner or at any time during processing with any dolphin-safe tuna or tuna products and may not share the same storage containers, cookers, conveyers, tables, or other canning and labeling machinery.

(e) *Tracking imports.* All tuna products, except fresh tuna, that are imported into the United States must be accompanied by a properly certified FCO that is submitted to the Administrator, Southwest Region, as required by section 216.24(f).

(f) *Verification requirements.*—(1) *Record maintenance.* Any exporter, trans-shipper, importer, or processor of any tuna or tuna products containing tuna harvested in the ETP must maintain records related to that tuna for at least 2 years. These records include, but are not limited to: FCO and required certifications, any report required in paragraphs (a), (b) and (d) of this section, invoices, other import documents, and trip reports.

(2) *Record submission.* Within 30 days of receiving a written request from the Administrator, Southwest Region, any exporter, trans-shipper, importer, or processor of tuna or tuna products containing tuna harvested in the ETP must submit to the Administrator, Southwest Region, any record required to be maintained under paragraph (f)(1) of this section.

(3) *Audits and spot-checks.* Upon request of the Administrator, Southwest Region, any such exporter, trans-shipper, importer, or processor must provide the Administrator, Southwest Region, timely access to all pertinent records and facilities to allow for audits and spot-checks on caught, landed, stored, and processed tuna.

(g) *Confidentiality of proprietary information.* Information submitted to the Assistant Administrator under this section will be treated as confidential in accordance with NOAA Administrative Order 216–100 "Protection of Confidential Fisheries Statistics."

[FR Doc. 04–20468 Filed 9–10–04; 8:45 am]
BILLING CODE 3510–22–S

Federal Register

Monday,
September 13, 2004

Part IV

# The President

Notice of September 10, 2004—
Continuation of the National Emergency
With Respect to Certain Terrorist Attacks

Federal Register
Vol. 69, No. 176
Monday, September 13, 2004

# Presidential Documents

Title 3—

The President

**Notice of September 10, 2004**

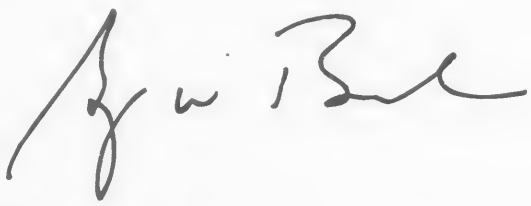
## Continuation of the National Emergency With Respect to Certain Terrorist Attacks

Consistent with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency I declared on September 14, 2001, in Proclamation 7463, with respect to the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States.

By Executive Order 13223 of September 14, 2001, and Executive Order 13253 of January 16, 2002, I delegated authority to the Secretary of Defense and the Secretary of Transportation to order members of the Reserve Components to active duty and to waive certain statutory military personnel requirements. By Executive Order 13235 of November 16, 2001, I delegated authority to the Secretary of Defense to exercise certain emergency construction authority. By Executive Order 13286 of February 28, 2003, I transferred the authority delegated to the Secretary of Transportation in Executive Order 13223 to the Secretary of Homeland Security.

Because the terrorist threat continues, the national emergency declared on September 14, 2001, and the measures taken on September 14, 2001, November 16, 2001, and January 16, 2002, to deal with that emergency, must continue in effect beyond September 14, 2004. Therefore, I am continuing in effect for an additional year the national emergency I declared on September 14, 2001, with respect to the terrorist threat.

This notice shall be published in the **Federal Register** and transmitted to the Congress.



THE WHITE HOUSE,
*Washington, September 10, 2004.*

[FR Doc. 04–20778
Filed 9–10–04; 12:57 pm]
Billing code 3195–01–P

# Reader Aids

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## LIST OF PUBLIC LAWS

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| 200-1199 | (869-052-00042-6) | 50.00 | Jan. 1, 2004 |
| 1200-End | (869-052-00043-4) | 45.00 | Jan. 1, 2004 |
| **15 Parts:** | | | |
| 0-299 | (869-052-00044-2) | 40.00 | Jan. 1, 2004 |
| 300-799 | (869-052-00045-1) | 60.00 | Jan. 1, 2004 |
| 800-End | (869-052-00046-9) | 42.00 | Jan. 1, 2004 |
| **16 Parts:** | | | |
| 0-999 | (869-052-00047-7) | 50.00 | Jan. 1, 2004 |
| 1000-End | (869-052-00048-5) | 60.00 | Jan. 1, 2004 |
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| 1-199 | (869-052-00050-7) | 50.00 | Apr. 1, 2004 |
| 200-239 | (869-052-00051-5) | 58.00 | Apr. 1, 2004 |
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| **18 Parts:** | | | |
| 1-399 | (869-052-00053-1) | 62.00 | Apr. 1, 2004 |
| 400-End | (869-052-00054-0) | 26.00 | Apr. 1, 2004 |
| **19 Parts:** | | | |
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| 141-199 | (869-052-00056-6) | 58.00 | Apr. 1, 2004 |
| 200-End | (869-052-00057-4) | 31.00 | Apr. 1, 2004 |
| **20 Parts:** | | | |
| 1-399 | (869-052-00058-2) | 50.00 | Apr. 1, 2004 |
| 400-499 | (869-052-00059-1) | 64.00 | Apr. 1, 2004 |
| 500-End | (869-052-00060-9) | 63.00 | Apr. 1, 2004 |
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| 1-99 | (869-052-00061-2) | 42.00 | Apr. 1, 2004 |
| 100-169 | (869-052-00062-1) | 49.00 | Apr. 1, 2004 |
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| 500-599 | (869-052-00066-3) | 47.00 | Apr. 1, 2004 |
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| **22 Parts:** | | | |
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| 300-End | (869-052-00071-0) | 45.00 | Apr. 1, 2004 |
| 23 | (869-052-00072-8) | 45.00 | Apr. 1, 2004 |
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| 500-699 | (869-052-00075-2) | 30.00 | Apr. 1, 2004 |
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| 1700-End | (869-052-00077-9) | 30.00 | Apr. 1, 2004 |
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| **29 Parts:** | | | |
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| *100–499 | (869–052–00104–0) | 23.00 | July 1, 2004 |
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[1] Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

[2] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[3] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

[4] No amendments to this volume were promulgated during the period January 1, 2003, through January 1, 2004. The CFR volume issued as of January 1, 2002 should be retained.

[5] No amendments to this volume were promulgated during the period April 1, 2000, through April 1, 2004. The CFR volume issued as of April 1, 2000 should be retained.

[6] No amendments to this volume were promulgated during the period July 1, 2000, through July 1, 2004. The CFR volume issued as of July 1, 2000 should be retained.

[7] No amendments to this volume were promulgated during the period July 1, 2002, through July 1, 2004. The CFR volume issued as of July 1, 2002 should be retained.

[8] No amendments to this volume were promulgated during the period July 1, 2003, through July 1, 2004. The CFR volume issued as of July 1, 2003 should be retained.

[9] No amendments to this volume were promulgated during the period October 1, 2001, through October 1, 2003. The CFR volume issued as of October 1, 2001 should be retained.

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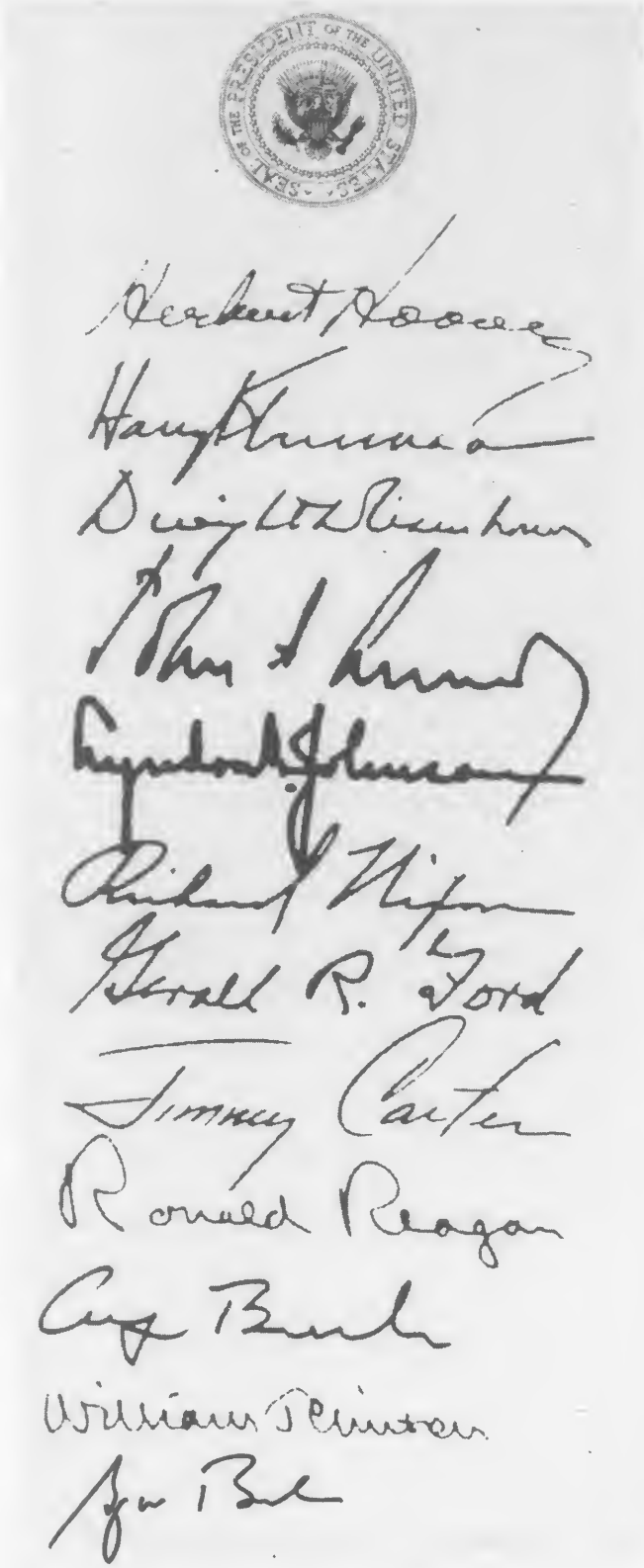

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